



Centre Europe - Tiers Monde

A ssociation
sociación
ssociação
merican
A méricaine de
mericana de
mericana de
ssociation of J uristes
uristas
uristas



Will the UN compel transnational corporations to comply with international human rights standards ?

I. EFFECTS OF TRANSNATIONAL CORPORATIONS' ACTIVITIES AND WORKING METHODS ON HUMAN RIGHTS

II. RECOMMENDATIONS AND PROPOSALS FOR MAKING THESE CORPORATIONS AWARE OF THEIR RESPONSIBILITIES

III. RESPONSABILITY OF STATES

IV. THE WORKING GROUP ON THE WORKING METHODS AND ACTIVITIES OF TRANSNATIONAL CORPORATIONS OF THE UNITED NATIONS SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS: AT AN IMPASSE

June 2002

I. EFFECTS OF TRANSNATIONAL CORPORATIONS' ACTIVITIES AND WORKING METHODS ON HUMAN RIGHTS

A. What are transnational corporations?

1. Transnational corporations are private law legal entities (it is important to maintain the distinction between public law legal entities and private law legal entities) with a presence in multiple territorial jurisdictions but with a single decision-making headquarters. Their transnational character does not mean that they are international legal entities (although they may be subjects of international law like individual persons). The only international legal entities are those subjects of international public law: states and intergovernmental organisations.

2. Transnational corporations are active in the production of goods and of services – in practically all areas of human activity – and also in financial speculation. In these three areas, they are active simultaneously, successively and alternatively.

3. The huge amount of capital funds they possess gives them a power unprecedented in history. The trading volume of the largest transnational corporations is equal to or bigger than many countries' GDP, and the trading volume of some half dozen of them is greater than the combined GDP of the 100 poorest countries.¹

4. They can operate with a main corporation and subsidiaries, build up groups active in a single sector or conglomerates active in diverse fields, combine with other firms by take-overs or buy outs or by setting up financial holdings. The only operating capital such holdings possess is stock shares with which they control companies or groups of companies. Be they main corporation, subsidiaries, groups, conglomerates, concerns, or holdings, the most important decision-making is centralised. They can be based in one or several countries: in the country where the head office is, in the one where their principal activities are carried on, and/or in the one where the company is officially registered.

5. However, one can always identify the nationality of a transnational corporation in that there is a government that supports and defends its interests (at the WTO, the IMF, the World Bank, or other international organisations, or by political, military or other means).

6. The true productive activities are sometimes subcontracted out while the transnational corporation controls the know-how, the trade mark and the marketing of the products. Activities can be carried on in different national territories and may quickly and frequently change location to ensure profit maximisation.

7. The transnational character of their activities allows these corporations to avoid the national and international laws and regulations that they consider counter to their interests.

Transnational corporations also engage in illicit activities or in activities situated in a grey zone between legality and illegality.

8. Relations between the transnational corporations are marked by a merciless war for market control and zones of influence, which takes the form of the buying out and both forced and consensual acquisition of other entities, mergers or agreements and the continual effort – never brought to fruition – to establish private and voluntary rules for fair competition among themselves. The supreme law that reigns among them and guides their behaviour is. « Eat or be eaten ».²

¹ Cf. Peter Utting, Business Responsibility for Sustainable Development, UNRISD, Geneva, January 2000

² Thus George Soros explains it, with the authority conferred upon him by virtue of his being « in the belly of the beast »: « If I impose rules upon myself without imposing them upon others, my performance in the market will feel this, but it will have no effect on the markets themselves since no single agent can influence them. There is a difference between establishing rules and implementing them. Establishing rules implies political or collective decisions, implementing the rules implies individual decisions, which prevail over the markets. » And he adds: « Capitalism needs the counter weight of democracy. » George Soros, La crise du capitalisme mondial. L'intégrisme des marchés, Editions Plon, 1998, pp. 21-22.

All these activities of the transnational corporations are actively supported and aided by the wealthy countries' governments, which represent and share their interests.

B. Effects of the working methods and the activities of transnational corporations

9. These working methods and activities are governed by a basic goal: getting maximum profit in the shortest time possible, which is, on the one hand, the logic of competition in a globalised capitalist economy and, on the other, the unlimited appetite for power and wealth of their chief executives, stock holders and property owners. This basic objective does not admit of any obstacle whatsoever and, to get it, transnational corporations stop at nothing:

- a) the promoting of wars of aggression and interethnic conflicts in order to control the natural resources of the planet – in particular energy sources and strategic minerals – and to foster the growth and the profits of the war industry;
- b) the violation of workers' rights and human rights in general;
- c) the degradation of the environment (air water and soil included) and in particular the active and well financed opposition³, with the unflagging support of the government of the United States, to any limitation of emission of greenhouse gases (Kyoto Protocol);
- d) the bribing of civil servants to facilitate the take over of essential public services, such as the supply of drinking water, through their fraudulent privatisation and thus the elimination of the rights of present and potential users (especially the least fortunate);
- e) the appropriation – formally legal or illegal – of ancestral, technical and scientific knowledge, which are by nature social entities;
- f) the corruption of political and intellectual elites and of leaders of « civil society »;
- g) the monopolisation of the principal means of communication, purveyors of the dominant ideology and mass cultural products, in order to manipulate and condition public opinion and thus change the habits and behaviour of people;
- h) financing dictators, the overthrow of governments, and other criminal activities.

10. Such methods are incompatible with human rights in general, including the right to self-determination and the right to development.

