

CONCLUSIONS OF THE WORKSHOP

A. Introduction

1. The activities of Transnational Companies are dominated by one essential goal: that of achieving maximum profit over the shortest possible time period, which is the result both of a competition logic in the globalized capitalist economy and also of the unlimited ambition for power and wealth of its foremost leaders.

This essential goal will not allow any obstacle to stand in its way, and all methods are acceptable in order to achieve it, from the violation of labor law, the appropriation of knowledge which is by nature social, corruption of political elites, intellectuals and the leaders of “civil society”, right through to the financing (with the logistic support of some big power or other) of terrorist activities (paramilitary groups, mercenaries, private militias and others), such as coups d’ état and bloodthirsty dictatorships.

Such behavior runs counter to respect of human rights in general, including the right to life, health, to freely chosen and decently paid work, to communication and to objective and impartial information, and so on, and violates the right to free self-determination of peoples.

2. Although the influence of economic power over political power has been a constant factor in human society ever since the existence of economic power, in the last decades, as a result of the enormous power accumulated by Transnational Companies in all spheres (at present Transnational Companies shape tastes, habits, behaviors and the ideas we hold), it can be seen that there is a clear increase in economic power at the expense of political power which puts into question the idea of representative democracy and the role of national and international political institutions as mediators – or supposed mediators – between different or contradictory interests.

This can be seen in the trend which leaders of States and of international interstate organizations show when they deliberately secede decision-making power and the functions which are inherent to political institutions to more powerful economic groups under the pretext or with the label of “participation of civil society” and “social actors”. This allows such groups, particularly large Transnational Companies, to develop their strategy on a world scale and to influence policy direction in accordance with their own interests.

Indeed, the very structures of some international bodies such as the IMF and the World Bank and the WTO have been conceived to function in the service of such interests.

Another consequence of the growing supremacy of economic power is the attempt to replace the normative function of the State with private rules and regulations, voluntary Codes of Conduct, and so on, which lack three essential elements which characterize legal norms:

- a) that the procedure for their drafting and of sanctions is established in the Constitution or the organic law of the State and that it is presumed that they express the wish of the citizens (“Laws do not oblige because they are accepted by the wish of the people ... the people will dictate its wish through suffrage” (*Digesto romano*, Lib. 1 tit. III, 32, paragraph I));
- b) that they are mandatory for all;
- c) that their violation or unfulfillment leads to a sanction which emanates from a legal or administrative source.

It is therefore necessary to re-establish the basic role of politics so that all citizens can have equal rights, whatever their economic or social position, through representative and participatory democracy, in the adoption of decisions, in the monitoring of their

implementation and in the evaluation of their results, and it also necessary to salvage the primacy of law as an expression of popular will.

Therefore it is both imperative and urgent to move to democratization of the international organizations and to ensure the transparency of their functioning.

B. The legal Framework for Transnational Companies

1. Codes of Conduct which are voluntary cannot replace norms dictated by national state bodies and international interstate bodies. Only the latter are true legal norms, by their nature compulsory, which where they are not complied with lead to sanctions.

Furthermore, experience and studies carried out show that voluntary Codes of Conduct are unexhaustive, their application depends on whether the company wishes to implement them or not and there is no true external independent control.

Voluntary Codes of Conduct are private initiatives and, therefore, lie outside the norm-setting activity of States and the norm-setting activity (Conventions, Resolutions, Declarations, etc.) or incitement to promote norms (Guidelines, Declarations of Principle, etc.) of interstate international organizations whose direct addressees are States and individuals are only included indirectly.

However, some lawyers believe that not complying with such Codes of Conduct even where voluntary can be invoked on the basis of the principle that an obligation that is assumed unilaterally is also incumbent on an interested third party and thus a company which falsely claims that it has implemented and respects a voluntary Code of Conduct could be alleged to be guilty of unfair competition.

However, even mandatory Codes of Conduct are intended to regulate specific questions and not to supplant national legislation which must supervise general consequences and indirect effects of the activities of Transnational Companies.

2. It is necessary to adopt principles for the legal framework, therefore, for the Transnational Companies which begin from the following basic premises:

- a) national communities and the international community are legal communities under public law, the concept is formed on a legal basis (of national and international norms), which, regardless of whether in fact they are respected to a lesser or greater extent and regardless of the level of their evolution, constitute a point of reference which cannot be ignored for establishing the rules of the game for living in harmony.
- b) Such norms are compulsory both for legal bodies and also for individuals.
- c) Transnational Companies are legal entities and therefore are subjects and objects of public law. So that legal norms are also compulsory for Transnational Companies.
- d) Legal norms which are in effect are also compulsory for the leaders of Transnational Companies.

