

TRANSNATIONAL CORPORATIONS ' IMPUNITY

History, What's at Stake
and Initiatives

Part of a series of the
Human Rights
Programme of the
Europe - Third World
Centre (CETIM)



CETIM

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Moreover, Mr. Olivier Peter et Ms. Haëndila Varela also contributed to the research.

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Translated from the French by Robert James Parsons

Cover design: Régis Golay

CETIM

6 rue Amat, 1202 Genève, Suisse
Tél. +41 (0)22 731 59 63
Fax +41 (0)22 731 91 52
E-mail : contact@cetim.ch
Website : www.cetim.ch

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*The **Human Rights Program** of the CETIM is dedicated to the defence and promotion of all human rights, a commitment based on the principle that human rights are totally inseparable and indivisible. Within that commitment, however, the CETIM has a particular focus on economic, social and cultural rights and the right to development, still much neglected in our times when not denied outright. Its objective includes combating the impunity accompanying the numerous violations of these rights and helping the communities, social groups and movements victimized by these violations to be heard and to obtain redress.*

*Through this **series** of publications, the CETIM hopes to provide a better knowledge of the documents (conventions, treaties, declarations etc.) and existing official instruments to all those engaged in the struggle for the advancement of human rights.*

Selection from among the CETIM's critical reports related to the subject

- *Transnational Corporations: Major Players in Human Rights Violations (N°10, December 2011)*
- *Mercenaries, Mercenarism and Human Rights (N°8, November 2010)*
- *International, Regional, Subregional and Bilateral Free Trade Agreements (n°7, July 2010)*

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TRANSNATIONAL CORPORATIONS' IMPUNITY

Publication prepared by

Melik Özden, Director of the CETIM

**Part of a series of the Human Rights Programme of the
Europe-Third World Centre (CETIM)**

INTRODUCTION

Since its founding in 1970, the CETIM, as a research and publication center, has been studying the problems posed by transnational corporations (TNCs) in the development of the countries of the Global South, while highlighting the responsibility of the countries of the Global North in the unjust international order. In its book *Mal-développement*, published in 1975, the CETIM already drew attention to the nefarious role of “multinational business enterprises” in the production of goods (unrelated to the elementary needs of the populations concerned), unfair trade and rising inequality. Since then, it has published numerous works studying the economic and social impact of these business entities active in various sectors.¹ Among these publications, a little book published in 1978 demonstrated the trading in influence (political and economic power) of one TNC (Brown-Boveri) as played out in a law suit against it in Brazil pour illicit trade practices, and its part in a world-wide electricity cartel.²

Since the 1990s, we have been witness to the offensive of financial capital and the adoption of a vast panoply of international norms favorable to TNCs (especially multilateral and bilateral agreements on trade and investment) and ignoring human rights. Moreover, the elevation of these entities to the rank of privileged agents of development by the promoters of neoliberal globalization and the wide-scale privatization of public services favoring them have reinforced their position to such a degree that they now control the bulk of production and marketing of goods and services at the global level.

In our time, TNCs have a determining influence over most political and economic decisions. They have also become major actors in human rights violations, in particular economic, social and cultural rights.

In fact, a large part of the catastrophes with dramatic consequences for humans and the environment have been caused by – or with the crucial complicity of – TNCs.³ From the explosion of an agro-chemical plant in Bhopal (India) to the petroleum pollution in Equatorial Amazon, from child labor on cacao plantations in Africa to the textile factories of Bangladesh, colossal tragedies with multiple human rights violations are imputable to TCNs and to the greed of the majority shareholders and directors. These entities very often escape legal action owing to a lack of political will of some states, but also owing to a lack of legal instruments specifically dealing with them at the international level – whence the *de facto* impunity that TNCs enjoy.

¹ Inter alia, *Les médicaments et le tiers monde* (1981), *Pesticides sans frontières* (1982), *L'empire Nestlé* (1983) and *La civilisation du sucre* (1985).

² *Multinationales et droits de l'homme* (Geneva: CETIM, November 1978).

³ David Baigun, “Responsabilidad penal de las personas jurídicas”, *Prevención y sanción de las violaciones a los derechos económicos, sociales y culturales y al derecho al desarrollo: El problema de la impunidad* (Madrid & Geneva: American Association of Jurists & CETIM, 1997) pp. 93–95.

However, states are responsible for combating impunity for human rights violations, regardless of the hierarchy of these rights (civil, political, economic, social and cultural). Thus, the fight against impunity for human rights violations demands sanctioning those responsible for them and forcing them to repair the damage done. With the exception of certain violations, in particular in the context of armed conflict, the vast majority of human rights violations remain unpunished. This impunity is particularly consequential for offenses committed by private non-state actors such as TNCs.

The vast majority of victims expect that the harm they have suffered be remedied and that the guilty be subjected to sanctions proportionate to the seriousness of their crimes.

Are the victims waiting in vain? Does the current legal framework correspond to their expectations? If not, how can we end the impunity enjoyed by those responsible for these violations and crimes?

This publication will explore answers to these questions. It comprises five chapters. The first presents the genesis of the fight against impunity for human rights violations and reviews states' obligations in this area. The second deals with the reasons for TNCs impunity for human rights violations. The third chapter presents several exemplary cases of human rights violations committed by TNCs. The fourth is devoted to an analysis of the current norms in several areas (at the regional and international level) applicable to legal persons, including TNCs. Finally, the fifth chapter presents two initiatives intended to close the legal loopholes at the international level (by the United Nations) and at the national level (by Switzerland).

Finally, it is hoped that this publication will make a contribution to the process under way at the United Nations Human Rights Council by analyzing the major points of the discussions and the various proposals that are being formulated there (Chapter V).

I. HISTORICAL OVERVIEW AND CURRENT STATE OF AFFAIRS

A) Definition of Impunity

According to criminologists, both in the past and recently, sentencing can have numerous objectives: expiation and retribution, sustaining social cohesion, reparation, reconciliation, resocialization of the offender etc.⁴ Regarding human rights violations, more than the sentence's effect on the perpetrator (and possible later reintegration into society), its purpose is dissuasion, hence prevention. Thus, the sanction must be primarily a warning to potential offenders, declaring unequivocally that certain actions are no longer tolerated and that those guilty of such actions risk being personally held accountable before national and international courts.

The United Nations experts have defined as follows impunity regarding human rights violations:

“Impunity” means the impossibility, de jure or de facto, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”⁵

This definition refers above all to violations of civil and political rights committed by the agents of states and is intended to guide people who, having lived under dictatorships or having survived a civil war, wish to create a regime based on the rule of law and human rights. However, it can also perfectly apply to violations of economic, social and cultural rights, by extending responsibility (in both civil and criminal law) to legal persons – typically TNCs – and their directors, the major actors in violations of human rights generally but especially of economic, social and cultural rights.

⁴ André Kuhn, “Peut-on se passer de la peine pénale? Un abolitionnisme à la hauteur des défis contemporains” *Revue de Théologie et Philosophie* (N° 2, 2009) pp. 179-192: http://infoprison.ch/bulletin_2/se_passer_peine_penale.pdf

⁵ *Updated Set of Principles for the Protection and Protection of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, 8 February 2005, p. 6: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement>

B) Genesis of the Struggle against Impunity for Human Rights Violations

Since the 1980s, NGOs active in the defense of human rights have seen, on the one hand, a proliferation of amnesty laws, in particular in Latin American countries, benefiting political leaders and civil servants responsible for wide-scale violations of human rights (Chili 1978, El Salvador 1987 etc.) and, on the other hand, failure by United Nations instances to act, justifying amnesty as “the price to pay to assure a transition to democracy, the return of the military to their barracks and progressing beyond domestic armed conflicts”.⁶

In response to this pragmatic view of impunity, human rights defense organizations, as well as various United Nations mechanisms, have worked intensely to develop a legal argument based on international law, in order to deny impunity in all circumstances.

Thus, in 1991, the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities⁷ requested that two of its members⁸ draft a working document on the fight against impunity and subsequently a study on “the impunity of the perpetrators of human rights violations”, and “propose measures to fight against this practice”.⁹ In 1994, the Sub-Commission divided the project, assigning Louis Joinet the part dealing with civil and political rights violations and El Hadji Guissé the part dealing with economic, social and cultural rights violations.

1. The Fight against Impunity for Violations of Civil and Political Rights

In 1997, Louis Joinet's final report, which included a *Set of principles for the protection and promotion of human rights through action to combat impunity*, was submitted to the Sub-Commission,¹⁰ which, in turn, submitted it to the parent body¹¹ for adoption. In 1998, the Commission on Human Rights “took note” of the report.¹² Several years later, the Commission requested that the report be updated, and the work was carried out by the Independent Expert Diane Orentlicher.¹³

⁶ Federico Andreu-Guzman, “Impunité et droit international – Quelques réflexions historico-juridiques sur la lutte contre l’impunité”, *Mouvements* (2008/1, N° 53) pp. 54-60.

⁷ In 2008, in place of the Sub-Commission, the Human Rights Council's designated as its body of experts the “Advisory Committee”. See Melik Özden, *The Human Rights Council and Its Mechanisms* (Critical Report N° 1, Geneva: CETIM, February 2008): <http://www.cetim.ch/the-human-rights-council-and-its-mechanisms/>

⁸ El Hadji Guissé (Senegal) and Louis Joinet (France).

⁹ *Progress Report on the Questions of the Impunity of Perpetrators of Human Rights Violations*, E/CN.4/Sub.2/1993/6, 19 July 1993, § 3 (French only): <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G93/143/01/PDF/G9314301.pdf?OpenElement>.

¹⁰ *Question of the impunity of perpetrators of human rights violations (civil and political)*, E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997.

¹¹ The Commission on Human Rights, later replaced by the Human Rights Council. See note 6.

¹² Commission on Human Rights, Resolution 1998/53, § 5.

¹³ *Updated Set of Principles for the Protection and Protection of Human Rights through Action to Combat Impunity*, E/CN.4/102/Add.1, 8 February 2005.

Comprising 38 principles, this document highlighted five major ones: the right to know (including, inter alia, the right to truth and the duty of memory of peoples); the right to justice; the right to redress and compensation; the right to guarantees of non-repetition of human rights violations; and the obligation of states to take effective measures in the fight against impunity. “Taking note” of this updated version, the Commission recommended this *Updated Set of Principles* to its Special Rapporteurs and to the United Nations member states as a road map in the fight against impunity.¹⁴

It should be noted that this *Updated Set of Principles* emphasizes “serious” crimes under international humanitarian law (war crimes, crimes against humanity and genocide), while considering civil and political rights violations such as torture, forced disappearances, summary executions and slavery as “serious crimes under international law”.¹⁵

2. The Fight against Impunity for Violations of Economic, Social and Cultural Rights

The report of E.-H. Guissé was also submitted in 1997.¹⁶ Unfortunately, this text had less of an effect than Louis Joinet's and did not contain a *Set of Principles* that might have contributed to the development of the fight against impunity for violations economic, social and cultural rights. And neither member states nor the international organizations found it useful to adopt effective instruments of punishment and dissuasion.¹⁷ Further, at the time, they omitted to define serious violations of economic, social and cultural rights as crimes in international law. For example, the 1998 *Rome Statute of the International Criminal Court* does not explicitly mention violations of economic, social and cultural rights as coming under its purview.¹⁸

Generally, the willingness to relegate serious violations of economic, social and cultural rights to a subordinate level derives from the adoption of the *Optional Protocol to the International Covenant on Civil and Political Rights* already in 1966, the same year as the adoption of the two *Covenants*, whereas an optional protocol to the *International Covenant on Economic, Social and Cultural Rights*, enabling victims to file complaints for violations of their economic, social and cultural rights, was adopted only in 2008.¹⁹ Further complications were that this second *Optional Protocol* has been ratified by very few states, mostly in the Global South, and that the adoption of the *Protocol* did not bridge the gap since,

¹⁴ Commission on Human Rights, Resolution 2005/81 21 April 2005, adopted without a vote.

¹⁵ *Updated Set of Principles*, Definitions: B. Serious crimes under international law.

¹⁶ *Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)*, E/CN.4/Sub.2/1997/8, 27 June 1997: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G97/129/18/pdf/G9712918.pdf?OpenElement>

¹⁷ *Prevención y sanción de las violaciones a los derechos económicos, sociales...*, op cit., p. 6.

¹⁸ It is worth noting that the *Statute of the Court* defines “pillaging a town or place” as “war crime” (Article 8.e.v).

¹⁹ Christophe Golay, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* (Critical Report N° 2, Geneva: CETIM, 2008) p. 2–3: <http://www.cetim.ch/le-protocole-facultatif-se-rapportant-au-pacte-international-relatif-aux-droits-economiques-sociaux-et-culturels-pidesc/>

unlike the international criminal jurisdictions, the Committee on Economic, Social and Cultural Rights²⁰ has no means of enforcement.

It should be noted that the justiciability of economic, social and cultural rights was often questioned by states of the Global North.²¹ The development of a rich jurisprudence in this area over the past 15 years, by both national and regional jurisdictions,²² has put an end to this discussion as well as to positions deriving from bad faith.

Regarding human rights violations and especially those of economic, social and cultural rights committed by TNCs, at the international level there are no norms nor specific mechanisms that deal with them. Those available are disparate, insufficient or simply not legally binding. (See Chapter IV).

Thus, for two decades the CETIM has been working within the United Nations in support of the drafting of norms in the fight against impunity for violations of economic, social and cultural rights,²³ especially those committed by TNCs. In this regard, it has conducted numerous studies and analyses and has contributed to the adoption in 2003 of the *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* by the former Sub-Commission for the Promotion and Protection of Human Rights,²⁴ as well as, in 2008, the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*.²⁵

3. The International Criminal Court

The creation of the International Criminal Court (ICC), through the adoption of the *Rome Statute of the International Criminal Court* in 1998 and its entry into force in 2002²⁶ is considered by some as the culmination of the fight against impunity. Without entering into detail regarding the shortcomings of this institution,²⁷ it is worth noting that its purview is limited to “serious crimes” of

²⁰ United Nations body entrusted with overseeing compliance of the *International Covenant on Economic, Social and Cultural Rights*.

²¹ In this regard, see, inter alia, the discussions of the United Nations Intergovernmental Working Group entrusted with drafting an optional protocol to the *International Covenant on Economic, Social and Cultural Rights*. Also Melik Özden and François Ndagijimana (eds), *The Optional Protocol to The International Covenant on Economic Social and Cultural Rights* (Geneva: CETIM, February 2006): <http://www.cetim.ch/the-optional-protocol-to-the-international-covenant-on-economic-social-and-cultural-rights-icescr/>

²² See the examples cited in the CETIM Human Rights Series on economic, social and cultural rights: <http://www.cetim.ch/human-rights-series/>

²³ *Prevención y sanción de las violaciones a los derechos económicos, sociales...*, op cit.

²⁴ See, inter alia, *Sociétés transnationales et droits humains: études de cas et responsabilités* (Geneva: CETIM, AAJ and FICAT, July 2000); Melik Özden, ed., *Transnational Corporations and Human Rights* (Geneva: CETIM, November 2005).

²⁵ See notes 19 and 21.

²⁶ <https://www.icc-cpi.int>

²⁷ For example, by virtue of Article 16 of the *Statute of Rome*, the United Nations Security Council can block any inquiry and prosecution undertaken by the International Criminal Court for a period of 12 months, renewable.

international law such as “the crime of genocide”, “crimes against humanity”, “war crimes” and “the crime of aggression”.²⁸

These acts, however, have not been chosen on the basis of an objective condition of seriousness (number of victims, vulnerability of the persons affected, seriousness of the effect on health and/or the environment, cruelty of treatment, despicable motivation...) but are dependent on the existence of other particular conditions deriving from intention, in the strict sense of the word, or the existence of a particular context.

For example, the crime of genocide is characterized by an intention to destroy, totally or in part, “a national, ethnical, racial or religious group” (Article 6). “Crimes against humanity” must have been committed “pursuant to or in furtherance of a State or organizational policy to commit such attack” (Article 7.2.a). And “war crimes” can be committed only in the context of armed conflict (Article 8).

In theory, and even if it remains limited to “serious crimes”, there remains the possibility of the International Criminal Court prosecuting physical persons (including the directors of TNCs) on the basis of certain articles of the *Rome Statute*,²⁹ but until now, no TNCs manager, as far as we know, has been prosecuted – much less convicted – by the ICC, and the Court declared that it was without jurisdiction concerning a case filed in 2014 by the victims of Chevron in Ecuadorian Amazon.³⁰

This situation demonstrates the contradiction between states' formal recognition of guarantees and the absence of any real political will to implement human rights when that constitutes an obstacle to the interests of the owners or main shareholders of the major TNCs. However, it has been acknowledged since the Vienna *World Conference on Human Rights* that there should be no distinction between implementation and protection of, on the one hand, civil and political rights and of, on the other, economic, social and cultural rights. These rights are to be treated “on the same footing and with the same emphasis”.³¹ Thus, when one speaks of the fight against impunity for human rights violations, it is now unacceptable to limit this fight to the violation of certain rights, characterized as “serious”, much less to certain forms of violations, by creating hierarchies contrary to the indivisibility of human rights.

In order to put an end to this situation, the fight against impunity must be extended to all human rights violations, especially those of economic, social and cultural rights, which until now have been neglected.

²⁸ *Statute of Rome*, Article 5: <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>

²⁹ Articles 7, 8 and 25.

³⁰ “(...) as the allegations appear to fall outside the jurisdiction of the Court, the Prosecutor has confirmed that there is not a basis at this time to proceed with further analysis. See the letter from The Office of the Prosecutor addressed to the representative of the victims, 12 March 2015, and also Chapter III.B.

³¹ *Vienna Declaration and Program of Action*, 25 June 1993, § 5: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>

4. The Right to a Remedy and Reparation

In 2005, another document, very important but largely unnoticed, was adopted successively by the Commission on Human Rights and by the General Assembly. It was the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.³² With these *Basic Principles and Guidelines*, there is no doubt that victims of human rights violations have a first-rate instrument, for it makes no distinction between, on the one hand, civil and political rights and, on the other, economic, social and cultural rights. It also makes no distinction between violations committed by a state, a physical person or a *legal person* (§ 15).

C) States' Obligations

Regarding human rights (civil, political, economic, social and cultural), states have three levels of obligations: respect, protect and fulfill. Respect means that states must not themselves violate human rights by their actions. Protect means that they must take measures, including sanctions, regarding third parties (individuals or entities, the latter including non-state entities such as TNCs) that violate human rights. Fulfill means that states must take all appropriate measures (legislative, administrative and political) to enable their population to enjoy all recognized human rights.

Besides these three obligations at the national level, states also have obligations at the international level. Regarding the fulfillment of economic, social and cultural rights, for example, states must cooperate among themselves in solidarity with countries that have difficulty in honoring their commitments, in conformity with the *Charter of the United Nations*, the *Universal Declaration of Human Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

Regarding the activities of TNCs, states must regulate them (obligation to protect) in such a way as to prevent any violation of the human rights of the persons under their and other countries' jurisdiction and, if need be, to impose sanctions in the event of violations committed by these entities. All human rights jurisprudence of the United Nations treaty oversight bodies is in line with this. (See the examples discussed in Inset N° 1 and in Chapter III.E.)

³² See Commission on Human Rights, Resolution 2005/35 and General Assembly, Resolution 60/147: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

Jurisprudences of the United Nations Treaty Bodies

In its *Statement on the obligations of states parties regarding the corporate sector and economic, social and cultural rights*,³³ the United Nations Committee on Economic, Social and Cultural Rights clarifies, as follows, states' obligation to protect against violations committed by third parties (in this case, business enterprises including TNCs):

“Protecting rights means that States Parties effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws and regulations, together with monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations. As the Committee has repeatedly explained, non-compliance with this obligation can come about through action or inaction.