C. Confusion of economic and political powers

11. If the influence of economic power over political power has been a constant in human society for as long as economic power has existed, one can notice in recent decades a growing interpenetration of economic and political power, which has led to the confusion, indeed, to the fusion, of these two powers. This process has produced an erosion both of representative democracy, right up to its formal aspects, and of the role played by its political institutions, national as well as international, as mediators – or supposed mediators – between different and contradictory interests.

12. The outstanding example of this relation between economic and political power is the United States, where a majority of the world's transnational corporations are based. In this case, it would be more accurate – especially at present – to speak of confusion or of fusion of political and economic power. This is all the more serious that this fusion comprises the greatest military power on the planet. Already forty years ago, Eisenhower, in his farewell address, warned his fellow citizens against the evil influence of what he called the « military-industrial complex ».

³ Advertising campaign worth 13 million dollars and orchestrated by the Global Climate Coalition, comprising, among others, Ford, General Motors, Mobil, and Union Carbide. Cf. Ann Doherty, « Les transnationales et leurs groupes de lobbying », in Transnational Corporation and Human Rights, AAJ, CETIM and FICAT, Geneva, July 2000.

13. In the present state of affairs, all one need do is analyse the *curriculum vitae* of President Bush, Vice-President Cheney, of ministers, counsellors and secretaries to notice the convergence of the private interests that these people represent and the policies, both foreign and domestic, of the government.

The *Centre for Responsive Politics* has published on its web site a document⁴ that provides details of the links between transnational corporations and President Bush, Vice-president Cheney, and members of their cabinet. The site concludes that those civil servants who are not linked to transnationals constitute an exception.

14. According to this document, Bush is a « man of the Texas oil magnates » even though he did not succeed as an independent entrepreneur, that Dick Cheney, until he took over the vice-presidency, was the chief executive officer of Halliburton, the biggest corporation in the world providing services in the oil industry and which has close ties to the Russian oil company Tyumen Oil Company, accused of having links to the Russian mafia and to drug traffickers.

Under Cheney's leadership, the Halliburton company, for the most part through its subsidiary Brown and Root, obtained \$2.3 billion in government contracts, most of them with the army, for building military installations in Albania, Bosnia, Kosovo and Haiti, among other places.⁵

15. As a civilian, Colin Powell, Secretary of State, was a member of the board of two huge companies: Gulfstream Aerospace (which builds aircraft for Hollywood stars and for several Middle-Eastern governments) and America Online (now absorbed into the telecom transnational giant AOL-Time Warner). Gulfstream was bought in 1999 by General Dynamics, a major US military contractor. Michael Powell, his son, was the only member of the Federal Communications Commission to press for approval without examination the AOL-Time Warner merger. Perhaps as a reward, Bush appointed Michael Powell to the presidency of the Federal Communications Commission.

16. This confusion between political and economic powers is also conspicuous in the international field.

17. In 1978, the non-governmental organization « Declaration de Berne » published a leaflet entitled « L'infiltration des firmes multinationales dans l'Organisation des Nations Unies » [The Infiltration of Multinational Firms in the United Nations Organisation], describing with detailed documentation the activities carried out by big transnational companies (Brown Boveri, Nestlé, Sulzer, Ciba-Geigy, Hoffmann-La Roche, Sandoz, Massey-Ferguson, etc.) in order to put pressure upon various bodies of the United Nations system.

Now, one no longer speaks of « infiltration » but of the opening of the doors of the UN to transnationals under the banner of the « Global Compact », inaugurated on July 25, 2000, at the UN headquarters in New York, with 44 major transnational corporations and a handful of « representatives of civil society ». Among the corporations participating in the « Global Contact » one finds British Petroleum, Nike, Shell, Rio Tinto and Novartis, all of which have a long record of substantial violations of human and workers rights as well as of environmental degradation. The Lyonnaise des Eaux, whose activities in the bribing of civil servants in order to obtain the monopoly in the supply of drinking water are well known in France and Argentina and more recently in Chile, is also among them.

18. This alliance between transnational corporations and the United Nations creates a dangerous confusion between a public international political institution, the United Nations, which, according to its charter, represents « the peoples of the United Nations », and a group of entities representing the private interests of an international economic élite. This « alliance » thus is totally opposite to the process of democratisation necessary to the United Nations.

⁴ The Bush Administration. Corporate Connections, www.opensecrets.org/bush/cabinet.asp

⁵ Cheney Led Halliburton to feast at Federal Trough. State Department questioned deal with firm linked to Russian mob. www.public-i.org/story_01_080200.htm.

19. A Belgian journalist and trade-unionist, Gérard de Selys⁶, relates how, owing to the work in tandem of the European Commission (which issues directives beyond the scope of its mandate) and the European Industries Round Table (ERT, the transnationals Volvo, Olivetti, Siemens, Unilever and others), the pillaging of companies currently the most dynamic and profitable, such as telecommunications and electronic communications, from the public patrimony of the European countries is now at its height.

De Selys Book was published in 1995, but since then the offensive of the European Commission in favour of the privatisation of public services (with the active support of transnationals) has not stopped: the postal service, health, education and the environment are now in its line of fire.

Un article published in the July 2000 issue of the *Monde Diplomatique* (Susan George & Ellen Gould, « Libéraliser sans avoir l'air d'y toucher » quotes a document of the European Commission in which one finds the following statement: « The active participation of service industries in the negotiations is crucial to allow us to align our negotiation goals with the priorities of the corporations. The GATS is not only an agreement between governments. It is above all an instrument benefiting the business sector. »⁷

⁶ Gérard de Selys, *Privé de public. A qui profitent les privatisations?* Editions EPO, Bruxelles, 1995.