3. What needs to be done is to make the principle of criminal liability for legal entities more widespread: a concept which is already incorporated in various national legislation, and in a non-binding way, in the Convention of the United Nations against Transnational Organized Crime of the year 2000 and in a binding manner in the 1999 European Penal Convention on Corruption. The principle of dual indictment must also become more widespread, that is to say that the legal entity can be sanctioned and so can the individuals concerned (leaders within the company) who take or consent to the decision which is being sanctioned.

4. We must establish in what way the legal framework for Transnational Companies and for their managers can be made effective within national and international norms in effect, how

sanctions are to be carried out or reparations, in the case of non-compliance with or transgression of these norms.

5. It is also necessary to consolidate and to develop the specific norms which exist relating to Transnational Companies, to strengthen legislation with regard to private monopolies, paying particular attention to essential services for the community and to mass communication means and infrastructure and it is necessary to establish mandatory Codes of Conduct for Transnational Companies which include the question of transfer of technology.

6. The problem of heterogeneity, dispersal and sometimes contradiction of the norms in effect under international law in various spheres is also apparent when examining the question of the legal framework for Transnational Companies. In order to have a minimum of consistency between international instruments, it is necessary to establish a hierarchy for them, starting from the principle that the interests of the general public or the common good should prevail, as should fundamental rights and the dignity of human beings, in a framework of justice and equity which does not recognize privileges, advantages or exceptions for any social actors due to their economic, political or social power.

I. Legal Characteristics of Transnational Companies

Transnational Companies are legal entities under private law which act in different States but with one single or main decision-making centre. Its transnational nature does not allow it to be seen as an international legal entity although it can be a subject of international law just as individuals can, as is the case at present in international doctrine and practice. In the current state of international law the only international legal entities are entities under public law, States and interstate organizations.

II. Economic and financial Characteristics

The dispersed and multiple nature of the activities of Transnational Companies the constant merger-takeovers and changes of name, the frequent difficulty for the consumer to connect a good or a service with a particular company, and so on, are elements which help to sustain the argument that the present economic system is constituted of a complex web of phenomena which are impossible to place spatially and temporally and that Transnational Companies do not exist as real entities and as physical representatives of the system.

However, as was said in the *Introduction*, Transnational Companies exercise a strong and real influence on political, economic and social activity which is irrefutable proof that they are not virtual entities. And their top leaders have names and surnames, appear often in specialized reviews and in political journals and sometimes in the legal register. All of which allows us to affirm that the difficulty we find in visualizing the Transnational Companies (which a thorough study will help us to overcome) does not mean that they do not exist.

Transnational Companies are present in production, trade, in research and in services – in almost all spheres of activity – and also in financial speculation, either directly using its own capital or accepting as company capital the entry of funds from managers of institutional investment pension funds, or from insurance company funds, and so on, and in this way these persons have a say in the decisions of the companies so that their investment produces the high profit expected.

The companies carry out these activities either separately, together or alternately. In their activities they include different national territories, varying with rapidity and relative frequency the places where they set up or where they invest capital, in accordance with their strategy based on the objective of highest profit (quest for cheap labor, fiscal advantages, state subsidies, being close to the source of raw materials, close to the consumer market, flexible

regulations and/or more favorable such regulations, high interest rates for their speculative capital, etc.)

They can function with a parent company and branches, creating groups of same sector activities, conglomerates or coalitions bringing together diverse activities, uniting through a merger or absorption or constituting financial groups (holdings). In all these cases (parent company/branches, groups, conglomerates, coalitions and holdings) the most important decisions are taken centrally.

They can have a legal domicile in one or several countries: in that of the actual headquarters of the parent company, in that of the headquarters of their main activities and/or in the country where the company is registered. However, a nationality can always be assigned in fact to the company in the sense that there will be a State which supports or defends their interests (in the WTO, the IMF, the WB and other international organizations or through military or political means or through other means).

It is often the case that the activity which is really productive is delegated to subcontractors and that the Transnational Company has the know-how, the brand and the marketing.