It is of the utmost importance that States parties ensure access to effective remedies to victims of corporate abuse of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means. States parties should also take steps to prevent human rights contraventions abroad by corporations which have their main offices under their jurisdiction, without infringing the sovereignty or diminishing the obligations of the host States under the Covenant.” (§ 5; emphasis added)

In its *General Comment No. 14: The Right to Health*,³⁴ the Committee enjoins the states parties:

“to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the *Charter of the United Nations* and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required. States parties should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments.

In relation to the conclusion of other international agreements, States parties should take steps to ensure that these instruments do not adversely impact upon the right to health. Similarly, States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health.

Accordingly, **States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.”** (§ 39; emphasis added)

³³ E/C.12/2011/1, 12 July 2011.

³⁴ E/C.12/2000/4, 11 August 2000.

Moreover, the Committee defines, inter alia, the following failures by states to respect their obligations regarding the right to health:

“the failure of the State to take into account its legal obligations regarding the right to health when entering into bilateral or multilateral agreements with other States, international organizations and other entities, such as multinational corporations (§ 50);

the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others (§ 51);

the failure to protect consumers and workers from practices detrimental to health, e.g. by employers and manufacturers of medicines or food.” (§ 51)

In its *General Comment No. 15: The Right to Water*,³⁵ the Committee has declared that:

“The obligation to protect requires States parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include **individuals, groups, corporations and other entities** as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems. (§ 23; emphasis added)

Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the *Covenant* and this general comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance. (§ 24; emphasis added)

To comply with their international obligations in relation to the right to water, **States parties have to respect the enjoyment of the right in other countries.** International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction. (§ 31; emphasis added).

Noting “with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside the United States by transnational corporations registered in the State party on the right to land, health, living environment and the way of life of indigenous peoples living in these regions”, the *Committee on the Elimination of Racial Discrimination* (CERD) requested that the government of the United States:

“take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in the State party which negatively impact on the enjoyment of rights of indigenous peoples in territories outside the United

³⁵ E/C.12/2002/11, 20 January 2003.

States. In particular, **the Committee recommends that the State party explore ways to hold transnational corporations registered in the United States accountable.**³⁶

In the same vein as the CERD, the *Human Rights Committee* requested that *Germany* enunciate clearly:

“the expectation that all business enterprises domiciled in its territory and/or its jurisdiction respect human rights standards in accordance with the *Covenant* throughout their operations. It is also encouraged to **take appropriate measures to strengthen the remedies provided to protect people who have been victims of activities of such business enterprises operating abroad.**³⁷

³⁶ *Concluding observations of the Committee on the Elimination of Racial Discrimination, United States of America*, CERD/C/USA/CO/6, 8 May 2008, § 30, (emphasis added). The CERD adopted similar observations regarding Canada: CERD/C/CAN/CO/18, 25 May 2007, § 17.

³⁷ Human Rights Committee, *Concluding observations on the sixth periodic report of Germany*, CCPR/C/DEU/CO/6, 13 November 2012, § 16, (emphasis added):
http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fDEU%2fCO%2f6&Lang=en

II. REASONS FOR IMPUNITY FOR TNCs' HUMAN RIGHTS VIOLATIONS

The reasons for impunity for TNCs human rights violations are many, but among the most common are: A. the economic power and concomitant political influence of TNCs over states; B. states' lack of political will; C. the powerlessness of public authorities.

Before discussing these causes, a brief description of TNCs is in order. Active in practically all areas of human activity, (production, services, finance, communication, basic and applied research, culture, leisure...), TNCs are legal persons under private law with multiple territorial implantations but with a single center for strategic decision making. They can function with a home company and affiliates, can constitute conglomerates within a single sector of activity, conglomerates or coalitions having diverse activities. They can also segment their activities among various territories, with *de facto* or *de jure* affiliates and/or with suppliers, subcontractors and licensees. (For details on the definition of TNCs, see Chapter V.B.1.)

A) Economic Power and Political Influence of TNCs over States

Favored by the neoliberal policies promoted and imposed over the past three decades by the international financial institutions (the IMF and the World Bank, in particular) with the support of certain powerful countries, TNCs have been promoted to the rank of “development motors”. In line with this and willingly or unwillingly, most states have embarked upon wide-scale privatization of all sectors of their economy, including essential public services indispensable to the enjoyment of human rights and social cohesion, thus favoring the strangle-hold of TNCs on natural resources and their monopoly in practically all areas of life.

Thus, in just a few decades, TNCs have acquired an economic, financial and political power unprecedented in history. Many TNCs are richer and more powerful than the states that seek to regulate them.³⁸ It is estimated that 80 % of international trade takes place within the framework of value chains linked to TNCs.³⁹ In 2015, the ten biggest TNCs boasted a volume of business of some US\$ 3,600 billion.⁴⁰ And among the 100 biggest economic entities world-wide (including states), 37 are TNCs.⁴¹

³⁸ UNCTAD, *World Investment Report: Transnational Corporations and Export Competitiveness* (New York & Geneva: United Nations, 2002) pp. 90-92.

³⁹ UNTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* (New York & Geneva: United Nations, 2013) p. 23.

⁴⁰ <http://fortune.com/global500/wal-mart-stores-1/>

⁴¹ Transnational Institute, “The State of Power”, 2014:
https://www.tni.org/files/download/state_of_power_hyperlinked_0.pdf

Trading in Influence

Nicaragua-United States⁴²

The TNC ***Dow Chemical*** has benefited from its influence to exert, through the United States Chamber of Commerce, enormous pressure on the government of Nicaragua so that it rescind Law 364 (adopted in 2001), allowing victims of the pesticide Nemagon (containing dibromochlorophane) to claim compensation from the company. This pesticide, used widely in huge amounts since the 1970s, helps a plant to grow faster and give greater yields, but it is a toxic chemical product slow to degrade that can remain in the sub-soil for hundreds of years, thus causing harm to living organisms and to the environment in general. The use of Nemagon was prohibited in the United States in 1979, but its use continued in Nicaragua until the transnational left the country in 1982, leaving behind thousands of sick farmers. Even today, they suffer from various forms of poisoning, and the number of cases of renal failure and cancer has increased exponentially. On the basis of Law 364, the pesticide manufacturers Dow and Shell as well as the agribusiness giant Dole were ordered in December 2002 and March 2004 to pay nearly US\$600 million to several hundred workers poisoned while working on banana plantations.

In parallel, the TNC has succeeded in introducing an amendment to the Central American Free Trade Agreement (CAFTA), comprising the United States, Central American countries and the Dominican Republic,⁴³ allowing the TNC to undertake court action for “compensation” against states parties when they consider that a court ruling or national law violates the principle of “just and equal treatment”.

Argentina-Spain

In 2012, following the decision of the Argentine government to (re)nationalize Yacimientos Petrolíferos Fiscales,⁴⁴ an affiliate of the TNC ***Repsol*** partially in Spanish hands, Repsol managed to exert enormous pressure on the Argentine Government through both the Spanish Government – which threatened to break off diplomatic relations with Argentina – and the European Union.⁴⁵

Volkswagen's Blackmail to Silence the French Media's Reporting on Its Fraud

“*Le Canard enchaîné* published an e-mail sent on 22 September 2015 by an advertizing agency to the managers of regional dailies. What does one discover?”

⁴² Jesus Ramirez Cuevas, “Nicaragua: la loi des compagnies bananières”, *Global Research* (13 septembre 2005): <http://www.mondialisation.ca/nicaragua-la-loi-des-compagnies-banani-res/945?print=1> and “L'événement syndical” n° 28/29, 7 July 2004.

⁴³ Adopted 5 August 2004; entered into force 1 March 2007.

⁴⁴ <https://en.wikipedia.org/wiki/YPF>

⁴⁵ <http://www.lefigaro.fr/societes/2012/04/24/20005-20120424ARTFIG00680-ypf-repsol-l-europe-prete-au-bras-de-fer-avec-l-argentine.php>

That MediaCom, the agency that purchases advertizing space for Volkswagen, is asking the newspapers not to publish 'any article about the VW crisis' in its editions 'of next 6, 8 and 10 October'... otherwise, 'we shall be obliged to cancel this contract', wrote the agency, in other words the planned 'investments' in the amount of €315,000, will not be forthcoming. The same commitment also allows the newspapers to maintain the advertizing campaign for Audi (an affiliate of Volkswagen). The amount, there also, is stated: €1,465,000.⁴⁶

B) States' Lack of Political Will

Converted to neoliberal theories, certain states continue to favor the interests of TNCs to the detriment of democracy and human rights. Others, having succumbed to the neoliberal sirens, have given themselves over to frenetic and absurd competition in attracting “foreign investment” by offering TNCs all possible advantages, including legal and fiscal.

Corruption, active or passive, constitutes one of the TNCs' arms to assure the services of a country's leaders and civil servants. (See Inset N° 14.)

For this reason, some countries remain “unaware” of the violations committed by the TNCs on their territory and/or refuse to cooperate with the judicial authorities of countries demanding sanctions, thus contributing to the impunity of these entities. (See Chapter III).

C) The Powerlessness of Public Authorities

As might be expected, more than three decades of neoliberal attacks against states' social services have resulted in weakening them. This weakness can be seen on several levels that are often interdependent: financial, administrative, legislative and technical knowledge and experience.

On the financial level, most countries have less financial resources than many of the TNCs that they want to regulate. Thus, totally apart from political will, they are devoid of the indispensable means of monitoring TNCs activities on their territory.

Very often, under constraint but also often convinced of the virtues of the “free market” that regulates itself, many countries have proceeded to carry out privatizations in all sectors of the economy, including within public structures entrusted with monitoring the activities of the private sector. Thus, one finds a situation both unprecedented and absurd, and the tendency is to a generalization of this state of affairs. For example, private financial institutions are audited by private entities viewing them as future clients (see Chapter IV, Inset N° 6); the performance of automobile manufacturers with regard to the environment is regularly verified by private entities whose existence depends on those manufacturers etc. (see Inset N° 3).

⁴⁶ <http://tempsreel.nouvelobs.com/en-direct/a-chaud/9466-volkswagen-faire-taire-presse-francaise-scandale-tests.html>

Inset N° 3

The Volkswagen Scandal

The Volkswagen Affair is an industrial scandal linked to the use by the Volkswagen Group, from 2009 to 2015, of various techniques aiming to fraudulently reduce the reporting of the polluting emissions (NOx and CO2) of several of its diesel motors and gasoline during emissions tests. According to the conglomerate, more than 11 million vehicles of the brands Volkswagen, Audi, Seat, Skoda and Porsche are concerned throughout the world. The scandal, unprecedented in automobile history, was revealed in September 2015 by the United States Environmental Protection Agency (EPA) and has resulted in the resignation of the conglomerate's chief executive officer, Martin Winterkorn.⁴⁷

“The deceit is crude and deliberate: the cars are equipped with a small software program which, during a test, activates the emission recirculation valve and deactivates it during normal conditions. The Clean Air Act sets the United States NOx emission limit at 0.04 g/km. In the laboratory, owing to the recirculation of the gases, it is met – the car is 'clean'; on the road, it is more than forty times that – the car is (very) polluting.”⁴⁸

There is an element that has been insufficiently mentioned in the VW scandal: the testing for antipollution standards by private companies! This is what *The Economist* has revealed: “It is possible that some companies are using software trickery to cheat on Europe’s tests on fuel efficiency. But as Nick Molden of Emission Analytics, a consulting firm in Britain, argues, the European testing regime is so out of date and open to abuse that car-makers do not have to bother with such subtlety. The companies test their own vehicles under the auspices of independent testing organizations certified by national governments. But these organizations are commercial enterprises that compete for business. Although obliged to put the vehicles through standard activity cycles both in a laboratory and on a test track – neither of which is remotely realistic – they are aware that their ability to 'optimize' the test procedures is a way to win clients. In practice this means doing everything possible to make the test cars perform far better than the versions punters drive off the forecourt.”⁴⁹

Regarding technical knowledge and experience, the lack in many countries is obvious when it comes to verifying food quality, the toxicity of various imported products or the loss of expertise in some area as vital for a country as in the case of the privatization of Niger's National Veterinary Office, which had disastrous consequences. (See Inset N° 4.)

⁴⁷ https://en.wikipedia.org/wiki/Volkswagen_emissions_scandal

⁴⁸ Daniel Tanuro, “Derrière le scandale Volkswagen, l'industrie capitaliste de l'automobile”, *solidaritéS* (N° 276, 15 October 2015): <http://www.solidarites.ch/journal/d/cahier/7160>

⁴⁹ <http://www.economist.com/news/briefing/21667918-systematic-fraud-worlds-biggest-carmaker-threatens-engulf-entire-industry-and>

Inset N° 4

Impacts of the Privatization Niger's National Veterinary Office

« “the IMF imposes draconian adjustment in the agricultural sector. Niger has wealth of 20 million head of cattle, sheep and camels, which are historically much sought after and exported widely. The animals constitute essential revenue for millions of nomads and peasants. But the privatization of the national veterinary office has produced disaster: these people can no longer afford the prices of vaccinations, medicines and vitamins charged by the commercial traders. Although there are still veterinary assistants, they are far from covering the need in Niger, and people are required to pay not only for their services, but also for their transport, which, given the inadequacies of the transport network in Niger, is extremely costly. Now, the privatization of the transport section of the ONPVN is slated and may also prove a disaster.

ONPVN trucks transport emergency food and seeds in times of famine, but after privatization, companies operating under the logic of the market will not venture into the remote areas on bad roads. Result: many villages risk not receiving any help. A final example: under adjustment, there is no longer a central laboratory to issue health certificates for animals as demanded under the rules of the World Trade Organization. Without certificates, buyers force the prices of the animals on the market lower, leaving pastoralists and farmers even poorer.”⁵⁰

On the legal and administrative level, complex legal montages of TNCs structures and the concomitant frauds obviously do not facilitate things in the face of differing legislation from various countries. To that can be added the lack of adequate control mechanisms at both the national and international level, not to mention the lack of real international cooperation. Further, economic and/or trade agreements (multilateral or bilateral) assure the primacy of private interests over the general interest and enshrine the legal power of TNCs.⁵¹ (See also Inset N° 5).

⁵⁰ Commission on Human Rights, *The right to food – Report by the Special Rapporteur on the right to food, submitted in accordance with Commission on Human Rights resolution 2001/25, Addendum: Mission to Niger*, E/CN.4/2002/58/Add.1, 23 January 2002, § 64: <http://www.righttofood.org/wp-content/uploads/2012/09/ECN.4200258Add.1.pdf>

⁵¹ Alejandro Teitelbaum, *International, Regional, Subregional and Bilateral Free Trade Agreements* (Critical Report N° 7, Geneva: CETIM, July 2010): <http://www.cetim.ch/international-regional-subregional-and-bilateral-free-trade-agreements/>

Inset N° 5

Validity of Free-Trade Agreements Questioned

In its report on the negative repercussions of (bilateral and multilateral) free-trade agreements and investment treaties on human rights, Alfred-Maurice de Zayas, United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order, has studied these agreements “both from the procedural aspect of their elaboration, negotiation, adoption and implementation, and from the substantive side, focusing on their constitutionality and effects on democratic governance, including the exercise of the State’s regulatory functions to advance the enjoyment of civil, cultural, economic, political and social rights.”⁵² His conclusion is clear:

“The validity of bilateral investment treaties and free trade agreements should be tested under the rules of the *Vienna Convention on the Law of Treaties*. ... To the extent that bilateral investment treaties and free trade agreements lead to violations of human rights, they should be modified or terminated.” (§ 42)

Noting that some 1,500 international investment agreements out of some 3,200 in force will expire, the Independent Expert is suggesting that states modify or nullify some of them, eliminating the disputes settlement regime provided for in these agreements.⁵³

⁵² Human Rights Council, A/HRC/30/44, p. 2, 14 July 2015.

⁵³ General Assembly, *Report of the Independent Expert on the promotion of a democratic and equitable international order (regarding settlement of disputes between private investors and states)*, A/70/285, 5 August 2015, § 3.

III. EXAMPLES OF TNCs' HUMAN RIGHTS VIOLATIONS

Without going into war crimes or crimes of genocide in which TNCs could be implicated (see Inset N° 6), the activities of these companies – touching practically all the areas of life – can have a negative effect on the enjoyment of human rights (civil, political, economic, social and cultural) which include, of course, the right to self-determination of peoples.⁵⁴ Violations of such rights can be direct and indirect.

Inset N° 6

War Crimes and Genocide

During the second World War, the German company *Tesch & Stabenow* knowingly provided the authorities of *Germany* with the gas Zyklon B used to exterminate persons in concentration camps. The company's owner, Bruno Tesch, as well as his “second”, Karl Weinbacher, were found guilty of war crimes by a British military tribunal in March 1946. They were sentenced to death and hanged.⁵⁵

During the 1980s, the company *FCA Contractors SA*, based in Switzerland and founded by the engineer Franz Van Anraat, sold tons of chemical products to the *Iraqi* government.⁵⁶ These products were said to have been used to produce nervin and mustard gas that the Iraqi army is said to have used during the Iran-Iraq war and in particular in the attack on the Iraqi Kurds in 1988.⁵⁷

The TNC manager was a refugee in Iraq for a long time, until the fall of Saddam Hussein (2003). He was finally arrested in the Netherlands in 2004 and sentenced to 17 years in prison for complicity in war crimes. Although the gas attacks were considered a crime of genocide, Van Anraat was not found guilty of this charge.⁵⁸

The control of diamond-mining areas and the profits generated by the sale of these stones have sometimes been a determining influence in many bloody

⁵⁴ In terms of international human rights law currently in force, the right to self-determination concerns not only the creation of a state for the peoples who are deprived of one or aspire to one, but also the right of citizens within an already existing state to participate in decision-making. (See in this regard Melik Özden and Christophe Golay, *The right of peoples to self-determination and to permanent sovereignty over their natural resources seen from a Human Rights perspective* (Geneva: CETIM, October 2010): <http://www.cetim.ch/product/the-right-of-peoples-to-self-determination-and-to-permanent-sovereignty-over-their-natural-resources-seen-from-a-human-rights-perspective/>

⁵⁵ *The Zyklon B Case, Trial of Bruno Tesch and Two Others*, 1946 British Military Court, Hamburg: http://www.worldcourts.com/ildc/eng/decisions/1946.03.08_United_Kingdom_v_Tesch.pdf

⁵⁶ « Saddam's Dutch link », *news.bbc.co.uk* (December 2005), http://news.bbc.co.uk/2/hi/middle_east/4358741.stm

⁵⁷ Ibid.

⁵⁸ TRIAL, « Frans Van Anraat », *trial-ch.org*, <http://www.trial-ch.org/en/ressources/trial-watch/trial-watch/profiles/profile/286/action/show/controller/Profile/tab/legal-procedure.html>

conflicts on the African continent: Angola, Democratic Republic of Congo, Ivory Coast, Liberia, Sierra Leone...⁵⁹

By direct violations imputable to TNCs, we mean violations committed by the entirety of entities that can be considered as part of a TNC (affiliates, licensees, sub-contractors, value-chain etc.).⁶⁰ One can name some examples in this regard: the damages caused to the environment; inhuman work conditions;⁶¹ child labor; forced labor, indeed, slavery; the non-respect of workers' rights in general and trade-union rights in particular; financial crime, including corruption etc.

Inset N° 7

Exploitation of Children

The Belgian TNC ***Kraft Food***, active in the agri-food sector, is accused by Oxfam of using in its products cacao harvested by children working on plantations in ***Ivory Coast*** and throughout ***Western Africa***.⁶²

The number of children working on the plantations is estimated to be around 250,000, of whom 15,000 are child slaves. Child labor is in particular the consequence of variations tending downward in primary commodity prices, which oblige families to grow more and thus to exploit the work of minors.⁶³

The TNC ***Barry Callebaut***, number one in cacao-based products and chocolate and whose headquarters are in Zurich, acknowledged in 2009 not knowing the source of 40% of the cacao beans bought in ***Ivory Coast***, the world's leading producer with 35% of world production, since it buys these cocoa beans through intermediaries and not directly from cooperatives assuring production conditions. This business choice on the part of the company comports the acceptance of the risk of buying cocoa beans produced by children. This is all the more true that other companies buy only cacao from cooperatives that guarantee the respect the rights of the child.⁶⁴

To the best of our knowledge, no legal prosecution has ever been brought against these conglomerates for their participation in slavery and child labor.