⁷ A group of researchers who belong to the Corporate Europe Observatory (CEO) published a comprehensive study on the role that the transnational corporations are playing inside the European Union: Belén Balanya, Ann Doherty, Olivier Hoedeman, Adan Ma'anit and Eric Wesselius, *Europe Inc. Regional and Global Restructuring and the Rise of Corporate Powers*, Pluto Press and CEO, 1999.

II. RECOMMENDATIONS AND PROPOSALS TO HOLD TRANSNATIONAL CORPORATIONS RESPONSIBLE

21. In a state of law, transnational corporations, like individual persons and legal entities treated as individuals under the law, are liable under both civil and criminal law for violations of prevailing legal standards (both international standards, implemented through domestic legislation, and national standards).

Voluntary guidelines cannot substitute for standards established by national governmental organs and by international intergovernmental organs, for such guidelines are not binding legal standards whose violation leads to a punitive sanction.

Further, both experience and studies show that voluntary codes are inadequate, that their implementation has been found wanting because left to the discretion of the corporations, with no real independent outside monitoring. For example, a consulting firm, engaged by a transnational corporation – hence paid by the corporation – hardly constitutes an independent outside monitor.

It is thus necessary to set forth proposals to situate transnational corporations within a legal framework built upon certain basic principles, as follows:

- a) National communities and the international community are communities of law, that is they are built on objective legal foundations (national and international standards), which constitute the basis for establishing rules of humane coexistence (irrespective of the extent to which such rules may be elaborate or may be observed). It is « essential that human rights be protected by the rule of law... » (Universal Declaration of Human Rights).
- b) These standards apply necessarily both to individual persons and to legal entities construed as persons, and their violation results in a punitive sanction.
- c) Transnational corporations are legal entities construed as persons under the law and, as such, subjects and objects of law. Prevailing legal standards are thus binding upon transnational corporations, just as upon any individual person or any other legal entity construed as a person. The equality of every person before the law is clearly established in the International Charter of Human Rights (the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights).
- d) In the carrying out of their duties, the directors and managers of transnational corporations, as individual persons, are also bound by prevailing legal standards.
- e) Current tendencies in criminal law, as reflected in much national legislation, accept the criminal liability of legal entities construed as persons. These tendencies also recognise the principle of double indictment, to wit the liability of the legal entity simultaneous with that of the individual persons (managers and directors of the entity) who made the incriminating decision or who, while in a position to oppose it, did not do so.

It is thus a question of establishing a way, within the current system of national and international standards in force, by which transnational corporations as well as their managers and directors can be situated within a legal framework, and a way by which, in case of violations, they can be punitively sanctioned within national and international jurisdictions. It is also a question of consolidating and developing specific existing standards regarding transnational corporations and of re opening the debate on compulsory guidelines for them as well as on technological transfers.

- f) The heterogeneity, the fragmentation and occasionally the contradiction among the standards in different areas of international law (for example trade law and human rights) become obvious when one enters into the question of a legal framework for transnational corporations. Some international law specialists foresee the necessity of creating within these standards some degree of consistency with the overall long-term aim of codifying international law.

One can conceive of three ways of approaching the problem of inconsistency. The first, formal, consists of distinguishing between specific and general standards, between prior and subsequent standards etc.

The second, intermediary, consists of establishing consistency by means of interface among three protagonists: political power, economic power (the private sector) and « civil society ». In practice, this idea of « stake holders » (obviously unequal) is tantamount to repudiating the principle of representative and participative democracy and furthering the consolidation of economic power as preeminent over political power.

We would submit that consistency can be achieved in a third way. This consists of building it on the basis of a hierarchy of standards, with human rights at the top of the normative pyramid, to wit giving human rights priority over other rights such as intellectual property rights.

Concerning the right to intellectual property, frequently invoked by transnational corporations to preserve their exorbitant earnings (for example in the pharmaceutical industry), the Committee on Economic, Cultural and Social Rights recently had this to say:

« Whereas intellectual property rights may be ceded, can have a duration and a limited application or be negotiated, modified, indeed lost, human rights are timeless and are the expression of fundamental prerogatives appertaining to the human person. They have for their purpose to assure a satisfactory level of protection and of well-being to the human being, whereas intellectual property regimes – although designed originally to accord protection to authors and creators as individual persons – tend more and more to protect the interests and the investments of commercial circles and companies. »⁸

22. Existing standards should be made complete on both the national and international levels.

- a) The principle of public service must be emphasized, especially in the areas of health, food (including clean water), education, housing, communication and information in all their forms, and one must prevent the setting up of oligopolies and private monopolies in these areas.
- b) Implementation mechanisms of the specific instruments dealing with transnationals must be reinforced, particularly those such as the Declaration of Tripartite Principles on Transnational Corporations and Social Policy adopted by the Administrative Board of the International Labor Organization in 1977 (which, in its November 2000 amendment, refers to 30 conventions and 35 recommendations of the ILO) and the OCDE directives (revised text, June 2000), even though they merely address recommendations to the corporations.
- c) Compulsory guidelines for transnational corporations must be established, guidelines such as were requested in the Declaration and the Program of Action of the Millennium Forum (United Nations, New York, 26 May 2000, Point 2 of Section A) by more than 1000 non-governmental organizations from 100 countries. These guidelines should also address the question of technology transfers.
- d) The violation of economic, social and cultural rights must be assimilated to a violation of fundamental human rights – in addition to being a violation of a specific corresponding legal standard. For example, the lack of housing is a violation of the right to privacy (as well as being a violation of other fundamental rights), and the failure to adopt measures against poverty and destitution (or adopting measure that engender it) constitute inhuman or degrading treatment, equivalent to torture. Depriving one of access to adequate food or essential drugs is a violation of the right to health, the right to life etc.