III. Responsibility of States and of the International Community for the Actions of Transnational Companies

1. The right to development and to a progressive increase in enjoyment of economic social and cultural rights places obligations on the international community and each State member with regard to their own peoples and to humanity in general, to the extent of their available resources. And these obligations mean the duty of every State to make maximum efforts to promote economic, social and cultural progress for its people. The obligations of the State in terms of economic social and cultural rights exist not only with regard to their own peoples but also those of all peoples. They are the so-called “solidarity rights” the respect and promotion of which obliges all the international community.

States are also responsible when they fail in their duty of due diligence or vigilance in the prevention and punishment of violations of human rights (on their own territory or transnationally) which are committed by individuals which are found under their jurisdiction, according to what has been established in the fundamental instruments and to international practice. In particular numerous international conventions and arbitration cases (the Trail Foundry and others) have established the subsidiary responsibility of States in the sphere of preservation of the environment.

IV. Applicable Norms

1. Transnational companies like all individuals, are civilly and criminally responsible for the violation or non-fulfillment of norms in effect, both international norms, most of which are applicable under domestic law, and national norms.

2. Responsibility for violations is shared by the parent company and the branch which transgressed the norms, and in groups, conglomerates or holdings by the company which was directly responsible and by the coordinating company of the group, conglomerate or holding whose managing body took or approved of the decision.

3. Transnational Companies are also responsible for transgressions committed by subcontracting companies, as co-authors or participants (accomplices, etc) in criminal terms, and in a general way, as beneficiaries of the illegal conduct.

4. States are internationally responsible for the implementation within domestic law of the majority of international norms as binding or obligatory through their nature as “*jus cogens*”

amongst them the Universal Declaration on Human Rights, the international Pacts and Conventions on human rights, conventions and recommendations of the ILO, various resolutions and declarations of the General Assembly and of International Conferences (on the right to development, protection of the environment, permanent sovereignty over national resources, corruption, economic crime, etc.) and other regional and international instruments on various matters.

5. The many activities of Transnational Companies include the sphere of the illicit, which is a grey area between legality and illegality and open crime. The characteristics which define organized transnational crime correspond perfectly to the habitual practice of large Transnational Companies: a permanent transnational structure, division and control of territories and markets, zones of influence to obtain the highest profits and indifference with regard to a deleterious outcome for third parties in terms of the means employed to achieve the result. With the peculiarity in the case of Transnational Companies that with the aid of large powers and of the IMF, the WB and the WTO the means employed include coups d'Etat, the promotion and backing of dictatorial régimes, terrorism and military, political and economic extortion, etc. And that the deleterious outcome can consist of violations of fundamental human rights for a large part of the world population. Amongst the international instruments which are applicable we should mention the Convention of the United Nations against Organized Transnational Crime (the Palermo Convention), adopted by the General Assembly on 15 November 2000 and the OECD Convention against Corruption, in effect since February 1999 although both instruments are characterized by their excessive flexibility, because they grant a wide margin for decisions to States Parties. The European Penal Convention on Corruption, open for signature from 27 January 1999, is much more exhaustive and binding.

6. It is possible to invoke article 7 in court as a right in effect (crimes against humanity) of the Statute of the International Criminal Court (Rome 1998) against leaders of Transnational Companies, particularly its paragraphs 1 c) (torture [which includes other degrading, inhuman or cruel punishment or treatment according to the relevant Convention]); 1 k) (other inhuman acts ... which cause great suffering or seriously attack the physical integrity or physical or mental health) and 2 b) **[extermination]** (intentionally inflict living conditions inter alia the deprivation of access to food or medication...). Also article 11 paragraph c) of the Convention for the Prevention and Sanction of the Crime of Genocide can also be invoked: .."the intentional submission of a group to living conditions which will lead to their physical destruction, whether partial or total."

7. Civil and criminal liability must have as a consequence not only the sanction for the violation or non fulfillment but also reparations for damage caused and, where possible, the re-establishment of the *statu quo ante*.

8. The norms in existence must be included in national and international plans:

a) The notion of public service must be reinstated, especially in terms of health, food, education, habitat, communication and information in all forms and support must be provided to prevent and prohibit the formation of private oligopolies and monopolies in these spheres.

b) Strengthening the mechanisms for application of specific instruments referring to Transnational Companies, such as the Declaration of Tripartite Principles on Transnational Companies and the Social Policy of the ILO (which in its amendment of November 2000 referred to 30 Conventions and 35 Recommendations of the ILO) and the Guidelines of the

OECD (revised text in June 2000), although this last only formulates recommendations to companies.