By indirect violations, we mean the consequences of a given TNC's activities. This category includes stock market speculation and various trade practices

⁵⁹ John Roach, "Blood Diamonds' and How to Avoid Buying Illicit Gems", *National Geographic* (8 December 2006): <http://news.nationalgeographic.com/news/2006/12/061208-blood-diamonds.html>

⁶⁰ In other words, all the commercial relations of any given TNCs, not limited to its suppliers or subcontractors but taking into account also the recipients of its products and services.

⁶¹ Work conditions can involve also conditions affecting health such as the length of the work day or the wage and social insurance provided the workers.

⁶² TRIAL, « Les entreprises multinationales et le droit international », [trial-ch.org](http://www.trial-ch.org/fr/ressources/droit-international/les-entreprises-multinationales.html), <http://www.trial-ch.org>

⁶³ À bon entendre "Du chocolat aux fèves de cacao: un voyage au goût amer!" *rts.ch* (December 2009), <http://www.rts.ch/emissions/abe/alimentation/1368284-du-chocolat-aux-feves-de-cacao-un-voyage-au-gout-amer.html>

⁶⁴ Ibid.

(monopolistic for example) that are detrimental to the enjoyment of human rights (see Inset N° 8), as well as threats/black mail, trading in influence (see Inset N° 2) and tax fraud (see Inset N° 12) that deprive the state of revenue indispensable for honoring its commitments in human rights – especially economic, social and cultural rights – towards its population.

Inset N° 8

TNCs' Monopoly over the Food Chain

In a little more than two decades, the agri-food TNCs have taken control of the food chain, ranging from production to the marketing of prepared food products: “Today, it is they [agri-food TNCs] that define the world's rules, while governments and public research centers fall in line behind them. The consequences of this transformation have been disastrous, for both the planet's biodiversity and the people who are supposed to be managing it. The major businesses have used their power to impose monoculture everywhere, sapping the peasants' seed systems and invading the local markets. Because of them, it is becoming very difficult for small producers to remain on their land and feed their families and communities. Thus, more and more, social movements are pointing the finger at the major food corporations and agri-food as the problem of the world food system against which resistance must be concentrated.”⁶⁵

Stock Market Speculation on Food Products

One of the main causes of the 2008 food crisis was “speculation on cereal prices, which made them rise even higher on international markets. According to the World Bank, nearly 30% of the increase in prices in food commodities is due to speculation.”⁶⁶

The human rights violations and other crimes committed by TNCs are countless,⁶⁷ bearing in mind that a crime can be both a single human rights violation or multiple ones. For example, the murder of trade-unionists in Colombia is part of the anti-union strategy of certain TNCs operating in this country (see Inset N° 9) and, in this regard, it cannot be characterized as a simple

⁶⁵ *Hold-Up sur l'alimentation: Comment les sociétés transnationales contrôlent l'alimentation du monde, font main basse sur les terres et détraquent le climat* (Geneva: CETIM-GRAIN, autumn 2012) p. 27.

⁶⁶ Christophe Golay, *The Global Food Crisis and the Right to Food* (Critical Report N° 3, Geneva: CETIM, December 2008) p. 5: <http://www.cetim.ch/the-global-food-crisis-and-the-right-to-food/>

⁶⁷ In its series on human rights and studies of the cases submitted to the United Nations, the CETIM has presented several examples of violations committed by TNCs (<http://www.cetim.ch>). Note that during these last two decades, many organizations and/or observatories have been created that publish analyses and information on a significant number of TNCs. The following is a non-exhaustive list of internet links liens (by language). In French, Mirador (Gresea): <http://www.mirador-multinationales.be/>; Observatoire des multinationales: <http://multinationales.org/>; in Spanish, Observatorio de Multinacionales en América Latina (OMAL): <http://omal.info/>; in English, Transnational Institute: <https://www.tni.org/en>; Corporate Watch: <https://corporatewatch.org/>; and multilingual, Finance Watch: <http://www.finance-watch.org>

common-law crime and should not be treated as such. It indisputably infringes directly on the right to life of the persons concerned, but also on the right to freedom of association, the right to organize trade-unions and to join them, the right to freedom of opinion and expression etc. which are enshrined in both international human rights law and international labor law.⁶⁸

Inset N° 9

Anti-Union Activities

Coca-Cola has been the defendant in much litigation in the *United States* owing to the violence it has perpetrated on its workers in *Colombia, Guatemala, China, El Salvador, India, Mexico* and *Turkey*.⁶⁹

In Colombia, at least nine Coca-Cola workers have been killed in the context of a major campaign of intimidation, kidnappings, torture and assassination of union leaders. Some union leaders have been prosecuted and convicted following false declarations from former extreme-right-wing paramilitaries. Photos of trade-union leaders were found in the offices of the company's management. However, the company has done everything possible to prevent the setting up of an independent inquiry to elucidate these.⁷⁰

Legal action is currently under way in the United States courts. According to the journalist Michael Blanding, the union members consider the litigation and the *Killer Coke* campaign the reasons for which they are still alive.⁷¹

In Turkey, during a protest in front of the offices of the company in 2005, while a meeting between union leaders and the company's managers was under way, Coca-Cola called the anti-riot police to attack the workers and their families who were peacefully demonstrating. Some 200 protesters were violently beaten and several had to be hospitalized. A court case is under way.⁷²

Regarding harm to the environment, when there is pollution – sometimes irreversible – of land, water or air from a TNC activity, there can be multiple human rights violations affecting the right to life, to health, to food, to water, to work, to adequate housing, to education, to access to information, to freedom of association and to participate in decision-making. From Bhopal⁷³ to the *Probo Koala* (see below), from Shell (Nigeria)⁷⁴ to the tanker *Prestige*,⁷⁵ the examples abound.

⁶⁸ See also Melik Özden, *The Right to Work*, Geneva: CETIM, September 2008:

<http://www.cetim.ch/product/the-right-to-work/>

⁶⁹ www.killercoke.org

⁷⁰ http://killercoke.org/crimes_colombia.php. See Also the CETIM's statement to the Human Rights Council, A/HRC/26/NGO/96, 6 June 2014: <http://www.cetim.ch/human-rights-violations-by-coca-cola-in-colombia/>

⁷¹ *Ibid.*

⁷² http://killercoke.org/crimes_turkey.php

⁷³ One of the worst industrial catastrophes ever, in 1984 in India in a factory owned and run by Union Carbide, now Dow Chemical, causing 25,000 deaths and hundreds of thousands of injuries, in addition to land and water contamination: <http://www.bhopal.com/>

Private monopolies in a vital sector such as water or health are also sources of human rights violations. Prices of these vital products and/or services beyond the means of the majority of persons currently deprive hundreds of millions of persons of their elementary rights. It is true that the United Nations human rights protection mechanisms do not take a position on whether the management of potable water or the production of essential medicines should be assured by public or private entities. Nonetheless, they set one condition: access to water and to essential medicines should be universal, barring which there is a human rights violation (see Chapter I, Inset N° 1). Need one be reminded that poverty as such is now classified as human rights violations by the United Nations bodies entrusted with monitoring implementation of these rights?⁷⁶

Inset N° 10

Who Benefits from the Economic Agreement between Europe and Africa?

Often presented as favoring the development of countries of the Global South, their integration into the global economy and even as an arm in the fight against poverty, economic partnership agreements (EPA) concluded between the European Union (EU) and the ACP (Africa, Caribbean and Pacific) countries are free-trade agreements. As a privileged actor in trade negotiations, at both the regional and world-wide level, Yash Tandon⁷⁷ does not mince his words analyzing these iniquitous accords. For him, the signing of these accords under threat of trade sanctions by the EU constitutes “an act of war”.⁷⁸ Studying the effect of these EPAs on the countries of Africa (before their signature in September 2014, for east Africa), he arrived at the conclusion that “the EPA threatened the subsistence several millions of small farmers, poultry farmers and fishers of Africa, as well as the industrialization perspectives of the countries of East Africa.”⁷⁹ In figures, Kenya would reap US\$ 97 million per year by signing the agreement, whereas by eliminating its customs duties on EU products, “it

⁷⁴ For several decades, the frequent oil spills and the torching of gas by Shell in Nigeria's Niger delta have polluted the lands and water, causing a decrease in fishing stocks, poor harvests and an increasing impoverishment of the region's population. (See the joint statement of the CETIM and Environmental Rights Action/Friends of the Earth Nigeria (ERA/FoEN) to the Human Rights Council, A/HRC/26/NGO/100, <http://www.cetim.ch/cases-of-environmental-human-rights-violations-by-shell-in-nigeria%e2%80%99s-niger-delta/>)

⁷⁵ The oil tanker *Prestige* floundered along the French, Spanish and Portuguese coasts then capsized on 13 November 2002, carrying some 77,000 tons of fuel oil, polluting nearly 3,000 kilometers of coastline. (See, inter alia, the article in the French daily *Le Monde*, 13 November 2013, announcing the acquittal in the trial held in Spain: http://www.lemonde.fr/planete/article/2013/11/13/apres-le-nauffrage-et-la-maree-noire-l-equipage-du-prestige-acquitte_3512971_3244.html)

⁷⁶ Francine Mestrum and Melik Özden, *The Fight Against Poverty and Human Rights* (Critical Report N° 11, Geneva: CETIM, June 2012, <http://www.cetim.ch/the-fight-against-poverty-and-human-rights/>).

⁷⁷ A professor of economics, Yash Tandon is the founder of SEATINI, the former director of the South Center in Geneva and a former government delegate of Uganda and Zimbabwe to negotiations at the World Trade Organization.

⁷⁸ Yash Tandon (ed.), *Le commerce, c'est la guerre* (Geneva: CETIM, 2015) pp. 115-116.

⁷⁹ *Ibid.*, p. 112.

could lose US\$742 per year by the end of the implementation period of 24 years, if the increases in imports are taken into account.”⁸⁰ A similar loss of revenue is estimated at “US\$940 million per year for Tanzania; \$597 million per year for Uganda; \$241 million per year for Rwanda and \$24 million per year for Burundi”.⁸¹

TAFTA – the Great Transatlantic Market

Since 2013, the EU and the United States have been secretly negotiating a transatlantic partnership agreement on trade and investment (TTIP): “This would be one of the most important free-trade and investment agreements ever concluded, representing half of the world’s GDP and a third of all trade.”⁸² A broad coalition of some 500 European organizations are mobilized against this accord. In their opinion this “partnership” would have “considerable repercussions on democracy, government by law, consumer and environmental protection and even the welfare state as in public health, education and culture. On both sides of the Atlantic, the partnership would create for all levels of the state, down to the community level, binding regulations affecting some 820 million men and women.

It would cover broad areas of economic life, from trade in services to technical standards, including copyrights, public contracts, agriculture and mining. As well, corporations would have the possibility of suing states in private courts when states vote laws that infringe on their investments and expected corporate profits.”⁸³

Regarding trade treaties (bilateral and multilateral), they have also become a source of human rights violations.⁸⁴ Worse, they deprive not only people of their right to decide their own future, but they also enshrine the supremacy of TNCs over democracy and all public policies in favor of the environment, human rights, public health, the fight against poverty, the improvement of working conditions. (See Inset N° 10.)

Inset N° 11

The (Almost Systematic) Success of TNCs against States in the World Bank Jurisdiction

“Among arbitration tribunals, those in the International Center for Settlement of Investment Disputes (ICSID) play a dominant role. The ICSID, as part of the World Bank, has as president, *ex officio*, the president of the World Bank, as

⁸⁰ Ibid., pp. 111-112.

⁸¹ Ibid., p. 112.

⁸² <https://france.attac.org/se-mobiliser/le-grand-marche-transatlantique/>

⁸³ <https://stop-ttip.org/fr/faq>. See also <http://www.waronwant.org/what-ttip>

⁸⁴ A. Teitelbaum, *International, Regional, Subregional and Bilateral Free Trade Agreements*, above-mentioned.

established in the ICSID's regulations. ... The ICSID, with the utter lack of impartiality for which the World Bank is notorious, supports international arbitration tribunals that settle disputes between transnational corporations and the countries that submit themselves to its jurisdiction. When accepting this jurisdiction to settle disputes, countries put themselves at a disadvantage to private corporations by renouncing a basic prerogative of sovereignty: territorial jurisdiction of their domestic tribunals. There is disadvantage because generally in free trade bilateral treaties, only the corporation can sue the state for breach of contract, whereas the latter cannot sue the corporation.⁸⁵

The following are several examples cases heard by the ICSID.

In 2004, *Mexico* was ordered to pay more than \$90 million to *Cargill* for having introduced a tax on sodas in order to foster the health of its population.⁸⁶

In December 2013, *Guatemala* was ordered to pay \$25 million (plus \$7.5 million in court fees) to *Tampa Electric* for having introduced a law limiting rates for electricity in order to to guarantee the poor access to essential services.⁸⁷

In 2011, the publicly traded Swedish conglomerate *Vattenfall* filed a complaint against *Germany* in order to install a coal-fired power station. Rather than pay an inflated compensation, Germany yielded to Vattenfall, renouncing its environmental policy.⁸⁸ In 2012, the same conglomerate decided to file a new claim against Germany, demanding \$5.8 billion in revenue losses, invoking Germany's decision to abandon nuclear power by 2020 out of fear of a catastrophe like Chernobyl or Fukushima.⁸⁹

In 2012, *Egypt* was sued in the ICSID by the French conglomerate *Veolia* for having increased the monthly minimum wage from €41 to €72 to support its population's right to education, to health and to food.⁹⁰

In 2010, *Philip Morris* sued *Uruguay* for introducing laws intending to reduce the use of tobacco products and their concomitant harmful effects on health.⁹¹

In October 2012, *Ecuador* was ordered to pay \$1.77 billion to *Occidental Petroleum* for having rescinded the contract that would have allowed the corporation to pump 100,000 barrels of petroleum per day in the Amazon basin.⁹²

⁸⁵ Ibid., p. 14.

⁸⁶ ICSID Case N° ARB(AF)/05/2, *Cargill Incorporated v. United Mexican States*, 18 September 2009: http://www.italaw.com/sites/default/files/case-documents/ita0133_0.pdf

⁸⁷ ICSID Case N° ARB/10/17, *TECO Guatemala Holdings LLC v. The Republic of Guatemala*, 13 December 2013: <http://www.italaw.com/sites/default/files/case-documents/italaw3035.pdf>

⁸⁸ ICSID Case N° ARB/09/6, *Vattenfal v. Federal Republic of Germany*, 11 March 2011: <http://www.italaw.com/sites/default/files/case-documents/ita0890.pdf>

⁸⁹ Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, "The State of Play in *Vattenfall v. Germany II*: Leaving the German public in the dark", International Institute for Sustainable Development (December 2014): <http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf>

⁹⁰ Benoît Bréville and Martine Bulard, "Des tribunaux pour détrousser les États", *Le Monde diplomatique* (July 2014): <http://www.monde-diplomatique.fr/2014/06/BREVILLE/50487>

⁹¹ ICSID Case N° ARB/10/7, *Philip Morris and Habal Hermanos v. Oriental Republic of Uruguay*, 2 July 2013: <http://www.italaw.com/sites/default/files/case-documents/italaw1531.pdf>

⁹² ICSID Case N° ARB/06/11, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, 5 October 2012:

At the request of the Ecuadorian president Rafael Correa, an appeal resulted in overturning the first ruling and a reopening of the case, which is yet to be heard by the ICSID.⁹³

The Exemplary Struggle of the Bolivians against the Privatization of Water

There are not only defeats and resignation in dealing with the World Bank, there are also peoples' struggles for life and dignity crowned with success. The struggle of the Bolivians is exemplary in this regard. This is the account of the Special Rapporteur on the Right to Adequate Housing: "Bolivia, at the behest of the World Bank, turned over management of the Cochabamba city water and sewage system to a single-bidder concession of international water corporations in 1999/2000. Under the arrangement, which was to last for 40 years, water prices increased immediately from admittedly negligible rates to approximately 20 per cent of monthly family incomes. Citizens' protests were eventually met with an armed military response that left at least six residents dead. The protests continued unabated until the consortium was forced to flee the country."⁹⁴

The consortium in question is Aguas del Tunari (a conglomerate comprising International Waters, Abengoa de Servicios Urbanos de España and associated Bolivian minority companies). In what can be described only as legal fiction, it moved its headquarters to the Netherlands, in order to be able to avail itself of a bilateral treaty supporting its suit in the ICSID against Bolivia demanding \$25 million in compensation for breach of contract: "Aguas del Tunari brought a claim under the bilateral treaty on investments between Bolivia and Holland, signed in 1992, even though the major shareholder of Aguas del Tunari was International Waters, comprising Bechtel, from the United States, and Edison, from Italy. Aguas del Tunari transferred its domicile to Holland only to be able to start a procedure against Bolivia invoking the treaty between Bolivia and Holland. Aguas del Tunari had only a mail box in Amsterdam after a doubtful and possibly illegal transfer of domicile from the Cayman Islands to Holland at the end of November 1999."⁹⁵ The first vast mobilization of the people in the Bolivian cities led the Bolivian government to cancel the contract with the consortium.⁹⁶ Several years later, another mobilization at both the national and international level forced the corporation to withdraw its lawsuit at the ICSID.⁹⁷ As for Bolivia, in 2007, it withdrew from the ICSID's jurisdiction, denouncing

<http://www.italaw.com/sites/default/files/case-documents/italaw1094.pdf>

⁹³ Ibid.: <http://www.italaw.com/cases/767>

⁹⁴ Commission on Human Rights, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, E/CN.4/2002/59, 1 March 2002, § 60.

⁹⁵ A. Teitelbaum, *International, Regional, Subregional and Bilateral Free Trade Agreements*, above-mentioned.

⁹⁶ Fernando B. Salazar Ortuño, *Movimientos sociales en torno al agua en Bolivia. Privatización e insurrección social en la guerra del agua en Cochabamba*, Cochabamba: Universidad Mayor de San Simón (UMSS-ASDI) (2011) p. 211.

⁹⁷ Magdalena Bas Vilizzio, "Algunas reflexiones en torno al retiro de Bolivia, Ecuador y Venezuela del CIADI", *Densidades* (Nº 17, May 2015) p. 52.

the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.⁹⁸

The Legality the ICSID's Rulings Contested

In the above-mentioned report, the Independent Expert on the Promotion of a Democratic and Equitable International Order, Alfred-Maurice de Zayas, contests the legality of the ICSID's rulings, noting: “The problem has been aggravated by the chilling effect of certain awards that have penalized States for adopting regulations to protect the environment, food safety, access to generic medicine and reduction of smoking as required under the WHO Framework Convention on Tobacco Control.” He thus concludes: “The legality of such awards is questionable as contrary to domestic and international *ordre public*, and may be considered, in some cases, *contra bonos mores*.” The Independent Expert proposes a thorough reform of this system that takes countries hostage: **“It is not just a question of reforming the investor–State dispute settlement system for the future, but imperative to review and revise existing bilateral investment treaties and free trade agreements, which were never intended to become prisons for States. If investor–State dispute settlement and ICSID have since mutated into institutions of economic coercion, they must be dismantled and reinvented through the *Vienna Convention on the Law of Treaties*.”**⁹⁹

In another more specific report on the subject, the Independent Expert also denounces the abuse of law that prevails in the system of disputes settlements between investors and states, giving several examples. He explains how the TNC *Philip Morris* created a front company in Hong Kong, in order to take advantage of a bilateral treaty between Hong Kong and Australia in order to sue Australia and how the TNC *Vodafone* through its Dutch affiliate “is suing India for \$2.2 billion in connection with India’s taxation of Vodafone activities deriving from a transaction conducted in a tax haven (Cayman Islands), although all the assets are in India”. He also discusses how the TNC *Renco* forced the Peruvian government to yield by using “the investor-State dispute settlement tactic to pressure the Government to allow it to reopen its smelter without installing pollution-capturing devices.”¹⁰⁰

The Independent Expert denounced the conflict of interest in the setting up of investor-State dispute settlement tribunals under the purview of the ICSID and how, in spite of this, the ICSID has maintained its ruling against Argentina in the *Vivendi c. Argentine* case. Here, he recounts: “Argentina stated that one of the arbitrators, Gabrielle Kaufmann-Kohler, was acting as a member of the Board of Directors and a member of the Corporate Responsibility Committee of the Swiss

⁹⁸ https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc-fra/CRR_French-final.pdf

⁹⁹ Human Rights Council, *Report of the Independent Expert on the promotion of a democratic and equitable international order*, A/HRC/30/44, 14 July 2015, §§ 8, 30; emphasis added.