⁸ Committee on Economic, social and Cultural Rights. Human rights and the questions relative to intellectual property. Declaration of the Committee. United Nations E/C.13/2001/15, 14.12.2001, par. 6.

- e) By extending the direct criminal liability of private legal entities, there is currently a tendency to hold responsible on the international level individual persons (as reflected in the statutes of the International Criminal Court and in the implementation of international jurisdiction by various national courts). Transnational corporations are liable in criminal law for the crimes and infractions that they commit, just as are their directors and managers (principle of double indictment).

The standards applicable to them are those in national legislations as well as those dealing with specified criminal behavior or described in international instruments signed or ratified by the government whose courts will rule in the matter.

Transnational corporations, when their activities are international, can commit international infractions (transnational infractions, to wit an across-border infraction), but even when such activities develop within the national framework without going beyond borders, corporations can also commit international crimes (infractions of international law or international crimes). International crime is understood to mean criminal conduct which affects the collective security interests of the world community or violates legal property recognized as fundamental by the international community, such as life, physical integrity, the right to non-discrimination, to the health etc. (crimes against humanity, genocide, apartheid, tortures etc.). In the case of infractions or crimes committed by transnational corporations, the two aspects are generally found together: they are both transnational infractions and international crimes;

- f) Governments that have not yet done so should incorporate into legislation the criminal liability of legal entities and should not hide behind the excessive flexibility of Article 10 of the United Nations Convention against Organized Transnational Crime nor behind the OCDE Convention against Corruption, which leaves to governments the choice of criminal, civil or administrative liability of legal entities. Article 18 of the European Criminal Convention on Corruption (1999), which establishes criminal liability of legal entities and the principle of double indictment could be a model to follow.

The standards applicable both to companies and to individuals, whether in their capacity as authors, accomplices, instigators necessary partners etc., should be those provided for in national legislations and in international instruments.

- g) There is no competent international criminal jurisdiction for judging private legal entities. The statutes of the International Criminal Court adopted in Rome and in force since 1 July 2002, do not provide for judging legal entities or infractions against social, economic and cultural rights. For the time being, the possibility of using this court to inform the prosecutor (individuals may not denounce much less file a complaint in this court) of violations of human rights committed by transnational corporations so that the prosecutor may decide to indict those responsible is, all the same, not to be ruled out. It would be advisable however to promote the reform of the statutes of the International Criminal Court to include under its jurisdiction infractions against economic, social and cultural rights and the criminal liability of private individual persons.

h) For the time being, national courts are the only ones that may receive complaints and requests against transnational corporations and their managers and directors, to the extent allowed by an ever-growing application of the principle of universal jurisdiction.

At present, there is a number of trials under way against transnational corporations and their directors and managers in various national jurisdictions for violations of several categories of human rights⁹.

i) Finally, the possibility of creating an international tribunal for transnational corporations should be studied, based on the model of the International Court of the Law of the Sea, established by the Convention on the Law of the Sea (Montego Bay, December 1982).

⁹ In November 1999, a suit against Union Carbide and its chief executive officer, Warren Anderson, opened in the court of the Southern District of New York, a suit launched under the Aliens Tort Act, accusing the plaintiffs of having acted with obvious culpable negligence, tainted with racial discrimination, during the installation in India of an industry with security standards far below those prevailing in the United States and because the disaster that caused the death of thousands of persons was predictable. (Sajida Bano et al. Vs Union Carbide Corporation).

There are trials under way in New York against Texaco for damage caused to the environment in Ecuador; in District Court 212 of Galveston County, Texas, against the manufacturers and users of a pesticide in the banana industries of Costa Rica, Honduras, and Nicaragua, which caused the sterility of 1,500 agricultural workers: Shell Oil Company, Dow Chemical Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit and Steamship Company, Dole Food Company, Inc., Dole Fresh Fruit Company, Chiquita Brands, Inc. and Chiquita Brands International; in Brazil against Monsanto for the use of genetically modified soya in violation of the precautionary principle; in Paris courts for financial misdemeanors against the directors of Eurotunnel (for having defrauded some 700,000 small and medium investors and against the directors of Elf for embezzlement of enormous sums of money, corruption, illegal financing of political parties etc.

A recent case is the complaint against Shell and its chief executive officer Anderson, filed in a New York court by the family of Ken Saro-Wiwa, who accuse the transnational corporation of having aided and abetted the Nigerian regime of Sani Abacha in the fabrication of false proof for a judgement that ultimately led the Ogoni leader and his supporters to the scaffold. In February 2002, Judge Kimba Wood, of New York, presiding over the case, rejected Shell's arguments and decided to pursue the case against the corporation and against Anderson, for participation in crimes against humanity, torture, summary executions, arbitrary detention and other violations of international law. The judge considered that the facts, as presented by the plaintiffs, can constitute crimes against humanity, according to the definition in the Treaty of Rome of 1998 relative to the adoption of the Statutes of the International Criminal Court.