c) Establishing mandatory Codes of Conduct for Transnational Companies as was asked for in the Declaration and Program of Action of the Millennium Forum (United Nations, New York, 26 May 2000, item 2 of Section A of the Declaration), by more than 1000 NGOs from 100 countries. Such Codes of Conduct must include the question of technology transfer.

d) Bringing the violations of human, civil, political, economic, social and cultural rights together under one violation of fundamental human rights (as well as a violation of the relevant norm). For example, being deprived of somewhere to live is a violation of the right to a private life (as well as being a violation of other fundamental rights) and not adopting measures against extreme poverty (or adopting measures which cause poverty) constitutes inhuman or degrading treatment that is equivalent to torture; the deprivation of access to adequate food or to essential medication represents a violation of rights to health and life, and so forth.

e) Extending the current trend to make individuals responsible internationally (Statute of the International Criminal Court) and that of direct international responsibility for private legal entities.

f) States which have not done so, must incorporate into their legislation criminal liability for legal entities, without hiding behind the excessive flexibility of article 10 of the Convention of the UN against Organized Transnational Crime and the OECD Convention against Corruption, which allows States to choose between criminal, civil or administrative sanctions for legal entities.

The principle of dual indictment must also become universal, so that Transnational Companies are criminally liable for the crimes they commit, yet so are the managers who approve them, in accordance with the statutes and with their affirmative vote or omission to vote against, on the decisions which are indicted. The applicable norms, both for companies as for individuals, whether in their quality as authors, accomplices, instigators, necessary participants, and so on, should be placed in national legislations and in international instruments.

V. Competent Jurisdictions

1. As was pointed out in the preceding Chapter, norms applicable to Transnational Companies exist although with serious loopholes. However, the mechanisms to apply such norms directly on private legal entities, amongst them Transnational Companies, are totally non-existent in international terms.

Nor does the Statute approved in Rome confer competency to the future International Criminal Court to judge legal entities nor crimes against economic, social and cultural rights, although if the Court is established individuals can inform the Public Prosecutor (they cannot file complaints nor act as a plaintiff) about violations of human rights committed by Transnational Companies, so that the Public Prosecutor can decide whether to investigate and accuse the individuals responsible. The options offered in this regard by the future International Criminal Court in the Statute as it stands at present are very limited.

2. In regional and international plans there are judicial and administrative jurisdictions, the system of arbitration courts and the so-called quasi jurisdictional proceedings, some accessible to individuals and others not, but in which it is only the States which can be the subject of an action, also as subsidiaries responsible for the actions of individual entities including Transnational Companies.

Amongst the mechanisms which exist one could cite the Interamerican Court and the European Tribunal for Human Rights, the International Court of Justice (only accessible to States) which since 1993 has had a Chamber on the environment; the proceedings before four of the Committees on International Pacts and Conventions (human rights, women rights, [TRANSLATOR'S NOTE: SHOULDN'T THIS BE RIGHTS OF THE CHILD?] racial discrimination and torture), the proceedings existing in the International Labor Organization, rules for the presentation of communications in UNESCO, the Additional Protocol of the European Social Chapter, the International Court on the Law of the Sea, the Protocol on the Basel Convention of December 1999, etc.

3. National tribunals, in contrast, can receive claims and requests against Transnational Companies and their managers (criminal claims against Transnational Companies as such can only be made in the States which agree with regard to criminal liability for legal entities). Those making the claim have the option of choosing the jurisdiction of the territory where the damage was produced, or the domicile of the victims, or the domicile of one or instead one of the domiciles of the company or companies responsible and also to apply the increasingly widespread principle of universal jurisdiction.

4. Jurisdictions and proceedings in existence should be supplemented by:

a) Approving, with the necessary reforms, the Draft Protocol of the International Covenant on Social, Economic and Cultural Rights, which establishes a procedure for claims before the relevant Committee and the drawing up and approval of a procedure for claims before the Committee on the Rights of the Child.

b) Establishing direct international liability of private legal entities:

- By amending the Statute of the International Criminal Court in order to

establish the competency of the Court to judge legal entities and violations of social, economic and cultural rights and those relating to the environment and allowing victims to act as claimants or plaintiffs and to represent themselves as civil parties in order to obtain reparation for the damage.

- through the creation of an international court for Transnational Companies,

taking its inspiration from the International Court on the Law of the Sea, whose Statute constitutes Annex VI of the Convention on the Law of the Sea (Montego Bay, December 1982).

- And also through legal channels, by applying the principle of universal jurisdiction.

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