¹⁰⁰ Human Rights Council, *Report of the Independent Expert on the promotion of a democratic and equitable international order (regarding settlement of disputes between private investors and states)*, A/70/285, 5 August 2015, §§ 36, 37, 31.

bank UBS, which was the single largest shareholder in Vivendi. Argentina further argued that Ms. Kaufmann-Kohler was partially remunerated with UBS shares. While Argentina acknowledged that any issues regarding the ability of an arbitrator should be raised without delay during the arbitration proceeding, in this case it was not possible to do so because Argentina only learned about the facts and circumstances affecting her ability to serve as arbitrator in November 2007, after the award judgement of 20 August 2007 had been rendered. While the review committee was critical of the arbitrator's judgement and agreed with Argentina that the tribunal was not properly constituted and that annulment under article 52 (1) (a) of the Convention on the Settlement of Investment Disputes Between States and Nations of Other States could be supported, it declined to annul the award, holding that (a) the arbitrator's exercise of independent judgement was not actually impaired; (b) it would be unjust to deny the claimants the benefit of the award owing to the arbitrator's failures; and (c) the lengthy proceedings should "come to an end"¹⁰¹

For the Independent Expert, the system of disputes settlements between investors and states "subverts the rule of law so laboriously constructed over the past two hundred years by attempting to privatize justice. *The establishment of a parallel system of dispute settlement, which is not transparent, accountable or even independent, cannot be tolerated.*"¹⁰²

Regarding financial crime, when there are sanctions, they are limited to compensating only the corporations suffering losses, such as banks, whereas the persons who lose their jobs or their pensions are not taken into account, and very often it is the state that must intervene to remedy the loss. Worse, *crime has become "the norm" in recent year in financial milieus.* (See Inset N° 12.) This sort of behavior has considerable socio-economic repercussions that inevitably influence the enjoyment of human rights by millions of persons, if one takes into account the world-wide scope of the activities of some non-state actors such as TNCs.

Inset N° 12

Financial Crime

Enron, an energy trader, was ranked the seventh biggest United States corporation (by declared volume of business) before its bankruptcy in December 2001, triggering a cascade of lay-offs and retirement pension losses for hundreds of thousands of persons. Some facts regarding the accounting fraud and stock market speculation give an idea of the colossal scale of the affair. On 2 December 2001, Enron declared bankruptcy, and the price of its stock dropped from \$90 to \$1 in several months. Some 5,000 employees were immediately laid off, whereas hundreds of thousands of small investors who had invested their

¹⁰¹ Ibid., §§ 47-48.

¹⁰² Ibid., § 52; emphasis added.

savings in the corporation lost most of their retirement funds and found themselves without income upon retiring. Criminal charges were brought against the company's former managers. The chief financial officer, Andrew Fastow, was sentenced to ten years in prison (his wife was also found guilty of having aided and abetted his manipulations of the accounts). On 25 May 2006, Kenneth Lay, 64, was found guilty of six counts, including fraud and conspiracy, but he died from a heart attack on 6 July before he could begin serving his sentence. Enron's former N°2, Jeffrey Skilling, was found guilty of 19 of the 28 charges against him, including fraud, conspiracy, false or misleading statements and insider trading and sentenced to 24 years and four months in prison on 23 October 2006. The company's former partners were also prosecuted, in particular: the audit firm Arthur Andersen, Citigroup, JP Morgan, Merrill Lynch, Deutsche Bank, CICB and Barclays Bank.¹⁰³

In 2003, *Parmalat*, an Italian agri-food transnational, collapsed following a financial scandal, leaving a loss of some €11 billion and hundreds of thousands of small investors suffering from the effects of the crash. The charges against the company centered on stock price manipulation, obstructing the financial oversight authority Consob and corrupt auditing.¹⁰⁴ It was saved *in extremis* from bankruptcy by the Italian government, and several lawsuits seeking compensation, demanding 60 billion Swiss francs, were filed against the following banks: UBS, Deutsche Bank, Bank of America, Citigroup and J.P. Morgan.¹⁰⁵ These same banks, several years later, were to be at the center of the sub-prime mortgage crisis. Although the foreign banks were prosecuted by virtue of Decree-Law 231 for manipulation of Parmalat's stock price, they were acquitted in the end.¹⁰⁶

For Italian researchers, the Parmalat scandal symbolizes clearly, the role played by the major banks: “The major banks stopped exercising... the activity of verifying corporations' state of health, at one time integral to their function, thus aiding the businesses involved in the financial scandals to sell huge quantities of junk bonds to savers... They also worked actively with financial officers of client companies to set up complex and convoluted financial operations, which then managed to make huge sums of depositors' money disappear”.¹⁰⁷

In the end, it was the Italian state, with tax payers' money, that had to pay for the consequences of unsafe and criminal practices, not only of Parmalat but also of the banks involved.

¹⁰³ <http://fdsp.univ-lyon2.fr/actualite-pour-2011-12-573158.kjsp?RH=1381741132631>

¹⁰⁴ Ignacio Ramonet, “Le scandale Parmalat”, *Le Monde diplomatique* (February 2004): <https://www.monde-diplomatique.fr/2004/02/RAMONET/10686>

¹⁰⁵ *Le Courrier* (27 September 2005).

¹⁰⁶ “Processo Parmalat, assolte le banche. La procura : indagini doverose”, *Il Corriere della Sera*, (18 April 2011).

¹⁰⁷ Mauro Gatti, Bice Della Piana and Mario Testa, “L'inefficacia dei modelli di corporate governance. Un'evidenza empirica : il caso Parmalat”, *Sinergie Italian Journal of Management* ([S.I.], 2011) p. 225-298.

Tax Fraud

In a context of where crime has become the norm of financial milieus, the numerous scandals that have come to light in recent years have demonstrated also how some transnational corporations, “highly respectable” in appearance, with the help of major banks have created offshore companies in tax havens in order to avoid paying taxes in the countries where they operate and/or where their headquarters are located.¹⁰⁸ Some 340 of them (*Apple, Amazon, Peps, BNP Paribas, Axa...*)¹⁰⁹ have gone even further and entered into secret tax agreements with *Luxembourg* in order to pay lower taxes (LuxLeaks)¹¹⁰. The Swiss banks in recent years have had to pay fines, ranging from several tens of millions to several billions, to the United States tax authorities for tax evasion.¹¹¹

Employer Fraud

In a small book, well documented, Aurore Lalucq and William K. Black denounce the fraud of “systemic magnitude” in financial milieus.¹¹² For them, the causes of the United States *sub-prime scandal*, which triggered a world-wide financial and economic crisis is to be found in particular in the deregulating and dismantling of state control over this sector starting in the 1980s. Driven by a dominate ideology that constantly insists on “markets' ability to self-regulate” and run by economists shaped in this mold, the system could propel only the worst to the top. Moreover, Gregory Mankiw, an economics professor at Harvard and chair of George Walker Bush's Council of Economic Advisors, stated that “it would be irrational for the directors of the savings and loans not to pillage their business.”¹¹³

Regarding the rating agencies, (all private) supposed to evaluate the financial health of the markets, such as the most famous, Moody's, Standard and Poor's and Fitch Ratings, they continue to give ratings of “AAA” (the highest, synonymous with “top quality”) to toxic and highly speculative financial products.¹¹⁴

As for the auditors, (also private), such as Arthur Andersen, Ernst&Young, KPMG and PricewaterhouseCoopers, it is vain to speak of their usefulness given

¹⁰⁸ See the inquiry conducted over several years by the International Consortium of Investigative Journalists and published in 2013: <https://offshoreleaks.icij.org/>

¹⁰⁹ The complete list is on line:

<http://cloudfront-files-1.publicintegrity.org/apps/2014/12/luxleaks/industries/index.html>

¹¹⁰ See, inter alia, *L'Express*, 6 November 2014, http://lexpansion.lexpress.fr/actualite-economique/luxleaks-cinq-questions-pour-tout-comprendre_1619692.html

¹¹¹ The 73 banking institutions that have signed an agreement with the United States tax authorities had paid, as of the end of 2015, more than a billion dollars in fines. This sum does not include “the 2.8 billion imposed on Credit Suisse in May 2014” and “780 million imposed on UBS in February 2009”: <https://www.letemps.ch/economie/2015/12/28/banques-suissees-ont-payee-plus-un-milliard-amende-aux-etats-unis>

¹¹² Aurore Lalucq and William K. Black (eds) *Les banquiers contre les banques: Le rôle de la criminalité en col blanc dans les crises financières* (Paris: Charles Léopold Mayer, October 2015).

¹¹³ *Ibid.*, p. 68.

¹¹⁴ *Ibid.*, p. 22.

the numerous financial scandals (in the past and yet to come) that they let slip by, being in the service of their clients and in search of yet more clients for their existence.

Faced with these scandals and no doubt to save the capitalist system, *in extremis*, in October 2015, a series of measures by the OECD presented as ***Reforms to the international tax system for curbing tax avoidance by multinational enterprises*** was adopted by the finance ministers of its member states.¹¹⁵ This institution also announced on 27 January 2016 that 31 countries had signed “a boost to transparency in international tax matters... a tax co-operation agreement to enable automatic sharing of country by country information”.¹¹⁶

Several years ago, UNCTAD sounded the alarm regarding the transformation banking activities and the concentration of financial capital in the hands of several transnational entities which have become a threat to the real economy: “Today, the ***financial sector has increasingly become a source of instability for the real sector***. At the same time, official support for this [financial]sector has become more frequent and involves ever larger injections of public money. ***Financial markets were deregulated, despite frequent failures of those markets. ... The deregulation of financial markets has also allowed an increased concentration of banking activities in a small number of very big institutions, as well as a shift in bank funding, from a reliance on deposits to a greater reliance on capital markets, and from lending to trading. Moreover, it has paved the way for the development of a largely unregulated “shadow financial system”, particularly in developed economies.***”¹¹⁷

In this chapter, we shall analyze, in considerable detail, three cases: A. *Probo Koala*; B. Texaco/Chevron in Ecuadorian Amazon; C. Child labor in the gold mines of Burkina Faso.

¹¹⁵ These measures were later approved by the G20 heads of state meeting in Antalya (Turkey) 15-16 November 2015: <http://www.oecd.org/ctp/g20-finance-ministers-endorse-reforms-to-the-international-tax-system-for-curbing-avoidance-by-multinational-enterprises.htm>

¹¹⁶ <http://www.oecd.org/tax/a-boost-to-transparency-in-international-tax-matters-31-countries-sign-tax-co-operation-agreement.htm>

¹¹⁷ UNCTAD, *Trade and Development Report 2011*, “Overview”, pp. ix-x (emphasis added): http://unctad.org/en/docs/tdr2011_en.pdf

A) The Probo Koala¹¹⁸

By 20 August 2009, toxic waste dumped in 18 sites around the city of Abidjan (Ivory Coast) had affected the health of tens of thousands of people, and we are not even talking about the environmental pollution. The toxic waste dumped in Abidjan was imported aboard the *Probo Koala*, a freighter chartered by **Trafigura**, an oil trading company based in Switzerland (operational center) and in the Netherlands (corporate headquarters). On its site, the TNC affirms that it has offices in 36 countries and announced, for 2015, \$2.6 billion in profit out of a total volume of business of \$97.2 billion.¹¹⁹

Origin of the Toxic Waste

Created in 1993 as a private enterprise, Trafigura is one of the biggest independent oil trading companies in the world. It deals with all supply operations and trading in crude oil, petroleum-based products, metal and coal.

At the end of 2005, Trafigura had acquired huge quantities of raw gasoline of poor quality (called coker naphtha) intended to serve as a cheap basic ingredient for gasoline. Trafigura first had to find a way of refining the product and opted for an aqueous solution of caustic soda, a process involving mixing the caustic soda with the coker naphtha. The caustic soda residues then require thorough treatment, for they contain toxic substances.

Trafigura knew that this process was going to produce dangerous waste that very few waste treatment plants anywhere in the world would be willing to treat. It found only two, one in the United Arab Emirates and the other in Tunisia. It tried both of them. The caustic soda washing was carried out between January and March 2006 in the Tunisian port of La Skhirra, on the site of the company Tankmed. In March 2006, however, gas leaks caused serious air pollution problems (three persons were said to be hospitalized). The Tunisian authorities then put a stop to the operations in La Skhirra.

Since the treatment had been suspended in Tunisia, Trafigura decided to carry it out directly aboard a ship at sea. Such an operation, as far as one knows, had never been tried before. At the end of June 2006, several lots of coker naphtha had been “cleaned” aboard the *Probo Koala*. The holds then contained more than 500 cubic meters (500,000 liters) of waste. After several attempts to discard it at European sites, Trafigura contacted a Dutch company, Amsterdam Port Services (APS), to have the waste treated in Amsterdam.

The *Probo Koala* arrived in Amsterdam on 2 July 2006. APS began unloading the waste onto one of its barges. However, the stink emanating from it was such that it triggered complaints from people working in the area. The matter was

¹¹⁸ Except where indicated otherwise, the description of this case is drawn from the article published on the site *Droits sans frontières* (French only),

<http://www.droitsansfrontieres.ch/fr/exemplesdescas/trafigura/>

¹¹⁹ <http://www.trafigura.com/trafigura-in-brief/french/>

referred to Dutch authorities for an investigation into the source of the odors. Samples were analyzed. The results showed that the waste contained a chemical dose of oxygen much higher than what had been expected when APS had set the price for doing the work for Trafigura. Further, it surpassed APS's on-site treatment capacities. APS then recalculated its price significantly upward, which Trafigura refused. The latter demanded that the waste be put back on the boat, something that the Dutch authorities accepted in the end, after considerable confusion.

The *Probo Koala* then sailed to the port of Paldiski, in Estonia, before heading for Africa. It arrived in Lagos (Nigeria) at the beginning of August 2006, where it tried several times – in vain – to get rid of the waste. Finally, it set sail for Abidjan (Ivory Coast).

Dumping the Waste in Ivory Coast

On 18 August 2006, the day before the arrival of the *Probo Koala* in Abidjan, Trafigura signed a contract with a newly registered Ivorian company, Compagnie Tommy, to which it entrusted the elimination of the waste. The contract stipulated that Compagnie Tommy would discharge the waste in a place called Akouedo and, for eliminating it, would charge a much lower price than what APS had asked after having analyzed the waste. Compagnie Tommy had gotten its operating license only a month before the arrival of the *Probo Koala*. It had neither the material nor the experience necessary to treat dangerous toxic waste.

The *Probo Koala* arrived in Abidjan the next day. Its cargo was unloaded onto the vehicles of truckers recruited by Compagnie Tommy. It was then dumped into the Akouedo dump, as well as into other places around the town, near living and work areas, school buildings, fields and crops, and right next to the town prison.

On 20 August 2006, the population of Abidjan was awakened by the unbearable stench of the dumped waste. During the following days, tens of thousands of persons were affected, suffering from nausea, head-aches, vomiting, abdominal pains, skin and eye irritations as well as other symptoms. A major health crisis was thus triggered. In October 2006, more than 107,000 persons had been listed by the medical centers as suffering from ills caused by the waste. The Ivorian authorities noted 15 to 17 deaths. Trafigura has systematically denied that the waste could have caused the deaths or the serious health problems.

Handling of the Affair by the Basel Convention

Even before the *Probo Koala* affair was discussed by the delegates to the Conference of the Parties (COP), Ivory Coast had seized the Convention secretariat requesting technical assistance to deal with the catastrophe. A technical mission was sent in collaboration with the United Nations Environment Program (UNEP).¹²⁰

During the 8th COP (November-December 2006),¹²¹ a new item was added to the agenda regarding the dumping of toxic waste in Abidjan. Ms Safiatou Ba-

¹²⁰ <http://www.unep.org/french/conflictsanddisasters/C%C3%B4tedIvoire/tabid/1884/Default.aspx>

¹²¹ UNEP/CHW.8/16

N'daw (the representative of the Bureau of the Ivory Coast Prime Minister) presented the facts and the measures taken by the government (creation of a commission of inquiry, setting up a national plan to fight toxic waste). She noted the lack of response to the request by her government for technical and financial assistance.

The dumping of this waste was denounced unanimously by the representatives of the states parties. One of them characterized it as “an act of environmental terrorism”; others considered it a criminal act (the nationality of those using these terms is not given in the report), demanding that the perpetrators be prosecuted.

In its *Decision VIII/1 regarding Ivory Coast*, the COP firmly denounced the dumping of waste that had taken place in Abidjan. Moreover, it enjoined the parties to supply technical and financial aid to Ivory Coast so that the country could implement the government's emergency plan to recover the waste and decontaminate the earth. The COP also invited the parties to support the opening of an inquiry to establish the responsibility of those behind the catastrophe.

Handling of the affair by the MARPOL Convention¹²²

Under the purview of the International Maritime Organization's *MARPOL Convention*, the affair was introduced into the Marine Environment Protection Committee at its 56th and 59th sessions by the Netherlands, which, citing the *Probo Koala* incident, emphasized the lack of information and regulations relative to the process of industrial productions aboard ships. During its 56th session, the Committee requested that the Netherlands supply greater detail regarding such cases of industrial production aboard ships for the 59th session, but no response was given by the Netherlands. However, this problem was taken into account by the Committee as well as by the Maritime Safety Committee, which had agreed to prohibit the mixing of toxic chemical substances on ships. In May 2011, the resulted in the adoption of an amendment to the *International Convention for the Safety of Life at Sea* prohibiting the mixing of liquid cargoes in freighters at sea.¹²³ Specifically in the context of the *MARPOL Convention*, no measure or decision was taken directly concerning the *Probo Koala* affair.

Handling of the affair by the United Nations Special Rapporteur on Toxic Waste

The United Nations Human Rights Council's Special Rapporteur on Toxic Waste, Okechukwu Ibeanu, issued a report on his visit to *Ivory Coast* (August 2008) and to the *Netherlands* (November 2008).¹²⁴ First, the Special Rapporteur recalled that the two countries are required to respect the provisions of the *Basel Convention* and the *Marpol Convention*, given that they are parties to them. He considered that both countries had violated the right to life by not taking adequate measures of prevention, inquiry and sanction regarding the dumping that is the cause of the death of several persons.

¹²² Reports of the Marine Environment Protection Committee of the IMO, 56th and 59th sessions.

¹²³ <http://www.imo.org/en/MediaCentre/MeetingSummaries/MEPC/Archives/Pages/default.aspx>

¹²⁴ Human Right Council, A/HRC/12/26/Add.2, 3 September 2009.

The Special Rapporteur recalled that the two conventions are obviously intended to be implemented, given that they have been incorporated into national legislation in the Netherlands. It is the same for EEC Regulation N° 259/93 of the Council of the European Union, as modified, concerning the monitoring and control of transfers of waste upon arrival to and departure from the European Community, which includes obligations specified in the *Basel Convention*. In view of Dutch and European regulation, neither the reloading nor the departure of the ship should ever have been allowed.

During his visit to Ivory Coast, the Special Rapporteur noted that the *Probo Koala* affair demonstrated the lacunae at the administrative procedure level regarding the dumping of toxic waste, especially regarding its import. He deplored the slowness and the lack of transparency in the compensation process for victims, many of whom had been excluded from it. The same remark was made regarding the agreement between Ivory Coast and Trafigura.