On 14 March 2002, in Federal District Court in Alabama, USA, a complaint was filed by the United Steelworkers of America, the United Mineworkers of America and the International Labor Rights Foundation against the transnationals Drummond Company, Inc., Drummond Ltd., as well as against the owner, United States citizen Garry Drummond, for their complicity in the murder of Colombian trade union leaders.

In 1997, a trial began against Unocal and Total for violation of human rights during the construction of the Yagana oil pipeline, in Myanmar, during which Judge Richard Páez figured that the transnational corporations and their directors could be held responsible for violations of international law relative to human rights in foreign countries and that the United States courts are competent to judge such violations.

On 8 April 2002, Mapuche communities of Loma and la Lata in Argentina launched a suit in an Argentine court against the transnational Repsol-YPF for damage and presumptions caused on their territory following a hydrocarbon explosion.

In the beginning of 2002, the superior court of Rio Negro, Argentina, found against the Banca Nacional del Trabajo and obliging it to pay back funds withheld from depositors (following the « corralito »), a finding extended to the economic group Banca Nazionale del Lavoro, Spa (that is to the main company and its subsidiaries). The obligation to return deposits illegally withheld thus affects not only the Argentine affiliate but also the non-Argentine main company and all its subsidiaries, banking affiliates or others.

In May 2002, the Supreme Court of California convicted Nike of deceiving public opinion with its advertising campaign about working conditions (which the company had portrayed as good) in its subcontracting firms in Southeast Asia, including in Vietnam. The court found that Nike could not avail itself of the first amendment of the United States constitution regarding freedom of expression in order to carry on fraudulent advertising. In a surprising gesture, the vice-president of the General Workers Confederation of Vietnam, Vuong Van Viet, defended Nike, declaring that the working conditions in Nike's affiliates were very good (New York Times, 04.05.2002, page A4).

III. GOVERNMENT RESPONSIBILITY

23. The right to development and the progressive enjoyment of economic, social and cultural rights comports the obligation, for governments, to do their utmost to promote the economic, social and cultural progress of their peoples.

Governments have, in the area of economic, social and cultural rights as well as in the area of the right to development, not only obligations towards their own peoples but also, as members of the international community, towards other countries and towards humanity in general. It is a question of rights called « rights of solidarity » (Art. 1, par. 1, of the United Nations Charter; Art. 22 of the Universal Declaration of Human Rights; Art. 2 of the International Covenant on Economic, Social and Cultural Rights; the Declaration on the Right to Development – especially Art. 2 and Art. 6 – etc.)

24. Governments are also responsible, when they have failed in their oversight duty, for violations (on their own territory or across-borders) committed by individuals (including transnational corporations) which come under their jurisdiction, as has been established by arbitration decisions and by numerous international conventions, in particular those relative to the preservation of the environment.

Governments are internationally responsible for the incorporation of basic international standards into their domestic law.

25. To fulfil their obligations, governments have the right and the duty to protect and to guarantee the right of their peoples to freely dispose of their wealth and natural resources, and they must act in such a way that those peoples are not deprived of their means of subsistence (Art. 1, par. 2 of the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Declaration on the Right to Development).

26. The victims, their representatives and/or non-governmental organisations can bring complaints against governments before the Committee of the International Covenant on Civil and Political Rights as well as before the committees of the main international conventions, for violations that governments have committed or for their subsidiary responsibility for the acts committed by individual private persons falling within the framework of their jurisdiction, in order that those committees may address recommendations to the governments in question. They may also request that the committees, in cases where the procedures (as established in the optional protocols or in the optional provisions included in these instruments) that would allow it exist, to establish resolutions condemning those governments which have accepted the jurisdiction of the committees charged with the implementation of these procedures. Recommendations and condemnatory resolutions of these committees are not enforceable, with the result that in practice they represent only a statement of moral authority.

At the present time there is no formal procedure for denouncing violations of rights established in the International Covenant on Economic, Social and Cultural Rights, although such violations can be made known to the Covenant's committee in an informal manner. The committee has worked out a draft optional protocol. It would be desirable for the Commission on Human Rights to adopt this protocol, with appropriate amendments.

27. Victims can denounce governments committing violations of their rights to the Commission and to the Inter-American Court and the European Human Rights Tribunal. Victims can also insist on the subsidiary responsibility of governments for violations committed by private individuals, including violations of certain economic and social rights.

IV. THE WORKING GROUP ON TRANSNATIONAL CORPORATIONS OF THE UNITED NATIONS SUB-COMMISSION ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS: AT AN IMPASSE

28. In a document submitted to the Sub-Commission on the Promotion and Protection of Human Rights in 2001 (E/CN.4/Sub.2/2001/NGO/21. Activities of the Working Group on Transnational Corporations of the Sub-Commission on the Promotion and Protection of Human Rights), the American Association of Jurists and the Europe-Third World Centre stated:

« In 1998, the Sub-Commission on the Promotion and Protection of Human Rights, duly concerned about the effect of the methods of work and the activities of transnational corporations on the enjoyment of human rights, decided to create a Working Group with the following six points mandate:

1) to identify and examine the effects of the working methods and activities of transnational corporations...

2) to examine, receive and gather information...

3) to analyse the compatibility of the various international human rights instruments with the various investment agreements...

4) to make recommendations and proposals relating to the methods of work and the activities of transnational corporations in order to ensure that such methods and activities in keeping with the economic and social objectives of the countries in which operate, and to promote the enjoyment of economic, social and cultural rights, the right to development as well as civil and political rights...