Regarding Trafigura's attitude, the Special Rapporteur emphasized the inconsistencies of the TNC and of the boat's captain regarding the nature of the waste as well as the final destination of the cargo. For the Special Rapporteur, Trafigura must demonstrate how the port facilities and the elimination of waste at Abidjan were better adapted than those of the Netherlands to proceeding with the treatment of the waste on the *Probo Koala*. He reckoned that, given the principle of due diligence, the TNC should have better informed itself about the qualifications of Compagnie Tommy to undertake the elimination of such waste in a way commensurate with respect for the environment, all the more that this company had just recently been set up.

Legal Action in the Concerned Countries¹²⁵

In September 2006, two highly placed management personnel from Trafigura – arriving in Abidjan following the dumping of the toxic waste – and the manager of the local Trafigura affiliate were arrested and indicted for violations of Ivorian environmental laws and endangering the country's public health, as well as for environmental poisoning or complicity in such poisoning. Among those indicted in relation to the dumping was a certain number of port employees and customs officials as well as the Compagnie Tommy manager.

In February 2007, the ***Ivory Coast*** government and Trafigura concluded an out of court settlement: Trafigura – without any acknowledgment of responsibility – accepted to pay roughly US\$195 million to Ivory Coast as compensation and to finance the clean-up operations. The TNC payed an additional amount for the release on bail of its two managers. In this agreement, the government renounced definitively all prosecution, proceedings, actions, or appeals against Trafigura. The next day, the Trafigura managers were released on bail and authorized to leave the

¹²⁵ For more details on the countries concerned, see also:
<https://business-humanrights.org/fr/r%C3%A9sum%C3%A9-du-proc%C3%A8s-trafigura-%C3%B4te-d%E2%80%99ivoire-0>
https://www.fidh.org/IMG/pdf/FIDH-LIDHO-MIDH_Rapport_ProboKoala_avril2011.pdf
<http://www.journaldelenvironnement.net/article/probo-koala-110-000-victimes-assignent-trafigura,55804>

country. In March 2008, criminal proceedings against the Trafigura managers in Ivory Coast were suspended, the court considering that there was insufficient evidence to prosecute the case against them.

Twenty Ivorian victims – with the support of attorneys from a certain number of French and Ivorian NGOs – filed a complaint on 29 June 2007 in **France**. They requested the setting up of a formal inquiry and the indictment of the company's French managers. However, the French judiciary declined to pursue the matter, owing to the lack of long-term links between the managers and the French territory, owing to Trafigura being based outside the country and owing to the existence of other, simultaneous legal proceedings in other countries.

In **Switzerland**, the effective decision-making center of Trafigura, no inquiry – to the best of our knowledge – has ever been undertaken by the authorities.

In November 2006, a civil suit for compensation for physical injury was filed against Trafigura in the High Court of the **United Kingdom**. This was launched by more than 30,000 Ivorians who were seeking compensation following exposure to toxic waste. On 19 September 2009, the parties settled out of court: Trafigura – without any acknowledgment of responsibility – accepted to pay some US\$45 million. According to the terms of the agreement, the plaintiffs agreed to renounce any future civil actions against Trafigura, to keep the details of the settlement confidential and to publish a joint declaration.

In 2014, Amnesty international seized the British judiciary asking that a judicial inquiry be opened in order to determine the role of Trafigura in the dumping of toxic waste in Abidjan. The court declined, claiming that the matter was not under its purview but rather under that of the Environmental Agency.¹²⁶ The Agency agreed examine the matter in November 2014 and published a definitive finding in March 2015, in which it refused to open an inquiry.¹²⁷ To justify this, the Agency cited, on the one hand, its inability to assume the substantial costs that such an inquiry might involve owing to its budgetary restrictions. On the other hand, the Agency deplored the lack of human resources and experience necessary to carrying out such a complex undertaking. Moreover, in this finding, the Agency cited the risk of obstacles to the proper carrying out of the procedure that it might be confronted with, declaring: “Trafigura will use all the procedural recourses available to counter each phase of a new inquiry.”¹²⁸

In 2006, an inquiry was opened in the **Netherlands** regarding the conditions of the unloading and reloading of the waste in the port of Amsterdam. The inquiry limited itself to what happened in Amsterdam. Within the context of this inquiry, those who were prosecuted for violation of Dutch and European legislation were: the TNC Trafigura, the city of Amsterdam, the Ukrainian captain of the *Probo Koala* and the chemical products treatment company Amsterdam Port Services

¹²⁶ State body entrusted with environmental protection and the fight against environmental crime.

¹²⁷ <http://www.amnesty.fr/Nos-campagnes/Entreprises-et-droits-humains/Actualites/Le-Royaume-Uni-baisse-les-bras-devant-Trafigura-15702>

¹²⁸ <http://www.actu-environnement.com/ae/news/probo-koala-royaume-uni-enquete-trafigura-amnesty-dechets-toxiques-25048.php4>. See also Amnesty International's detailed report, *Too Toxic To Touch? The UK's response to Amnesty International's call for a criminal investigation into Trafigura Ltd*, July 2015: <https://www.amnesty.org/en/documents/eur45/2101/2015/en/>

(APS). For its part, Greenpeace filed a complaint so that the TNC should also be prosecuted for the dumping in Abidjan. However, in 2011, the judiciary refused to prosecute the TNC for what had taken place in Ivory Coast.

In 2009, during an initial trial, APS was sentenced to paying a fine of €450,000 for violating environmental protection laws (for having unloaded and reloaded the highly toxic waste). Moreover, one of its former managers was sentenced to 240 hours of community service.

In 2010, during a second trial, those answering charges were: Trafigura, APS, the city of Amsterdam and the captain of the *Probo Koala*. Trafigura was found guilty of the following charges:

- illegal export of toxic waste (reloading), a violation of the European laws on the elimination of waste;
- falsification of documents on the waste's composition and absence of information provided to APS concerning the waste's toxicity.

For these acts, Trafigura's responsibility was acknowledged, and the TNC was ordered to pay a fine of €1 million (the prosecution had asked for a fine of €2.1 million). The captain was sentenced to five months in prison – suspended – and a fine of €25,000 for not having announced the real nature of the waste. The trial did not result in the conviction of APS nor its manager. Finally, the prosecution declared that it lacked jurisdiction to prosecute the city of Amsterdam, citing criminal immunity of the city, even though the city, through its representatives, had already in a December 2006 declaration acknowledged its political responsibility. On appeal, Trafigura was acquitted of the charge of falsification of documents. The prosecution appealed this ruling.

Moreover, the prosecution wished to prosecute the head of Trafigura, Claude Dauphin, a request refused by the Amsterdam district court in 2008. The prosecution appealed this ruling before the Supreme Court, which ordered a re-examination of the first ruling by the Amsterdam appeals court.

In, 2012, the appeals court reversed the first decision considering that the manager could be prosecuted for illegal export of waste. However, the prosecutor's office and Trafigura reached an agreement in November 2012 according to which the company accepted to pay €300,000 in compensation and a fine of €67,000 in order to draw the case to a close.

In February 2015, more than 110,000 victims served writs on Trafigura declaring its civil responsibility and expressing their wish for compensation for the physical, moral and economic injury suffered; €2,500 per victim is being asked as well as the cleaning up of the waste.¹²⁹

B) Texaco/Chevron in Ecuadorian Amazon

The single case of Chevron (formerly Texaco) in the Ecuadorian Amazon illustrates multiple problems posed by TNCs: irreversible damage to the environment; population displacement, even the extinction of peoples; multiple

¹²⁹ <http://www.ladepêche.fr/article/2015/02/20/2052938-probo-koala-plus-100-000-victimes-assignent-trafigura-justice-pays.html>

human rights violations (right to water, to food, to a healthy environment, to justice, to freedom of association...); obstruction of justice etc. A brief account follows.¹³⁰

On 5 February 1964, the military junta governing Ecuador granted a one-and-a-half-million-hectare concession in the Ecuadorian Amazon to Texaco Gulf. Although the concession was later reduced, the area in which Texaco worked was over 400,000 hectares (in the provinces of Orellana and Sucumbíos).¹³¹

Texaco carried on exploration and oil production in areas of the jungle inhabited by various Ecuadorian indigenous communities.¹³² After the exploration phase, during which explosives were used and an incalculable number of rudimentary wells were drilled, Texaco finished by drilling 350 wells. During the drilling operations of each of these wells, a huge quantity of toxic waste was produced, known as “drilling muds”.¹³³

Owing to their toxicity, these waste products must be stored in appropriate containers and treated in a responsible manner. Far from doing this, Texaco, dug almost a thousand holes in the ground, which it used as open sewers, without any sort of protection to prevent leaks through the linings and run-off. When some of these products were not dumped directly into the environment, they were simply burned intentionally by Texaco, with consequences as harmful for the populations as for the environment.

Later, during the preparation of the wells, these same pools were used by Texaco to store waste water and other dangerous residues, whereas steel cisterns were required. The company thus realized substantial savings, to the detriment of the both the environment and the local populations.

The company's irresponsibility did not stop there. In spite of legal¹³⁴ and contractual prohibitions,¹³⁵ the content of the pools was simply dumped into the nearby rivers and streams. Texaco had installed in each pool a rudimentary

¹³⁰ This account is drawn from two documents presented by the CETIM to the United Nations in collaboration with the Union of People Affected by Texaco (now Chevron) (UDAPT): the written statement submitted to the Human Rights Council, A/HRC/26/NGO/74, June 2014 (<http://www.cetim.ch/human-rights-violations-and-access-to-justice-for-the-victims-of-chevron-in-ecuador/>) and the *Report submitted to the United Nations Special Rapporteur on the situation of human rights defenders (individual names have been deleted)* (<http://www.cetim.ch/report-submitted-to-the-united-nations-special-rapporteur-on-the-situation-of-human-rights-defenders-individual-names-have-been-deleted/>).

¹³¹ In the concession contract and subsequent agreements that modified it, Texaco was designated the company that would do all technical planning and work in the field. This situation remained unchanged, leaving Texaco the only and exclusive company operating in the entire concession area throughout the duration of the concession – until June 1990.

¹³² At the time, the concession area was inhabited notably by the Secoya, Waorani, Shuar, Quichua, Cofán and Tetete nations.

¹³³ The drilling muds are a mixture of various chemical substances used to lubricate the bit of the machinery that drills the wells. This mixture comprises several heavy metals and other toxic and carcinogenic products such as chrome VI.

¹³⁴ For example, Article 12 of the health code, in effect since 1971, stipulates that “no person may emit into the air, the ground or the water any solid, liquid or gas residues without having treated them so as to render them without risk to human health.” Also Article 22 of the law on water, in effect since 1972, stipulates: “All contamination of water that affects human health or the development of the flora and the fauna is prohibited.”

drainage system called a “goose neck” and used it systematically to drain the contents of the pits into the nearest streams. Although Texaco was fully aware of the noxious effects of its activities¹³⁶ and had the technology that could have avoided, or at least considerably diminished, the damage caused by the dumping of these toxic substances into the environment,¹³⁷ this technology was never used during its operations in Ecuador.¹³⁸

Although this region had earlier been characterized by its vast biodiversity and its abundant resources for its inhabitants, these resources have since disappeared or are seriously damaged by the petroleum owing to water and soil contamination, thus threatening its inhabitants' right to food¹³⁹ and to health.¹⁴⁰

Several peoples who lived in the region since time immemorial have disappeared or been displaced. The Cofán population was reduced from 5,000 inhabitants to less than 800. They have been displaced from their lands, while the Tetete population was completely exterminated.

Thus, in 26 years of oil exploitation in Ecuadorian Amazon, Texaco fouled more than 450,000 hectares of one of the planet's areas richest in biodiversity, destroying the conditions of life and subsistence of its inhabitants, causing the death of hundreds of persons and a brutal increase in cancers and other serious health problems. More than 60 billion liters of toxic waters were dumped into the rivers, 880 waste pits were dug and 6.65 billion cubic meters of natural gas was burned in the open air.

Attempt (and Obstacles) by Chevron

The case against Texaco was initially filed in New York (which at the time was where Texaco had its global headquarters) on 3 November 1993, barely one year after Texaco had left the country. Nearly 30,000 Ecuadorians, indigenous and

¹³⁵ A contractual clause required the company to work “the concession using adequate and effective materiel”.

¹³⁶ In 1962, T. Brink, a Texaco, Inc., engineer wrote an article about the risks of waste water in a book, *Principles of the Oil and Gas Industry*, published by the American Petroleum Institute. The book discusses the dangers of dumping waste water into bodies from which water is drawn for human consumption, in other words, exactly what Texaco was doing in Ecuador.

¹³⁷ Already in 1974, Texaco had obtained several patents for re-injection equipment which, if it had been used in Ecuador, would have prevented the dumping of some 60 billion liters of waste water into the Ecuadorian Amazon streams.

¹³⁸ The first re-injection equipment arrived in Ecuador at the beginning of 1998, well after Texaco had left the country. Before that, the system set up and used by Texaco dumped all the waste water directly into the streams.

¹³⁹ Chevron's activities had a horrible impact on the right to food and the entire way of life of those affected. Persons who depend on the jungle for their food, through gathering, hunting and fishing, were suddenly deprived of the source of food, for the animals fled or died because of the noise and pollution.

¹⁴⁰ The human right to life can be affected by environmental damage. In this case, one notes an increase in cancers due to exposure to petroleum and other polluting elements used in producing it from wells. There are numerous studies showing a cause-and-effect relation between exposure to petroleum and increases in cancer. This corresponds to the testimony of many persons who recounted their suffering and illnesses following the pollution.

*colonos*¹⁴¹, directly or indirectly affected by Texaco's activities in their lands have also lodged complaints with the courts.

In 2002, after nine years of proceedings, without having been able even to discuss the pollution, the United States courts finally accepted the argument of Chevron (which had by then merged with Texaco)¹⁴² and rejected the complaint presented by the Ecuadorian inhabitants for *forum non conveniens*,¹⁴³ arguing that Ecuador was the most appropriate place for the case to be heard.¹⁴⁴

Pursuing their quest for justice, and accepting the decision of the United States court, the populations affected by Chevron's operations Chevron filed a complaint in Ecuador on 7 May 2003.¹⁴⁵

However, in spite of the decision of the United States court, Chevron challenged the right of the Ecuadorian judges to hear the case, with the argument that Chevron had never operated in Ecuador and that Chevron was not the business enterprise that had succeeded to Texaco because there had never been a merger. During the first years of the trial in Ecuador, the plaintiffs were persecuted by the Ecuadorian armed forces, who had been hired by Chevron for security missions and intelligence gathering.¹⁴⁶ These "connections" of Chevron with the military also enabled the falsification of intelligence service reports and the suspension of arrest warrants.

On 14 February 2011, the Sucumbíos court finally handed down a ruling and ordered Chevron to pay almost US\$9 billion in compensation to finance the clean-up of the contaminated ground and water, a health program to aid the cancer victims, and the restoration the lost fauna and flora. Chevron was also ordered to pay punitive damages in view of the scope of the damage and the bad faith of its lawyers throughout the trial.

This ruling was confirmed on appeal on 3 January 2012, and it was then submitted to review by the National Court of Ecuador, the country's highest

¹⁴¹ Landless peasants working as sharecroppers.

¹⁴² In 1999, a merger process was launched between Chevron Corporation and Texaco Inc. On 9 October 2001, the merger was consummated. At that time, the new entity took the name Chevron-Texaco Corporation. However, in 2005, "Texaco" was eliminated from the name, leaving only "Chevron Corporation".

¹⁴³ Generally practiced in common law countries, *forum non conveniens* is used by a jurisdiction that declines to adjudicate in a case if it considers that, in view of the case and the interest of the parties, another jurisdiction would be better situated to hear the case.

¹⁴⁴ United States judges "guaranteed" the plaintiffs the right to a fair trial by imposing on Chevron the obligation to submit to the Ecuadorian courts and to comply with any ruling against it. To extricate itself from the United States litigation, Chevron agreed and committed itself to complying with the ruling in Ecuador, but the victims soon realized that this did not constitute any guarantee of compliance.

¹⁴⁵ The complaint that was filed was based on damage to the environment caused by Chevron through the use of obsolete and polluting technology and practices in violation of Ecuadorian law, which required specifically that any damage to the ecosystem be avoided and that only "modern and efficient technology" be used.

¹⁴⁶ The contracts are no longer available to the public, but it is well known that the president of the Republic of Ecuador, Rafael Correa, denounced the consequences of a contract signed some ten years previous by a company of the armed forces to provide security and intelligence services to Chevron: <http://www.andes.info.ec/eres/actualidad/presidente-correa-denuncia-contrato-empresa-militar-ecuatoriana-brinda-servicios>

judicial instance. On 12 November 2013, this court confirmed the legality of the ruling. While it confirmed the rulings of the lower courts regarding the environmental damages, it cancelled the punitive damages.

In spite of its defeat in the courts that it had chosen itself, Chevron still refuses to acknowledge the ruling against it. Worse, Chevron has decided to use its substantial financial resources not only to refuse to fulfill its obligation to repair the damage but to finance an international defamation campaign and to attack the plaintiffs, the lawyers representing them and any other person working for their cause.¹⁴⁷

Manipulation of the United States Judiciary by Chevron

Among the most enlightening and critical basic elements are Chevron's internal documents which revealed that, starting in 2009, Chevron acknowledged that it was likely to lose in the Ecuadorian court. It then decided to respond by what it agents called “a long-term demonization strategy” aimed at the lawyers and the community leaders “behind” this environmental case, in order to discredit the expected ruling and make it inapplicable.¹⁴⁸

For the past five years, Chevron has not stopped pursuing this strategy of “demonization” in the media (in particular the social media, where the company is very active on Twitter, anonymous blogs, YouTube and other outlets that constantly take up the attacks on its Ecuadorian opponents), by carrying on lobbying at the highest level of the government and, as explained in this report, through an aggressive campaign of law suits personally attacking its opponents.

Chevron began its reprisal campaign with a series of appeals based on a United States law intended to facilitate litigation under way outside the country that allows a party to recur to discovery (access to documents in the possession of the opposing party but deemed essential to case) for a person based in the United States. Chevron filed “an extraordinary series of at least 25 requests to obtain documents from at least 39 different parties” under at least ten federal jurisdictions, all in the United States,¹⁴⁹ an effort described as “unique in the annals of United States judicial history”.¹⁵⁰ The litigation attacked the lawyers, the facilitators, the scientists and any other person who had helped the Ecuadorian communities in their environmental court action throughout the years.

The files, which are the basis of the judicial process, were loaded with incendiary rhetoric making accusations of “fraud” and “extortion”. An almost unlimited access to computers of the accused as well as their files and e-mail accounts was requested, as well as the filmed depositions of witnesses.

¹⁴⁷ The plaintiffs' lawyers are facing law suits in the United States for extortion, investigations in Argentina for fraud, criminal complaints in Colombia and media smear campaigns in general. These attacks are intended to deprive the victims of their right to defense. Moreover, Chevron has systematically attacked all the income sources of the victims to deprive them of their ability to carry on the case.

¹⁴⁸ <http://stevendonziger.com/wp-content/uploads/2013/12/Irwin-To-Gidez.pdf>

¹⁴⁹ In re Chevron, 633 F.3d 153, 159 (3d Cir. 2011).

¹⁵⁰ In re Chevron, 650 F.3d 276, 282 n.7 (3d Cir. 2011).

By using these legal actions, Chevron obtained hundreds of thousands, if not millions, of confidential communications and documents protected by lawyer-client confidentiality, as well as some 600 hours of footage held by a famous film maker who had been authorized to film the communities and their representatives for a 2008 award-winning documentary *Crude: The Real Price of Oil*. These materials do not indicate anything incriminating or untoward when dispassionately examined in context. However, Chevron's lawyers and their public relations managers selected bits of these materials, removed them from their context to weave a fabricated narrative suggesting that there were problems with aspects of the environmental trial. By selecting single words and professionally editing the videos, they were able to produce “homogenous” results, but with a totally different meaning.

In fact, it was proven that Chevron played with public relations and hired firms of private detectives in order to be more intrusive and intimidating. Chevron hired firms such as *Kroll* and *Investigate Research Inc.* to prepare dozens of reports on individuals who supported the Ecuadorians (including reports on members of their families), to offer money to witnesses (see below) and to implement a vast program espionage organized against the Ecuadorians and their lawyers.

One of Chevron's main targets, Steven Dozinger,¹⁵¹ at one point hired a private detective and discovered that persons were furtively following him wherever he went.¹⁵² Overall, Chevron has admitted in legal documents that it had hired up to 2,000 lawyers, public relations consultants and detectives to gather proof against the Ecuadorian plaintiffs.

With all these questionable elements, Chevron carried its legal reprisals to an even higher level. In February 2011, Chevron launched a lawsuit for “civil racket”, citing a United States law called RICO (*Racketeer Influenced and Corrupt Organizations*), accusing the Ecuadorians who had taken it to court for pollution, including some of their lawyers and scientific advisors, of “fraud” and extortion” for having brought this case in Ecuador, which Chevron claimed was a “legal hoax”.¹⁵³ What followed was a veritable parody of justice. The facts are too voluminous to be presented in detail here, but the following points illustrate some of the most disturbing aspects of the case (and thus for the outcome):

¹⁵¹ Legal counsel for the plaintiffs in the United States.

¹⁵² See Denis Collins' statement, 31 May 2013: <http://stevendonzinger.com/wp-content/uploads/2013/09/2013-05-31-collins-declaration.pdf>

¹⁵³ As mentioned in the CETIM's original submission, the *bona fides* of the Ecuadorian litigation could not be clearer. Numerous new organizations have assembled proof of the huge toxic waste pits at the heart of the case. See, for example, Simon Romero and Clifford Krauss, “In Ecuador, Resentment of an Oil Company Oozes”, *The New York Times* (14 May 2009): http://www.nytimes.com/2009/05/15/business/global/15chevron.html?_r=2. Regarding the persons suffering the consequences, see, for example, Lou Dematteis, “Chevron Says These People Don't Matter”, *Huffington Post* (12 April 2012): http://www.huffingtonpost.com/lou-dematteis/chevron-ecuador_b_1421407.html. More recently, videos have shown the Chevron technical teams joking about their inability to find clean ground in order to show the Ecuadorian courts that the environment is clean and safe. See, for example, Robert S. Eshelman, “The Chevron Tapes: Video Shows Oil Giant Allegedly Covering Up Amazon Contamination”, *Vice News* (8 April 2015): <https://news.vice.com/article/the-chevron-tapes-video-appears-to-show-oil-giant-allegedly-covering-up-amazon-contamination>

- Chevron invoked a mechanism so that the RICO Act could be used by a judge who had openly expressed his contempt for the Ecuadorian cause and had even denigrated it as a product of “the imagination of United States lawyers” who were demanding so much money that they would manage to cover the deficit of the balance of payments between the United States and Ecuador. This judge also openly expressed his bias for Chevron, figuring that this company should be protected so that the United States consumer would not have to take his car to a gas station to get gas only to find that there is not any because these people (the plaintiffs) had sold it to Singapore or somewhere else. This judge had even publicly suggested that Chevron use the RICO Act even before Chevron thought of it!
- The United States court¹⁵⁴ subjected the Ecuadorians and their lawyers to major discovery procedures and numerous obligations prior to the trial. The financial impact was such that six months before the trial their lawyers (except for one) had to withdraw from the case. Just before the trial, three lawyers agreed to represent the Ecuadorian party *pro bono*, but they were unfamiliar with the details of the case.
- The court refused the defense (the Ecuadorians) the right to discovery or to make reference to the major pollution caused by Chevron in Ecuador, which was nonetheless the basic point of contention in the case. Just before the trial, the judge announced that he would hold in contempt of court any lawyer who pronounced the “pollution”...
- Again, just before the beginning of the trial, the court authorized Chevron to withdraw all its suits for damages while allowing the case to go forward. This tactic allowed the court to refuse that the case be heard by an impartial jury. In the United States, all criminal and civil cases involving more than 20 dollars must be heard by a jury. This way, Chevron was able to assure that the judge, known for his bias, would rule on the case. (After the trial, the judge allowed Chevron refile its complaint of injury, demanding \$32 million in court costs.)
- During the trial, the court let Chevron continue to implement its tactics, which aimed to destroy the defense by sheer brute force. For example, Chevron was authorized to submit up to 2,000 pieces of evidence in one day. As the defense lawyers were not able to object to each of these in the four days granted to examine them, their objections were overruled.
- The court allowed Chevron to submit anonymous testimony from witnesses who had testified *ex parte* (without the presence of the defense) and, even more serious, which was given by a discredited Ecuadorian judge, Alberto Guerra, who had received commissions or had paid them during his career. He had even admitted that he had approached Chevron

¹⁵⁴ District Court of Southern New York.

to sell his testimony, and Chevron had indeed paid him millions of dollars in cash and provided him with other advantages, all in flagrant violation of ethical principles forbidding payment to witnesses. Alberto Guerra was the star witness, and he was the only witness who testified (wrongly) about the supposed corruption in the environment suit.

Given the unfair nature of the trial, it is not surprising the court, invoking the RICO Act, ruled in favor of Chevron in March 2014. The judgment is being appealed, and it is hoped that it will be overturned. Moreover, new evidence has come to light, including that Alberto Guerra, the main witness of the “corruption”, who had already been discredited, had openly admitted that he lied under oath during the RICO Act trial.¹⁵⁵

However, independent of the result of the appeal or of other future developments, the use of the RICO Act represented an act of brutal and severe intimidation inflicted by powerful actors on their human rights defender opponents using the United States judiciary a main weapon.

Other United States courts and other legal authorities have acknowledged the danger of abuse inherent in a RICO Act civil case. In other cases, the RICO Act was used to for its “stigmatizing” and even “terrorizing” effects by parties seeking to take tactical advantage or wreak the greatest vengeance possible on their adversary.¹⁵⁶ One United States court has compared it to legal action like a thermonuclear weapon.¹⁵⁷ But, to the best of our knowledge, no corporation had ever used the RICO Act against human rights defenders.¹⁵⁸

Inset N° 13

The Supreme Court of Canada Opens a Breach in Favour of the Chevron Victims¹⁵⁹

Given that the United States judiciary was largely manipulated by Chevron and that Chevron no longer has any assets in Ecuador, in 2013 the corporation's

¹⁵⁵ See. For example Adam Klasfeld, “Ecuadorean Judge Backflips on Explosive Testimony for Chevron”, Courthouse News Service: <http://www.courthousenews.com/2015/10/26/ecuadorean-judge-backflips-on-explosive-testimony-for-chevron.htm>

¹⁵⁶ *Gross v. Waywell*, 2009 U.S. Dist. LEXIS 52599 (S.D.N.Y. 16 June 2009).

¹⁵⁷ *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 655 (S.D.N.Y. 1996).

¹⁵⁸ In another case, equally troubling in several respects, the conglomerate Ringling Brothers and Barnum & Bailey Circus sued a militant group defending animal rights, the Humane Society, basing their arguments on the circus animals. The animal rights defenders finally accepted to an agreement and even to pay Ringling Bros. in order to avoid the costs of a court case. See Thomas Heath, “Ringling Circus prevails in 14-year legal case”, *The Washington Post* (16 May 2014): https://www.washingtonpost.com/business/capitalbusiness/ringling-circus-prevails-in-14-year-legal-case-collects-16m-from-humane-society-others/2014/05/16/50ce00b8-dd15-11e3-8009-71de85b9c527_story.html

¹⁵⁹ *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R., 4 September 2015: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15497/index.do>

victims, with the support of Canadian lawyers and organizations,¹⁶⁰ filed suit in the Ontario superior court for recognition and enforcement of the Ecuadorian ruling.

Chevron challenged the jurisdiction of the Canadian court, arguing that “the 'real and substantial connection' test for establishing jurisdiction ... applies not only to the question of whether a court can assume jurisdiction over a dispute in order to decide its merits, but also to whether an enforcing court has jurisdiction in an action to recognize and enforce a foreign judgment.”¹⁶¹

The victims' lawyers replied that “the 'real and substantial connection' test for jurisdiction does not apply to the enforcing court. Rather, in an action for recognition and enforcement, it need only be established that the foreign court had a real and substantial connection with the dispute's parties or with its subject matter.”¹⁶²

The court ruled in the plaintiffs' favor, declaring it had jurisdiction in the case. Chevron then launched repeated appeals in the Canadian courts to invalidate the ruling, taking the case to the Supreme Court. In its 4 September 2015 ruling, the Supreme Court confirmed that the Canadian court had jurisdiction in the case. Among the reasons for the ruling, it gave the following ones.

“Legitimate judicial acts should be respected and enforced, not sidetracked or ignored. The goal of modern conflicts systems rests on the principle of comity, which calls for the promotion of order and fairness, an attitude of respect and deference to other states, and a degree of stability and predictability in order to facilitate reciprocity. This is true of all areas of private international law, including the recognition and enforcement of foreign judgements. (...) In today's globalized world and electronic age, to require that a judgment creditor wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition and enforcement proceedings would be to turn a blind eye to current economic reality. (...) In this case, jurisdiction is established with respect to Chevron.”

Pablo Fajardo, the Ecuadorean victims' attorney recalls that Chevron possesses in Canada assets worth more than US\$ 15 billion and that the implementation of the Ecuadorian judgment by the Canadian court would allow “the restoration of one of the most important areas for the balance of the world's ecosystem”.¹⁶³

¹⁶⁰ International Human Rights Program at the University of Toronto, Faculty of Law; Mines Alertes Canada; Centre canadien pour la justice internationale and Justice; Corporate Accountability Project.

¹⁶¹ *Chevron Corp. v. Yaiguaje*, 2015 SCC 42, [2015] 3 S.C.R., 4 September 2015: <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15497/index.do>

¹⁶² *Ibid.*

¹⁶³ <http://www.agenciaecologista.info/sierra/873-canada-abre-las-puertas-para-cobro-de-sentencia-contra-chevron>

C) Child Labor and Trafficking in Gold between Burkina-Faso/Togo and Switzerland

In an investigation carried out in three countries (Burkina-Faso, Togo and Switzerland), the Declaration of Berne shed light on child labor in the gold mines of Burkina Faso, on the intolerable working conditions, and on the traffic in gold among these three countries. Here are major extracts from the this inquiry, which we reproduce with the kind consent of the Declaration of Berne.¹⁶⁴

At the Bottom of the Mines, Children

Many of Burkina Faso's artisanal mines are a stone's throw from the capital, Ouagadougou, and easily accessible by road We visited five.¹⁶⁵ There are dozens of them in the country. Of varying sizes, these sites can have up to 7,000 employees and sprawl over several hectares. Although the division of labor is observed in a way suggesting almost military discipline, this is not the case for the organization of the work space and security conditions.

The families live in a chaotic landscape, as if agglutinated *ad hoc* to this world, in spite of the dangers it represents. People eat, sleep and work under a cloud of gray dust. Everywhere, the ground is gouged out first by dynamite, then by hand, to create deep but narrow underground tunnels that nobody bothers to seriously shore up with supports. Armed with a simple hemp rope, the miners descend as much as several hundred meters into the bowels of the earth. On the surface, following a rudimentary procedure, an employee waves a big sheet of rubber in order to waft air into a pipe supposed to ventilate the tunnels his co-workers labor. Explosions are set off at only several dozen meters distance from the workers. The local press regularly reports mortal accidents. Shortly before our arrival, on the site of Alga, in the north of the county, 46 miners were said to have perished following the collapse of a tunnel.

According to our estimates, between 30% and 50% of the employees working on the five sites that we visited were children. The youngest could not have been more than 10 years old. Many adults recount having begun working before they were 18. Some children accompany their parents in order to contribute to the household income. Others, sometimes very young, wander, alone, from one mine to another in function of the opportunities, searching for earnings considered attractive – 9 Swiss francs¹⁶⁶ per week, in a country where most people's income is below the legal minimum of 14.75 Swiss francs per week. The work pace is infernal: 12 hours non-stop, day or night.

¹⁶⁴ The extracts are translated from the French version quoted in the original CETIM text. The English version conveys the same information but in somewhat different order according to the subheadings: https://www.berndeclaration.ch/fileadmin/files/documents/Rohstoffe/BD_2015_Investigation-Gold.pdf

¹⁶⁵ The mines at Tikaré, Yabo, Alga and Karentenga in the north, and Tikando, in the southwest.

¹⁶⁶ Roughly US\$ 9.23.

High Health Risks

In three of the mines visited, we noted generally no distinction between children and adults regarding the work carried on. Most of the “little ones” go down into the tunnels, where they risk their lives. All are frequently exposed to mercury, cyanide and other toxic substances used to extract the gold. The majority of the employees are unaware of the health risks related to their activities. Although the constant dust causes serious lung and respiratory illnesses such as silicosis, the workers have no access to masks or other protective material that would allow them to limit these risks.

A veritable poison, mercury attacks the digestive and immune systems, destroys the lungs and the kidneys. Muscle and bone injuries from carrying the heavy loads are common. Bodies become deformed. Nearly a quarter of the children working in the artisanal mines have already been victims of an accident causing injuries. According to the NGOs working in the area, most have not benefited from appropriate medical treatment.

Drugs to Deal with the Fear

“To give themselves courage” the miners have available an assortment of alcohols, cannabis and amphetamines, these last moreover known to go hand in hand with small scale gold mining. Such substances vanquish hunger, fatigue and the fear in the guts in the claustrophobic darkness of the tunnels. According to a local NGO representative, “The miners refuse to go down into the mines without having taken any drugs.”

The Burkinabe Smugglers

After having been extracted from the bowels of the earth and “cleaned”, the gold is sold to a series of intermediaries called “purchase counters”. They are individuals or companies. These counters can be simple buyers or investors in the mines, thus benefiting from exclusive purchasing contracts applicable to a percentage of the production.

Some of these counters are equipped for a preliminary refining of the gold. They crush the ore, place it in terra cotta containers and heat it until it is liquified. Then the liquid is poured into iron ingot molds. A solution composed of nitric acid and hydrochloric acid is then injected into the liquid ore in order to separate the impurities during the solidification, generally copper (pink gold), silver (yellow gold) or iron (white gold). Thus, there remains only the precious metal (and sometimes some platinum residues). At this point, the gold is already on average 22 to 23 carats, nearly its maximum purity of 24 carats, explained a source at the Togo Ministry of Energy and Mines.

It is in this form, in little ingots the size of a pack of cigarettes and weighing a maximum of one kilo, that the smugglers move the gold illegally over land to Lomé, in Togo, thus depriving Burkina Faso of precious public income. “To be quite truthful, there is practically no legal exporting of gold from Burkina to Togo,” announced, unequivocally, a civil servant from the Burkinabe Ministry of

Mines. According to our estimates, on a cautious basis or reckoning, no less the 7,000 kilos of gold move in this way between the two countries. There is, however, good reason to believe that undeclared artisanal gold production is much greater.

The “Tax Optimization” of the Smugglers

For the smugglers, exporting the precious metal from Togo rather than from Burkina Faso has an obvious advantage: they thus avoid all taxes, be they royalties, taxes on the profits or export taxes. While it is difficult to estimate reliably the losses that such practices represent for the state, it is safe to say that they run into the tens of millions of Swiss francs, given the quantities. One can, moreover, evaluate with greater accuracy the amount of uncollected export taxes from the smuggling into Togo. For 7,000 kilos of gold exported each year, the lost income is around 6.5 million Swiss francs. This substantial income would be most welcome in the treasury of Burkina Faso, ranked 181st country in the world in 2014 on the United Nations Development Program's Human Development Index.

A Powerful Man

The major Burkinabe “exporter”, who, according to our sources organizes the transit of the gold to Togo, is a company called Somika. This firm is owned by a certain El Hadj Adama Kindo. A central player in the sector, this powerful businessman holds many mining permits, and his company is one of the country's main buyers of artisanal gold. As is often the case with such persons, Adama Kindo has political supporters. Is he not the honorary consul of Guinea in Burkina Faso? The general secretary of the Union of Geology, Mines and Hydrocarbon Workers claims that Kindo has “the closest relations with Blaise.”¹⁶⁷ The press, moreover, has noted his friendship with a dozen ministers, which could make him a politically exposed person, as understood in Swiss law. This status implies increased vigilance by his Swiss business partners.

Solicited several times, Adama Kindo has never responded to our requests for an interview. When we were in the country, a representative of his company denied all involvement in illegally exporting gold to Togo, without however explaining where the tons of gold produced in the concessions controlled by Somika disappear to.

How can this massive trade totally escape from the vigilance of the Burkinabe authorities? Most of the civil servants, journalists and NGO representatives with whom we spoke figure that the sector is infested with corruption and that such a level of smuggling is unthinkable without complicity in the highest spheres of power. Contrary to what our inside source suggested, the Ministry of Mines officially refuted all claims of corruption and declared that it is unaware of any gold being illegally exported to Togo.

¹⁶⁷ Blaise Campaoré, former president of Burkina Faso, overthrown 31 October 2014.

The Ammar Clan and Its Refinery

Once the gold has reached Lomé by road, it is shipped by the Wafex company, an affiliate of the Ammar conglomerate. A burkinabe dealer explained how easy it is to deal “with the Lebanese”, who “are satisfied to pay you in cash and do not worry about the paperwork”. The yellow metal quietly removed from Burkina Faso is thenceforth “legalized”.

The interest for the Burkinabe smugglers of going through Togo is obvious, but what about the Ammars, resident in the two countries as tire merchants? The advantage is also fiscal. If they pay an export tax in Lomé, it is ten times lower than what they would pay exporting from Ouagadougou. In Togo, the Ammars pay only eight centimes per gram, whereas a gram of raw gold is worth 29 Swiss francs.

Substantial Profits

The gold exported via Wafex brings the Ammar clan substantial profits. The conglomerate thus markets almost two thirds of the gold exported from Togo (some 10 tons in 2011), and, according to one of our sources, all the gold going to Switzerland. Documents drafted by the Ammars themselves attest that the entirety of their gold is sent to Switzerland. When they were setting up their affiliate in Geneva, in 2012, they declared to the cantonal authorities that the gold activities generated, for the Swiss banks, a volume of business of 540 million francs (for some 8,000 kilos of gold, they explained). They hoped to reach 705 million in 2014.

In 2012, the three brothers (Antoine, Elias and Joseph) created a company in Geneva to eliminate the intermediary on whom they had depended previously. With a straight face, the trio justified, to the Geneva authorities, the setting up of their Swiss branch, MM Multitrade SA, by their desire to “dissociate themselves totally from the activities of the Decafin company” – for “ethical reasons”. If Decafin, in 2008, was in fact accused of marketing gold produced by the children of Mali,¹⁶⁸ ethical considerations do not seem to be the primary concern of the Ammar conglomerate, for in Burkina Faso it has perpetuated the structure that it used when associated with Decafin.

Contacted many times, both in Togo and in Geneva, the Ammars refused to respond to our questions, limiting themselves to general declarations about their compliance procedures. In an e-mail sent to the Declaration of Berne, MM Multitrade SA, the Geneva affiliate of the Ammar conglomerate, claimed to be affiliated with the *Association romande des intermédiaires financiers* [French Swiss Association of Financial Brokers], the sector's oversight agency for money laundering. The company claims to be subject to monitoring by Valcambi, the final purchaser of this illegitimate gold. Considering the facts revealed by our investigation, these monitoring mechanisms are indisputably inadequate to prevent the purchase of gold produced in flagrant violation of the basic ILO conventions on the worst forms of child labor.

¹⁶⁸ *A Poisonous Mix*, Human Rights Watch, 2011.

From Lomé, the little raw gold ingots, assembled in packages weighing generally between 50 and 100 kilos, are transported to Switzerland via Paris, on regular Air France flights. Once they have arrived at the Kloten airport, in the canton of Zurich, the packages are sent to Ticino, where Valcambi operates. Regarding financial matters, MM Multitrade SA receives the ingots in Switzerland before they are sold to Valcambi, which refines them. In return, Valcambi credits the monetary gold account (in ounces) of MM Multitrade, opened with the Arab Bank of Geneva. It is the end of the chain.