5) to prepare each year a list of countries and transnational corporations, indicating, in United States dollars, their gross national product or financial turnover, respectively...

6) to consider the scope of the obligations of the States to regulate the activities have or are likely to have a significant impact on the enjoyment of human rights (Sub-Commission Resolution 1998/8).

The frequent negative effects on human rights of the activities of transnational corporations and the delinquent or criminal character (as authors, instigators or accomplices) of certain activities of many of these corporations lead to the issue of submitting these corporations to an effective normative and jurisdictional framework.

There is not an easy solution to this problem given that the transnational character of these corporations and the volatility and ubiquity of their activities result in serious difficulties to include them in national standards and jurisdictions. There are international standards, albeit with gaps, but no international jurisdiction competent to apply these standards directly to the companies.

This problem appears to be the motivations of points 4 and 6 of the mandate conferred upon the Working Group.

The Working Group has dedicated a great part of its time in meetings to examining a project of directives for a voluntary code of conduct of the transnational corporations, presented by the United States member of the group, Mr. David Weissbrodt, entitled « Draft Universal Guideline for Companies », for which the last version is dated May 21, 2001. This does not appear to be part of the mandate of the Working Group. At best, it stems from a highly controversial interpretation of the mandate.

The AAJ and CETIM deem that voluntary conduct codes (whose usefulness is highly relative, as demonstrated by experience) are private initiatives and as such are not part of the normative activities of the States, of any normative activities (agreement, resolution, declaration, etc.) or initiatives to promote standards (directives, Declaration of Principles, etc.) of intergovernmental organisms directly received by the States and indirectly by private entities. AAJ and CETIM consider that the elaboration of such codes is a task outside of the realm of an organism of the United Nations and more appropriate for a consultant contracted by a transnational society. »

In 2002 the situation described above by the Working Group still persists. The Working Group has only dealt until now with point 4 of its mandate but, as argued in the cited document by the AAJ and CETIM, it followed a wrong approach and went beyond its mandate, except for efforts made by the President of the Group, Mr. El-Hadji Guissé and the former member of the Group, Mr. Asbjorn Eide, in order to tackle other points of the mandate.

The novelty is that in February 2002 the Working Group held a non-official, confidential meeting, called by the United States member of the Working Group, Mr. Weissbrodt with the sole aim to examine a new version of his project, this time entitled « Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises » (E/CN.4/Sub.2/2002/WG.2/WP.1/Add.2).

The new project does not only distort the Working Group's mandate but represents a significant step backwards from the current state of international human rights law.

The new project by Mr. Weissbrodt: Its most outstanding features.
--

A. Non-compliance with the objective of the Working Group's mandate

29. Mr. Weissbrodt's project aims at transnational corporations and "other business enterprises". The latter are defined by the author as "any business entity, regardless of the international or domestic nature of its activities".

This definition cannot be understood as referring only to transnational corporations' subsidiaries or subcontractor companies (which certainly fall within the Working Group's scope of study) but extends to any type of enterprise operating at a domestic level regardless of size.

Thus the definition fails to comply with the object of the study assigned to the Working Group, namely, to pay particular attention to transnational corporations, as a worldwide specific phenomenon of vast economic, social and political significance, with evident effects upon the enjoyment of human rights on a global scale.

Certainly, the Sub-Commission, when conferring the mandate upon the Working Group in 1998¹⁰, expressed no intention to extend the scope of the study to the operations of small companies operating solely within the boundaries of one State and whose activities have no effect on human rights worldwide

Apart from non-compliance with the Working Group's objective of the study, Mr. Weissbrodt's project does not tackle at all the effects on the following *fundamental human rights* which can derive *only from transnational corporations' activities*, given their worldwide power:

- a) on the right to peace;
- b) on the right to access to essential public services;
- c) on the right to free access to knowledge which are social by nature;
- d) on the right to freedom of communication, information, opinion and expression;
- e) on the right to a real representative and participative democracy.

(See, on this document, I. 2, a), d), e), g) and 3).

Mr. Weissbrodt's project addresses, in paragraphs 1 to 15, various significant aspects of the activities of transnational corporations and other enterprises, that affect, or may affect, human rights but, as will be considered later in B and C, it does not propose any approach that would effectively protect these rights.

¹⁰ In 2001, when extending the mandate of the Working Group (Resolution 2001/3), the Sub-Commission re-formulated the mandate. The added words « and other economic units », included in paragraph 4 c) of the Resolution cannot be interpreted, as Mr. Weissbrodt says in paragraph 19 b) of his project, as « any business entity, regardless of the international or domestic nature of its activities », without falsifying the letter and the spirit of the mandate. These words must be interpreted in the sense that subsidiaries and sub-contractor companies as well as the diverse functional units of transnational corporations, such as holdings, conglomerates, coalitions, and so on, are to be included in the mandate. The mandate certainly does not extend to "any business enterprise, regardless of the international or domestic nature of its activities", that is, to any business enterprise.

It is regrettable that the following point was included in the mandate: "Compile a list of the various relevant instruments and standards concerning human rights and international cooperation that are *applicable* to the activities of transnational corporations". The regrettable implication of this point is that some human human rights instruments and standards *do not apply* to such companies.

30. In the penultimate paragraph of the Preamble of Mr. Weissbrodt's project, it is stated that officers and *workers* of the enterprises bear responsibilities regarding this Declaration of Principles.