Valcambi, Refined Refiners

Like its business partner, the Ammar conglomerate, Valcambi refused to respond to our questions, all while asking us to send them any documents in our possession – a request to which we have not responded. We have had to limit ourselves to genteel discourse, through free service on the internet site of the refinery, which discusses the procedures, to the “strict” conformity of which Valcambi is subjected “in all that it does, every day and everywhere” it operates. Within its internal directives, the refinery has committed itself, in particular, to refraining from profiting, in any way, from illegal child labor. If so, then how can the Ticino refinery buy, refine, then sell gold mined by children sometimes younger than 10 years old, claiming moreover “to be able to guarantee the highest standards in traceability over the entirety of its supply chain regarding information, documents and the actors connected to each lot of precious metal that is transformed”? It would have seen that greed pushes Valcambi to ignore its public commitments and the measures it claims to subject itself to.

Impure Gold and Switzerland

Switzerland produces no gold, but it refines it – a lot of it. Unlike petroleum, copper and wheat that the traders buy and sell from Zug or Geneva, the commercial flux of gold passes physically through the Confederation's territory. Switzerland imports, each year, the equivalent of 70% of the world's production of gold, excluding the precious metal stored in its free trade zones. This is both mined (or raw) gold and scrap (residual of jewelry, watches etc.). In 2013, more than 3,000 tons of raw gold converged on Switzerland, according to the statistics of the Federal Customs Administration. Its value was some 109 billion francs, or 17 % of the Swiss GDP.

Extremely concentrated, the world market is dominated by six refineries that share 90% of the volume. In 2011, Frederic Panizzutti, spokesman for MKS, which owns the Pamp refinery, declared to *swissinfo.ch* that four are based in Switzerland. Besides this one, there are Metalor, Argor-Heraeus and Valcambi. All have already been denounced for the dubious practices involved in their acquisition of gold.

Unflattering Precedents

Metalor and Argor-Heraeus were accused of participating indirectly in the financing of the conflict in the Democratic Republic of Congo, by buying gold

pillaged by armed groups. The two refineries defended themselves vehemently. In Peru, in the Madre de Dios region, Pamp is said to have acquired gold mined illegally, generating violence and environmental degradation.

For its part, according to our sources, the Ticino refinery Valcambi, through the intermediary of the Geneva company Decafin, is said to have refined gold mined by children in Mali. Our investigation showed that the practice still prevails today, in spite of the warning shots fired by civil society.

It is this gold that the Swiss companies refine to reach a maximum purity of up to 99.99%. It is a purity that contrasts with the deplorable conditions in which the precious metal is too often mined.

Valcambi, a Typical Refinery

Founded in 1961 as Valori & Cambi, in Balerna, in the canton of Ticino (Switzerland), the Valcambi refinery has recently passed into the hands of the Indian conglomerate Rajesh Exports. In July, Newmont Mineral Holdings – a United States company which, in 2009, received the “Shame-on-You Award” to sanction its “environmental” projects in Ghana – sold its 60.6% share for \$119 million. The total value of the company is said to be \$400 million.

Valcambi employs some 165 persons and has a refining capacity of 2,000 tons of gold per year. Contrary to some of its competitors, active in trading, Valcambi does only refining. According to its website, its clientele comprises some of the biggest mining companies in the world, some of the most prestigious time-piece manufacturers, major banks, governments and central banks.

IV. NORMS APPLICABLE TO TNCs AND MECHANISMS FOR REDRESS

At present, no international instrument regulates the activities of transnational corporations in their entirety and with a binding effect, nor is there any sanction for the human rights violations committed by these entities. The main specific norms currently applicable to TNCs on the international level are, in the order of their adoption, the *OECD Guidelines for Multinational Enterprises* (1976), the International Labor Organization's *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (1977), the United Nations' *Global Compact* (2000) and the United Nations Human Rights Council's *Guiding Principles on Business and Human Rights* (2011). As we already analyzed in two previous publications,¹⁶⁹ these norms are merely voluntary codes of conduct. Consequently, compliance with them depends on the good will of the TNCs, and there is no sanction for non-compliance. They have amply proven their inadequacy as demonstrated by the impunity that continues to reign in the area of human rights violations and crimes committed by these entities.

In the context of this chapter, we shall limit ourselves to presenting the legally binding norms that contain specific provisions applicable to the private sector, including TNCs. These are norms adopted by states in the areas of the environment, corruption, organized crime, workers' rights and human rights. As there are many such conventions (adopted at the international and regional level), we shall present a selection from among the most important of them that create direct obligations for the private sector, including TNCs.

A) Regarding the Environment

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*¹⁷⁰ reflects a general increasing awareness of the necessity of protecting the environment, especially following the discovery during the 1980s, in Africa and in many countries of the Global South, of toxic waste dumps whose contents came from abroad.¹⁷¹ This convention aims to reduce the generation of these wastes (toxins, explosives, corrosives, inflammables, ecotoxins and infectious substances) while limiting and regulating

¹⁶⁹ *Transnational Corporations and Human Rights* (Geneva: CETIM, November 2005), above-mentioned, and Alejandro Teitelbaum and Melik Özden, *Transnational Corporations: Major Players in Human Rights Violations* (Critical Report N° 10, Geneva: CETIM, December 2011): <http://www.cetim.ch/transnational-corporations-major-players-in-human-rights-violations/>

¹⁷⁰ Adopted 22 March 1989; entered into force 5 May 1992: <http://www.basel.int/portals/4/basel%20convention/docs/text/baselconventiontext-e.pdf>

¹⁷¹ See, inter alia, the CETIM publications *Nos déchets toxiques. L'Afrique a faim: v'là nos poubelles!* (Geneva, 1989 – available only in French and German): http://www.cetim.ch/legacy/fr/publications_ouvrages/50/nos-dechets-toxiques-l-afrique-a-faim-v-la-nos-poubelles/; and *Transboundary Transfers of Toxic Wastes and Their Effect on Human Rights*, (Geneva, 2009): <http://www.cetim.ch/transboundary-transfers-of-toxic-wastes-and-their-effect-on-human-rights/>

their transboundary movement (with a view to limiting their harmful effects on health and the environment).

The necessary participation of the commercial sector in fulfilling the primary objective of the convention is established in the preamble, which lists the obligations incumbent on those generating wastes regarding their transport and elimination in an environmentally sound way; the states parties being the guarantors of compliance with this obligation and, thus, monitoring its implementation. Thus the preamble states that:

“states should ensure that the generator should carry out duties with regard to the transport and disposal of hazardous wastes and other wastes in a manner that is consistent with the protection of the environment, whatever the place of disposal.”

Moreover, in the body of the convention, other obligations are listed regarding companies designated by the terms “importer”, “person” (physical or legal), “exporter” and “generator”. It is the duty of the State under whose jurisdiction the company is located to monitor the implementation of these obligations. Thus, the state party must:

“ensure that persons involved in the management of hazardous wastes or other wastes within it take such steps as are necessary to prevent pollution due to hazardous wastes and other wastes arising from such management and, if such pollution occurs, to minimize the consequences thereof for human health and the environment” (Article 4.2.c; emphasis added).

The convention enshrines, in principle, the prohibition for any person under the jurisdiction of a state party, to transport or dispose of hazardous wastes or other wastes. An exception, however, is provided for if the person in question is authorized to carry on such operations (Article 4.7.a).

To be allowed to transport toxic waste, the generator or the exporter must inform the appropriate authority of the importing state in writing if the authority of the exporting state has not done so (Article 6.1).

Overall, any transboundary movement by the generator or the exporter must meet the conditions laid down in Articles 6.3, 6.5 and 6.9.¹⁷²

Further, in the event that transboundary movement of hazardous waste constitutes illegal traffic, the convention provides that the waste in question shall be taken back by the exporter or the generator; or, if necessary, by the exporting state party onto its own territory; or, if this is impossible, disposed of by some other means within 30 days (from the time the traffic is discovered); or by the importing state party, upon which it is incumbent to assure that the hazardous waste is disposed of in an environmentally sound manner by the importer; or, if

¹⁷² These deal with, inter alia, 1. written consent from the importing country; 2. confirmation of the existence of a contract between the exporter and the eliminator specifying environmentally rational management of the waste under consideration; 3. the requirement imposed on every person moving dangerous or other transboundary waste to sign the movement document upon delivery or reception of this waste.

necessary, by the state itself within 30 days from the date when the state shall have been informed of the illegal traffic (Article 9).

Ratified so far by 182 states and the European Union,¹⁷³ with the noteworthy exception of the United States,¹⁷⁴ the convention has entrusted the monitoring of its implementation to the Conference of the Parties (Article 15) and to its subsidiary oversight body, (Article 15.5.e) comprising 15 members. These two instances are assisted by the convention secretariat (Article 16). Non-member states, the commercial sector and NGOs may attend the sessions of the Conference of the Parties as observers (Article 15.6).

In keeping with the convention's Article 12, the Conference of the Parties adopted, on 10 December 1999, the *Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal*.¹⁷⁵ This protocol aims to “to provide for a comprehensive regime for liability and for adequate and prompt compensation for damage resulting from the transboundary movement of hazardous wastes and other wastes and their disposal including illegal traffic in those wastes” (Article 1). It is not limited to the states parties to the *Basel Convention*, but applies to “all persons”, which includes in particular corporation that might cause damage during a transfer of hazardous wastes. Owing to an insufficient number of ratifications (minimum 20), the protocol has never entered into force.¹⁷⁶ This would explain why the intervention of the *Basel Convention* in the *Probo Koala* case was limited (see Chapter III.A).

Following in the wake of the *Basel Convention*, the *Bamako Convention on the ban on the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*¹⁷⁷ goes further for it responds to concerns of the African states and their populations with the total prohibition of importing into Africa hazardous wastes from non-contracting states parties (Article 4.1).

This convention clearly aims to assure that industrialized countries do not export their hazardous wastes to African countries. It also aims to set up a control over the transboundary movements of hazardous wastes within Africa and to assure that the disposal of such wastes is carried out in an environmentally sound way.

In its preamble, The *Bamako Convention* recalls the responsibilities of the waste generator during the transport, disposal and treatment of hazardous wastes, which must be carried out with regard for human health and the environment, and the duty of the states parties to oversee compliance.

Besides the total prohibition on importing hazardous wastes to the African continent, the convention prohibits “dumping of hazardous wastes at sea and internal waters” (Article 4.2). It provides for a rigorous management framework

¹⁷³ This convention is open to ratification “by political and/or economic integration organizations” (Article 21). This means that the European Union, as such, under this convention, has the same obligations as its member states.

¹⁷⁴ <http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx>

¹⁷⁵ <http://archive.basel.int/meetings/cop/cop5/docs/prot-e.pdf>

¹⁷⁶ <http://www.basel.int/Countries/StatusofRatifications/TheProtocol/tabid/1345/Default.aspx>

¹⁷⁷ Adopted 30 January 1991; entered into force in 1998.

for the generation of hazardous wastes and their transboundary movement throughout Africa in the following terms:

“Each Party shall:

a. ensure that hazardous waste generators submit to the Secretariat reports regarding the wastes that they generate in order to enable the Secretariat of the Convention to produce a complete hazardous waste audit;

b. impose strict, unlimited liability as well as joint and several liability on hazardous waste generators;

c. ensure that the generation of hazardous wastes within the area under its jurisdiction is reduced to a minimum...;

e. ensure that persons involved in the management of hazardous wastes within its jurisdiction take such steps as are necessary to prevent pollution arising from such wastes and, if such pollution occurs, to minimize the consequence thereof for human health and the environment; (...)

m. furthermore, each Party shall: (i) prohibit all persons under its national jurisdiction from transporting, storing or disposing of hazardous wastes unless such persons are authorized or allowed to perform such operations” (Article 4.3).

Also, within the context of all transboundary movement, the contracting parties must assure that the wastes are packaged and labeled, as well as assuring the communication of specified information such as place of origin of the waste, its place of export etc. (Article 4.3.m.ii).

The obligation incumbent on the parties to assure the implementation of the convention and to prosecute the perpetrators of violations based on national legislation and/or international law is established in Article 4.4. a.

Regarding the procedure to be followed, the generator may be required to report a transboundary movement to the state if the exporting state has not done so (Article 6.1). Further, a series of formalities must be fulfilled by any persons carrying on transboundary movement of hazardous waste (Article 6.8).

Regarding the implementation of the convention, the parties “shall designate or establish one or more competent authorities and one focal point” (Article 5.1)¹⁷⁸ and must inform the Secretariat (Article 5.2). Additionally, “the parties shall... appoint a national body to act as a Dumpwatch. In such capacity as a Dumpwatch, the designated national body only will be required to co-ordinate with the concerned governmental and non-governmental bodies” (Article 5.4).

Regarding illegal traffic, the convention stipulates that: “Each Party shall introduce appropriate national legislation for imposing criminal penalties on all persons who have planned, committed, or assisted in such illegal imports. Such penalties shall be sufficiently high to both punish and deter such conduct” (Article 9.2).

¹⁷⁸ The correspondent will represent the state that has appointed her/him in the context of the mechanism for monitoring movements of transboundary waste provided for by the convention in Articles 13 and 16.

Thus, violation of this convention by any person, and especially by legal persons, is to be sanctioned at the national level by the parties' national jurisdictions, thus coming under criminal law, something that the Basel convention does not provide for.

Moreover, in the event that the illegal traffic results from the conduct of the exporter or generator, "the State of export shall ensure that the wastes in question are taken back by the exporter or generator or if necessary by itself into the State of export, within 30 days from the time the State of export has been informed about the illegal traffic. To this end the Parties concerned shall not oppose, hinder or prevent the return of those wastes to the State of export and appropriate legal action shall be taken against the contravenor(s)" (Article 9.3).

Likewise, if the illegal traffic is the result of conduct on the part of the importer or the disposer, "the Party of import shall ensure that the wastes in question are returned to the exporter by the importer and that legal proceedings according to the provisions of this Convention are taken against the contravenor(s)" (Article 9.4).

The convention has so far been ratified by 25 states and signed by 10 others.¹⁷⁹ Its implementation depends on cooperation among the parties and African organizations (Article 10). The conference of the parties is entrusted with establishing an *ad hoc* expert body "to prepare a draft Protocol setting out appropriate rules and procedures in the field of liabilities and compensation for damage resulting from the transboundary movement of hazardous wastes" (Article 12). The conference met for the first time in June 2013, but the *ad hoc* body has not yet been set up. Apart from the conference of the parties, the convention has no implementation procedure to deal with the responsibility of violators of its provisions.

The Stockholm Convention on Persistent Organic Pollutants (POPs)¹⁸⁰ is intended to prohibit the use of certain polluting chemical substances owing to their harmful effects on human health and the environment. These pollutants remain stable over long periods and spread into, inter alia, the air, water and migratory species, which makes them a transboundary and even a global problem necessitating consideration at the international level.

In its preamble, the convention evokes not only the responsibility of the manufacturers regarding a reduction of the toxic effect of their products but also their duty to inform the public and governments concerning the properties of these products:

"Recognizing the important contribution that the private sector and non-governmental organizations can make to achieving the reduction and/or elimination of emissions and discharges of persistent organic pollutants,

Underlining the importance of manufacturers of persistent organic pollutants taking responsibility for reducing adverse effects caused

¹⁷⁹ http://www.au.int/en/sites/default/files/treaties/7774-sl-bamako_convention.pdf

¹⁸⁰ Adopted 22 May 2001; entered into force 17 May 2004:
http://www.pops.int/documents/convtext/convtext_en.pdf

by their products and for providing information to users, Governments and the public on the hazardous properties of those chemicals...” (emphasis added).

Article 10.3 of the convention defines the duty to inform, to sensitize and to educate the public about these toxic substances in these terms:

“Each Party shall, within its capabilities, encourage industry and professional users to promote and facilitate the provision of the information referred to in paragraph 1 at the national level and, as appropriate, subregional, regional and global levels.”¹⁸¹

Further: “*For the purposes of this Convention, information on health and safety of humans and the environment shall not be regarded as confidential*” (Article 9.5; emphasis added). On the other hand, the convention allows a margin of maneuver to the parties: “Parties that exchange other information pursuant to this Convention shall protect any confidential information as mutually agreed” (Article 9.5).

It should be noted that, since its entry into force (2004), the convention has been amended three times (2009, 2011, 2013) in order to add new substances to the initial POP list of 12 substances.¹⁸² Currently 178 states and the European Union are parties to the convention.¹⁸³

The Conference of the Parties makes all major decisions regarding the convention and monitors its implementation (Article 19). The parties are required to submit a report to the Conference listing the measures taken to implement their obligations (Article 15.1). Moreover, every four years, the Conference evaluates the effectiveness of the convention (Article 16). Each of the states parties is required to draft an action plan to implement its obligations arising from this commitment.

By virtue of Article 19.6, *the Conference of the Parties* established a *Persistent Organic Pollutants Review Committee*. This is a body subsidiary to the Conference of Parties. Comprising 31 members, all experts in chemical assessment or management, the Committee considers the addition of new substances to the Convention.

These two instances are supported by the convention secretariat, which handles all administrative matters (Article 20).

There is a provision to establish “procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for the treatment of parties found to be in non-compliance” (Article 17). However, this compliance committee (another body subsidiary to the Conference of the Parties), which, in turn, should set up a “facilitation procedure” to deal with non-compliance, has not been set up. Although a draft procedure has been proposed, it has not been adopted. As it stands now, the draft provides for a mutual agreement

¹⁸¹ Article 10, § 1, stipulates the requirement that the parties to the convention inform and sensitize to POPs both those politically responsible and the public.

¹⁸² <http://chm.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>

¹⁸³ The convention is also open to ratification by “regional economic integration organizations” (Article 24).

procedure: the committee is authorized to receive communications from states parties and, if need be, formulate recommendations or furnish technical/financial assistance so that the state party in question can comply with its obligations.¹⁸⁴

B) Regarding Corruption

The necessity of fighting corruption has been evoked at the United Nations since 1975 by the General Assembly, which has condemned all corrupt practices, especially acts of corruption committed by TNCs.¹⁸⁵

However, it was only in 2003 that the General Assembly adopted a legally binding instrument dealing with corruption: the *United Nations Convention against Corruption*¹⁸⁶. It entered into force 14 December 2005. This convention aims not only to fight corruption but also to create international cooperation in this area, for, as stated in its preamble, corruption is “a transnational phenomenon that affects all societies and economies”. It thus testifies to a commitment made at the international level to prevent and end this scourge, which threatens democracy, security and the stability of societies and hinders the development of some countries.

The treaty creates a set of norms and rules that should inspire states parties to improve the own legal regime in fighting corruption in the public and private sectors. The objectives of the convention as stated in its first article are:

- a. to promote and strengthen measures to prevent and combat corruption more efficiently and effectively;*
- b. to promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;*
- c. to promote integrity, accountability and proper management of public affairs and public property.”*

To attain these goals, the *Convention against Corruption* provides that states parties shall both implement anti-corruption policies (Article 5) and create one or more bodies entrusted with preventing corruption as established in the provisions of the convention (Article 6).

Regarding the fight against and *prevention of corruption in the private sector*, in Article 12.1 the convention requires states parties to take necessary measures in order to prevent private-sector corruption, and to issue accounting and audit standards for the sector and, where necessary, “provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures”. It lists several of the measures to be taken, such as “promoting

¹⁸⁴ Decision SC-6/24 of the Conference of the Parties:

<http://chm.pops.int/TheConvention/ConferenceoftheParties/ReportsandDecisions/tabid/208/Default.aspx>

¹⁸⁵ *Measures against corrupt practices of transnational and other corporations, their intermediaries and other involved*, A/RES/35/14, 15 December 1975: <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/002/27/IMG/NR000227.pdf?OpenElement>

¹⁸⁶ A/RES/58/4, 21 November 2003: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/58/4&Lang=E

the development of standards and procedures designed to safeguard the integrity of relevant private entities” (Article 12.2.b) and “promoting transparency among private entities” (Article 12.2.c).