To include workers (who possess no decision-making power over enterprises and often lack even collective bargaining power) amongst those who incur responsibility towards the realisation of this Declaration, *detracts from or even undermines the core issue of civil and penal responsibility of transnational corporations* as legal persons and of their officers as physical persons who make the decisions.

It is difficult to see any logic and any sense of equity in wishing to attribute responsibility - to take one example - for the occurrence of respiratory diseases, to the young women who work in conditions of semi-slavery for Nike's subcontractors in some Asian countries; or to make the workers of Enron, who lost their jobs and their money for retirement, responsible for criminal activities carried out by officers of that enterprise which led to such a result.

B. The project assigns a subordinate and secondary role to national and international operative standards; it actually ignores their binding character for transnational corporations.

31. The project as a whole appears designed to have the Working Group pass a Declaration of Principle, rather than a binding instrument, for transnational corporations to be implemented with private and voluntary codes of conduct. Such a Declaration would constitute a *big step backwards* in international human rights law, for it would effectively undermine **the whole** international human rights law currently in force (not exhaustively enumerated in the preamble of the project¹¹) as a prescriptive and binding law for physical *as well as* legal, whether public or private, persons, **including** transnational corporations.

32. Cheriff Bassiouni says that there are five successive stages in the progressive development of human rights: 1) enunciative (the emergency of certain common values recognized internationally); 2) declarative (the declaration on an international document or instrument of certain interests or human rights identified as such); 3) prescriptive (the formulation of obligations with regard to human rights in international instruments - general or specific - or in binding conventions); 4) implementation (establishment of mechanisms to ensure effective protection of human rights) and 5) criminalisation (development of international penal prescriptions aiming at the protection of such rights against their possible violation).¹²

33. Mr. Weissbrodt intends to take back, *for transnational corporations*, the current stage of international human rights law, prescriptive and binding, to the declarative stage.

The latter has not the legal effects due to current legal standards (domestic and international) namely, to be exigible and to bring a sanction in case of non-observance.

There are neither legal nor rational grounds to:

- a) establish an specific list of human rights that should be respected by transnational corporations and not to simply establish that transnational corporations must respect, like persons, all human rights and all legal standards currently in force, particularly those concerned with their activities (industrial, financial, services, and so on) and

¹¹It would be wearisome to point out the omissions and superfluous inclusions on that enumeration. It is, however, remarkable that the United Nations Convention Against Transnational Organised Crime, which is not binding and leaves to the State the option between administrative, civil or criminal responsibility of legal persons, is included, while the European Criminal Convention on Corrupt Practices (1999), which is binding and establishes penal responsibility for legal persons and the principle of double imputation, is omitted. Maybe the omission of this European Criminal Convention should be linked to the comment of paragraph 11 of the Project, which deals with corrupt practices, and states that enterprises "should increase its activities' of transparency regarding payments made to governments and civil servants ". To admit the possibility of payments made by enterprises to civil servants is a way of legitimizing corrupt practices.

¹² Cheriff Bassiouni, *International Criminal Law and Human Rights*, Transnational Publishers, New York, vol. I, pp. 16 and 17.

b) take back to the declarative stage (that is, non-binding and non-punishable), especially for transnational corporations, legal standards that are currently in force and are binding on all who could violate these standards.

34. This evaluation of the project can be confirmed with the reading of some of its paragraphs and the Introduction and Comments. In the Introduction, for instance:

« The Human Rights Principles and the related Commentary represent an effort to establish standards for business conduct which will assist transnational corporation and other business enterprises to be good world, national and local citizens » (E/CN.4/Sub.2/2002/WG.2/WP.1/Add.1, par. 24).

35. Paragraph 30 states that, given that the Sub-Commission asked the Working Group to contribute to the drafting of *binding* standards, the Group decided (unofficially, at the meeting held in February 2002) to draft a Declaration of Principles (which is *non-binding*, as it has been pointed out above).

36. Paragraph 32 states that the Principles « are not only intended to contribute to the drafting of binding standards... », etc. In other words, along the text, there are references to *future* binding standards, as if they did not already exist, and the text refers to a *progressive and voluntary implementation* of some of the principles, as if the already existing standards were not binding and immediately applicable to transnational corporations.

C. In Mr. Weissbrodt's project private initiatives are privileged and the state is given a secondary role in the implementation of standards and the monitoring of this implementation

37. The first sentence of paragraph 1 of the Project is a general statement about the « primary responsibility » of the State to respect and ensure respect of human rights.

But this general statement is not applicable to the general context of the Project, where the « primary responsibility » of the State disappears, or at best carries out a subsidiary role, regarding transnational corporations.

38. The commentary of paragraph 4 of the Project, (« security arrangements ») states that transnational corporations and their officers shall observe international human rights standards, the U.N. Principles on the Use of force and Firearms; and the U.N. Code of Conduct for Law Enforcement Officers. This is an attempt to legitimate the use of private militias by enterprises. The same commentary to paragraph 4 foresees business security arrangements between enterprises and State military forces; thus, such armed forces would become a private service paid by the enterprises. This is what happens in Colombia, where British Petroleum has acknowledged that it is rewarding the Armed Forces. This approach legitimizes the development of situations in which the State would delegate the use of force to private actors or subordinate its armed forces to private interests.

39. The last part of the Project (« General Provisions of Implementation ») states:

- a) that, as a first step to implement the Principles, enterprises will adopt internal rules according to the Principles;
- b) that enterprises will be subject to periodic monitoring by national, international, *governmental*, and/or *non-governmental* mechanisms and that enterprises will themselves conduct periodic evaluations concerning their own activities.
- c) that enterprises will provide reparation for any harm inflicted.

40. Paragraph 34 of the Introduction of the Project, clears up any possible doubt as regards the secondary role given to the State, because it is placed as the *sixth* in the enumeration of those who will implement the Project, should it be approved, after transnational corporations themselves, business groups or trade associations, unions, NGOs and intergovernmental organisations. The United Nations is in the *seventh and last* place.

41. Thus it becomes clear that the implementation of the Principles is not entrusted, as it should be by a Declaration that originates in the United Nations, firstly to states, which are responsible for assuring law enforcement within their national territory, but to the enterprises themselves and to other private entities, except for a monitoring which could be optionally carried out by the State (*governmental and/or non-governmental*, in the words of the Project).

42. In this Project, *the State and its institutions*, such as justice and security forces, perform a *secondary and subordinated function* with respect to the private sector.

43. The American Association of Jurists and the Centre Europe–Third World have already pointed out in other documents, citing several studies, the doubtful effectiveness of voluntary codes and the private external monitoring systems' doubtful effectiveness. The latter are often fraudulent, as shown by some monitoring carried out by transnational corporations, such as Arthur Andersen in the Enron case and Pricewaterhouse Coopers, in the Gazprom case, whose activities are currently subject to judicial inquiry.

44. The Project's objective, implicit but evident, is to confer upon transnational corporations, with the symbolic authority of a UN instrument, the power to disregard the infrangible obligation, common to all physical and legal persons and guaranteed by existing domestic law and international instruments, to respect human rights. The Project's implicit objective is also to give those corporations the chance to avoid state authorities (judicial and other) in case of violation of such rights.

45. In other words, the project's ultimate result would be to legitimate, by means of an international document, the current situation which consists of providing the large transnational corporations with a shield of total impunity, placing them outside the realm of human rights standards, as well as outside the reach of national, regional and international institutions established to enforce such standards.

At best, the project would institute some rules of the game in the matter of competition between transnational corporations in order to maintain the "quality of free market".

46. Yet the Working Group's mandate is not the « *quality of free market* » but the « *quality of human rights* ».

Both the quotation of Milton Friedman and the commentary of the project's author, in paragraphs 18 and 19 of the Introduction to the Declaration of Principles are highly significant:

« 18. Professor Milton Friedman in 1970 raised another issue when he contended that « there is only one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud. » It is interesting to note that even Friedman's view that businesses should not pursue socially desirable objectives excluded two social policies –fraud and competition. These exceptions may be explained by the need to maintain the quality of the free market that he strenuously advocated. It is doubtful, however, that even Friedman would argue that corporations could pursue profit by committing genocide or using slave labour. Indeed, Friedman would likely have agreed that corporations can only pursue profits in ways that are consistent with legal limitations. That position is consistent with the views of many businesses and business officials who wish to be informed of the law and would be willing to comply with the law.

19. Professor Ronald Coase developed an alternative paradigm to Friedman's understanding of how businesses should act, arguing that businesses are best understood by observing carefully their actual conduct rather than creating artificial models of how they ought to act. »

It can be proved that, up to now, transnational corporations are applying to the letter the first part of Friedman's « principle »: to use their resources and engage in activities designed to increase their profits, but not the second one, consisting of respecting the rules of the game, a free and open competition, without deception or fraud. They certainly do not subordinate the goal to increase their profits to the respect of the law, as Mr. Weissbrodt seems to assume. He seems to adhere to professor Coase's « alternative paradigm », contending that enterprises monitor themselves and be not obliged to respect « artificially created » models.

In other words, the Universal Declaration, the Covenants and International Conventions and eventual binding codes of conduct would be « artificial creations ». Instead, free market, businesses and profits, in a word « the market's invisible hand » are, just as the rule of universal gravitation, « natural laws », which must have priority over « artificial creations » such as legal norms.

47. The Working Group should turn down Mr. Weissbrodt's project and try to *recover lost time* and tackle with no further delay the mandate conferred to it by the Sub-Commission.

In order to comply with its mandate, the Working Group, taking into account what has been set out in points I, II y III of this document, should study and make recommendations to states and to the international community on ways and means to subject transnational corporations to the existing law, on how to improve and complete standards so as to reach that goal and on how to punish these companies when they violate domestic or international law (the implementing and sanctioning stages of the Bassiouni's classification, cited above).

48. Since the working Group was created, the AAJ y the CETIM have been trying very hard to help it fulfil its mandate and to redirect its work to the letter and spirit of the mandate. To that end, they have carried out the following activities:

- a) Editing in July 2000 of a 172 pages brochure entitled « Transnational Corporations and Human rights », with articles by experts in Spanish, French and English.
- b) Holding of an international interdisciplinary meeting in Celigny, Switzerland, on the 4 and 5 of May 2001;
- c) Editing in June 2001 of a 42 pages brochure in Spanish, English and French, including a summary of individual contributions, the debates and the conclusions of the Celigny meeting;
- d) Submitting several documents to the Sub-Commission on the Promotion and Protection of Human Rights as well as intervening verbally at the Working Group;

Hence, the AAJ and the CETIM have provided the Working Group with comprehensive information, without a major visible result up to now.

49. Nevertheless, the American Association of Jurists and the Centre Europe-Third World as well as other organisations and persons, will continue to make efforts and cooperate in order for the Working Group to fulfil its mandate.

ASOCIACIÓN AMERICANA DE JURISTAS -CENTRE EUROPE-TIERS MONDE