In Article 14.1.a, dealing with the **prevention of money laundering**, the states parties are encouraged to “institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, ... in order to deter and detect all forms of money-laundering”. The second paragraph provides that states parties “shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders. ... Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.”

Regarding sanctioning of any act of corruption committed in the private sector, Article 21 states that states parties must take legislative measures to establish such acts as criminal offenses when committed intentionally in the course of economic, financial or commercial activities. Thus, pursuant to the convention, acts of corruption committed in the private sector are **criminal offenses** only if they have been committed intentionally. The article stipulates two sorts of acts:

“a. the promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

b. the solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.”

Further regarding sanction, like the act of corruption, embezzlement in the private sector is also to be a criminal offense, incorporated as such into legislative acts by the states parties. The crime must have been committed “in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position” (Article 22).

The assistance, the complicity or the incitement to committing such acts (corruption as well as embezzlement) are also established as criminal offenses by the states parties (Article 27).

Regarding the **liability of legal person**, Article 26 provides that:

“1. each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offenses established in accordance with this Convention;

2. subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative;

3. *such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offenses,*
4. *each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.”* (emphasis added)

Moreover, regarding compensation for harm done through an act of corruption, the victim, entity or person must have the right to take legal action against those responsible in order to obtain redress. The states parties must thus provide for this in their national legislation (Article 35).

Regarding of the fight against corruption, Article 39 encourages states to establish cooperation between the private sector and national authorities responsible for investigations and prosecution, especially financial institutions, in dealing with offenses established by the convention.

Ratified by 178 states parties,¹⁸⁷ the convention provides for a Conference of the States Parties in order “to improve the capacity of and cooperation between States Parties to achieve the objectives set forth in this Convention and to promote and review its implementation” (Article 63.1). Among the duties entrusted to the Conference, one might mention those of facilitating “the exchange of information among States Parties on patterns and trends in corruption and on successful practices for preventing and combating it” (63.4.b); “reviewing periodically the implementation of this Convention by its States Parties” (63.4.e); and formulating recommendations in order to improve the convention and its implementation (63.4.f).

Since its creation, the Conference of the States Parties has held several sessions. The decisions emanating from these sessions deal in particular with recommendations made to the states parties in order to assure the implementation of the convention, such as bringing their legislation into line with the convention and encouraging the business world to participate actively in the prevention of corruption.

At its third session in 2009, the Conference of the States Parties, pursuant to Article 63.7 of the convention, established a review mechanism for implementation of the convention.¹⁸⁸ This mechanism enables verification of implementation by the states parties as well as helping them to keep their commitments. The review process comprises two cycles of five years each. During the first cycle, Chapters III (criminalization and law enforcement) and IV (international cooperation) are to be reviewed. During the second, Chapters II (preventive measures) and V (asset recovery). This mechanism claims to be,

¹⁸⁷ As of 3 July 2016: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-14&chapter=18&lang=en

¹⁸⁸ Conference of the States Parties: <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session3.html>; and Resolution 3/1: http://www.unodc.org/documents/treaties/UNCAC/COSP/session3/Doha_resolutions_unofficial.pdf

among other things, “transparent”, “impartial”, neither “punitive” nor “accusatory”.¹⁸⁹

At the regional level, the Council of Europe's *Criminal Law Convention on Corruption*, adopted in 1999, preceded that of the United Nations, adopted four years later. The Council bills it as “an ambitious instrument aiming at the coordinated criminalization of a large number of corrupt practices. It also provides for complementary criminal law measures and for improved international cooperation in the prosecution of corruption offenses.”¹⁹⁰ It covers active and passive forms of corruption: bribery of domestic and foreign public officials; bribery of national and foreign parliamentarians and of members of international parliamentary assemblies; bribery of international civil servants; bribery of domestic, foreign and international judges and officials of international courts; trading in influence; money-laundering of proceeds from corruption offenses; accounting offences (invoices, accounting documents etc.) related to corruption offenses.¹⁹¹

Corruption in or by the *private sector* is treated in Articles 7 and 8 of the convention. Pursuant to Article 7, states parties must adopt legislative or other measures to establish such acts as criminal offenses “when committed intentionally in the course of business activity, the promising, offering or giving, directly or indirectly, of any undue advantage to any persons who direct or work for, in any capacity, private sector entities, for themselves or for anyone else, for them to act, or refrain from acting, in breach of their duties”.

Regarding the *liability of legal persons*, Article 18.1 encourages the states parties to adopt legislative or other measures so these entities can be held liable for acts of active corruption, trading in influence¹⁹² and money laundering,¹⁹³ committed for their own benefit by any physical person acting individually or as a member of a body of a legal person or who has a leading position within it. They can also be held liable if the person acting in his or her own interest is an accomplice or an instigator of the above mentioned offenses. The convention stipulates that states parties shall take all necessary measures so that legal person can be held liable if the commission of the above mentioned offenses results from an absence of oversight or control on the part of a physical person mentioned in

¹⁸⁹ *Draft terms of reference of the mechanism for the review of implementation of the United Nations Convention against Corruption: rolling text: Working paper prepared by the Secretariat*, CAC/COSP/2009/3, 15 September 2009, § 2:

<http://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V0986376e.pdf>

¹⁹⁰ *Details of Treaty No.173: Criminal Law Convention on Corruption*:

<http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173>

¹⁹¹ *Ibid.*

¹⁹² Trading in influence is defined in Article 12 as follows: “the promising, giving or offering, directly or indirectly, of any undue advantage to anyone who asserts or confirms that he or she is able to exert an improper influence over the decision-making of any person referred to in Articles 2, 4 to 6 and 9 to 11 in consideration thereof, whether the undue advantage is for himself or herself or for anyone else, as well as the request, receipt or the acceptance of the offer or the promise of such an advantage, in consideration of that influence, whether or not the influence is exerted or whether or not the supposed influence leads to the intended result.”

¹⁹³ A criminal offense under Article 13.

the first paragraph acting for the benefit of the legal person (Article 18.2). It affirms, moreover, that the liability of the legal person does not exclude criminal proceedings that might be undertaken against physical persons perpetrators, instigators or accomplices of the offenses mentioned in the first paragraph (Article 18.3).

Regarding sanctions, the convention stipulates that the states parties “shall provide, in respect of those criminal offences established in accordance with Articles 2 to 14, effective, proportionate and dissuasive sanctions and measures, including, when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition”. (Article 19.1). Regarding the liability of legal persons, they “shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions”. (Article 19.2)

The treaty, which entered into force in 2002, has until now been ratified by 45 countries.¹⁹⁴ Monitoring of the implementation of the convention by the states parties is assured by the Group of States against Corruption (GRECO), pursuant to Article 24. This group was set up through a partial and enlarged agreement,¹⁹⁵ and its mission consists of evaluating the measures implemented by the states parties to fight against corruption. The GRECO currently includes 49 member states. It oversees compliance and implementation of not only the *Criminal Law Convention on Corruption* but also other treaties, legal texts and principles adopted by the Council of Europe in the framework of its Program of Action against Corruption. This group comprises two representatives, maximum, of each member state.¹⁹⁶

The convention was complemented in 2003 by an *Additional Protocol to the Criminal Law Convention on Corruption* in order to implement more broadly the 1996 Program of Action against Corruption, which was the inspiration of the *Criminal Law Convention on Corruption*. It has so far been ratified by 41 states, including Belarus, non-member of the Council of Europe. Regarding the private sector, the protocol does not contain any additional provisions, it only increases the requirements in criminal liability for public corruption and adds new agents susceptible to corruption (corruption of arbiters and jury members, national and foreign).

The adoption by the Council of Europe of *The Civil Law Convention on Corruption* was inspired by the same reasons that inspired the *Criminal Law Convention*: the realization of a greater unity among the members of the Council of Europe, the reinforcement of international cooperation in the fight against corruption and the threat that this scourge constitutes for democracy, human rights etc. This convention strengthens the *Criminal Law Convention* by setting norms

¹⁹⁴ Among which are Belarus, non-member of the Council of Europe, and five signatory states, including the United States and Mexico: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/173/signatures?p_auth=aQZ4L5Wa

¹⁹⁵ Such an agreement supposes that accession is not limited to Council of Europe member states, as stated in Articles 32 and 33.

¹⁹⁶ Members of the Group as of 10 May 2016: http://www.coe.int/t/dghl/monitoring/greco/general/members_en.asp

that enable a person who has suffered harm from an act of corruption to “receive fair compensation”, to quote its preamble.

The aim of the convention is to incite the states parties to incorporate into their domestic law effective remedies for persons who have suffered “damage as a result of acts of corruption, to enable them to defend their rights and interests”, including the possibility of obtaining compensation for damage. (Article 1).

Compensation for damage requires that all conditions that a state party has introduced into its domestic legislation be fulfilled (Article 4). It means that:

- the defendant has committed or authorised the act of corruption, or failed to take reasonable steps to prevent the act of corruption;
- the plaintiff has suffered damage; and
- there is a causal link between the act of corruption and the damage.

These three criteria are cumulative, and it is possible to establish **joint and several liability** for all the persons responsible for the damage resulting from a single act of corruption (Article 4.2; emphasis).

Moreover, Article 8 mentions the case where the act of corruption invalidates a contract. Thus, the states parties must provide, on the one hand, in their domestic law, that the contract be null and void when resulting from corruption and, on the other hand, the possibility for the contracting party to request that the courts nullify a contract without affecting the party's right to compensation.

Having entered into force in 2003, the convention has to date 35 ratifications and 7 signatures.¹⁹⁷ As is the case for the *Criminal Law Convention on Corruption*, the GRECO reviews the implementation of the *Civil Law Convention on Corruption* (Article 14).¹⁹⁸

Adopted 21 November 1997 and entered into force 15 February 1999, the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*¹⁹⁹ establishes binding norms regarding its states parties in order to establish as criminal offenses the corruption of foreign public officials involved in international business transactions. It aims to sanction, and more broadly to end, such practices, recalling the responsibility incumbent upon states to fight this scourge. This legal instrument is the first of its kind to target particularly bribes paid to foreign public officials. It establishes a common framework for the fight against corruption in the countries that have signed it and lays the groundwork for international cooperation in this area.

Like the other above mentioned conventions, the OECD convention also established as a criminal offense complicity in an act of corruption (Article 1.2). The responsibility of legal persons is described in Article 2.

The convention also provides for setting up a system to monitor implementation by its states parties (Article 12), directed by the OECD Working Group on Bribery in International Business Transactions composed of

¹⁹⁷ Belarus, non-member of the Council of Europe, is also among the states that have ratified this convention: http://www.coe.int/fr/web/conventions/full-list/-/conventions/treaty/174/signatures?p_auth=AW77ROw8

¹⁹⁸ The review procedure is thus the same as that for the *Criminal Law Convention on Corruption*.

¹⁹⁹ http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf

representatives from the states parties. There are currently 41 signatory states of which seven are not OECD members.²⁰⁰

Inset N° 14

The OECD Report on Corruption

In its report on transnational corruption published in December 2014, the OECD offers “an analysis of the crime of corrupting foreign public officials”.²⁰¹ Covering the period from 15 February 1999 to 1 June 2014, the report quantifies and describes transnational corruption on the basis of information from 427 transnational corruption cases²⁰² settled since the entry into force of the OECD convention. In 41% of the cases involving businesses, their top-level management was directly implicated or at least aware of the acts of transnational corruption.

The report unveiled statistics concerning the sectors most affected by corruption, the origin of the foreign public agents corrupted (they were often from countries where the human development level was high, even very high), the average duration of cases of transnational corruption (more than 7 years), the nature of the sanctions against the perpetrators of these acts (compensation paid, prison, fines...).

One can conclude that the implementation of anti-corruption legislation is sometimes thwarted by difficulties encountered in the detection of cases of transnational corruption, which are often built around a complex scheme comprising numerous transactions, the intervention of intermediaries, complex business structures...

The report mentions an increase in global prosecution of the offense of transnational corruption, and in this regard, the United States is the country prosecuting the greatest number of cases of such corruption.²⁰³

The report also notes the businesses that have committed acts of corruption: 60% are major corporations; 59% of the cases concern four sectors: extraction, construction, transportation and storage; information and communication. 69% of sanctions for transnational corruption were imposed through regulatory channels as opposed to 31% through convictions.

While welcoming the progress made by states in the fight against transnational corruption (adoption of adequate legislation, prosecution of offenses...), the OECD concluded that it is necessary to bring pressure on states in order to incite them to reinforce their legislative arsenal for fighting transnational corruption and assure that the sanctions are effective, proportionate

²⁰⁰ <http://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf>

²⁰¹ Full text of the report: <http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>

²⁰² Of these 427 cases, 167 involved legal persons. Other figures are available on pp. 10-11 of the report.

²⁰³ See Figure 19 of the report, p. 33.

and dissuasive. In this regard, the OECD formulated the following suggestions for the states parties to its convention:

- make public a maximum of information related to cases of transnational corruption;
- reinforce law-enforcement authorities' detection and reporting mechanisms;
- allow law-enforcement officials to suspend or interrupt statute of limitations on prosecution in order to be able to conclude their investigations;
- in cases of transnational corruption, allow monetary sanctions as well as confiscation of the products and instruments of corruption.

The Case of France

In the context of monitoring compliance with the OECD convention, the review of France is currently in Phase 3. France adapted its criminal law to the provisions of the convention as emphasized by the Working Group in its report on Phase 1 (passage of the law of 30 June 2000 regarding the fight against corruption and providing for adding a Chapter V²⁰⁴ to the French criminal code regarding active and passive corruption and the responsibility of perpetrators of such crimes in the public administration sector). Thus, the transnational corruption of public officials in international business transactions is now regulated by Articles 435-1 to 435-15 of the French criminal code. And, for legal persons, the sanctions risked by committing an act of transnational corruption of foreign public officials are fines, the confiscation of the object having served or intended to serve to commit the offense, and the confiscation of the object that is the product, as stipulated Article 435-15.

However, in spite of such legislation, the results are meager, for few convictions have been handed down for corrupters (physical persons), and the sentences have been insufficiently dissuasive, as emphasized by the Working Group in its 23 October 2014 statement on France's implementation of the convention.²⁰⁵ Thus, French legislation needs yet further revising.

Here are several of the Working Group's points and recommendations regarding the fight against corruption and France's implementation of the convention, following its three reports on the three phases of the review.²⁰⁶

Regarding the criminal responsibility of legal persons, the Working Group noted that conditions for enforcement are the same as those provided for in the

²⁰⁴ Chapter V of the criminal code: “Des atteintes à l'administration publique des Communautés européennes, des États membres de l'Union européenne, des autres États étrangers et des organisations internationales publiques.” [Offenses against the Public Administration of the European Communities, the Member States of the European Union, Other Foreign States and Public International Organizations].

²⁰⁵ <http://www.oecd.org/corruption/statement-of-the-oecd-working-group-on-bribery-on-france-s-implementation-of-the-anti-bribery-convention.htm>

²⁰⁶ Phase 1 Report, 1999 (French only): <http://www.oecd.org/fr/daf/anti-corruption/conventioncontrelacorruption/2076569.pdf>; Phase 2 Report, 2004 (French only): <http://www.oecd.org/fr/daf/anti-corruption/conventioncontrelacorruption/26243002.pdf>; Phase 3 Report, 2012 (French only): <http://www.oecd.org/fr/daf/anti-corruption/FrancePhase3FR.pdf>

event of the corruption of a French public official. However, these conditions, strictly interpreted, could exclude criminal responsibility of legal persons when the offense is committed by a subordinate.

Among the Working Group's many recommendations to France, one finds:

- “encourage the development and adoption by business enterprises of internal control mechanisms, the establishment of ethics committees and alert systems for employees, and a code of conduct dealing with transnational corruption;
- draw the attention of judges to the importance of effective application of the criminal liability of legal persons to business enterprises prosecuted for corruption of foreign public officials.”

The Working Group deplored that since 2000 (the year of ratification) only 33 cases have been opened and that, among these, only one has resulted in a conviction by a court in first instance – which was then overturned on appeal.²⁰⁷ The absence of a final conviction of French corporations by the French judiciary does not, however, mean that corporations do not recur to corruption of foreign public officials, as attested by the numerous convictions of French companies for this in foreign jurisdictions.²⁰⁸

While welcoming the 2007 and 2011 legislative reforms regarding the fight against corruption, the Working Group considers that France does not vigorously carry out law-enforcement, especially in cases involving legal persons. Hence, the Group formulated a series of recommendations, in particular in corruption cases involving legal persons:

- clarify the requirements for criminal liability of legal persons so that they cannot avoid it by recurring to the use of intermediaries;
- organize continuing education for judicial authorities regarding the enforcement of criminal liability of legal person in corruption matters;
- increase the maximum amount of the fine risked for corruption by a legal person so that the sanction will be dissuasive and effective while remaining proportionate;
- sensitize companies to the offense of corruption of foreign public officials and to the sanctions they risk.

²⁰⁷ This was a case regarding the aeronautic and military conglomerate Safran, which was convicted in September 2012 by the Paris correctional court to a fine of € 500,000 for active corruption of foreign public officials. (Safran was accused of having paid bribes to high Nigerian officials to obtain a contract for producing 70 million identity cards in Nigeria.) Safran appealed in January 2015, the Paris appeal court overturned the ruling, acquitting the corporation. During the hearing held in September 2014, the prosecution had not demanded a sentence, considering that the responsibility of the company as a legal person could not be raised in this case. (22% of Safran – ex-Sagem – is held by the French state.)

²⁰⁸ For example, the French conglomerate Alstom was implicated and convicted in many cases of corruption of foreign public officials in Italy, Mexico, Zambia and Switzerland: <https://www.asso-sherpa.org/corruption-dagent-public-etranger-sherpa-souline-la-portee-de-la-condamnation-du-groupe-safran#.VgaNxPntmkp> (French only). Its most recent conviction was in 2014 in a United States jurisdiction for acts of corruption committed in several countries. The conglomerate pleaded guilty and paid a fine of €630 million, the biggest ever in the United States for a corruption case.

C) Regarding Organized Crime

The *United Nations Convention against Transnational Organized Crime*, which was adopted in 2000²⁰⁹ and entered into force in 2003, aims to “to promote cooperation to prevent and combat transnational organized crime more effectively” (Article 1). Article 10 deals with the liability of legal persons, requiring that each state party adopt

“such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in serious crimes involving an organized criminal group and for the offenses established in accordance with articles 5 [criminalization of participation in an organized criminal group], 6 [criminalization of the laundering of proceeds of crime], 8 [criminalization of corruption] and 23 [criminalization of obstruction of justice] of this Convention” (Article 10.1).

Further, pursuant to Article 10, *the liability of legal persons may be “criminal, civil or administrative”* (§ 2; emphasis added), without affecting the criminal liability of the physical persons who have committed the offenses (§ 3). This article also requires that each state party “ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions” (§ 4).

A Conference of the Parties was established “to combat transnational organized crime and to promote and review the implementation of this Convention” (Article 32.1).

Each state party is required to take “take the necessary measures, including legislative and administrative measures, ... to ensure the implementation of its obligations under this Convention” and to include in its domestic law the offenses named in Articles 5, 6, 8 and 23 (Article 34.1).

The *Convention* is complemented by three protocols that deal with specific activities and manifestations of organized crime: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*; the *Protocol against the Smuggling of Migrants by Land, Sea and Air*; the *Protocol against the Illicit Manufacturing and Trafficking in Firearms, Their Parts and Components and Ammunition*. To accede to any one of the protocols, a state must first be party to the *Convention against Transnational Organized Crime*.²¹⁰

Since 1963, thirteen legal instruments have been drafted by the United Nations.²¹¹ One in particular is worth mentioning in this context: the 1999 *International Convention for the Suppression of the Financing of Terrorism*,²¹²

²⁰⁹ A/RES/55/25, 15 November 2000: http://www.unodc.org/pdf/crime/a_res_55/res5525f.pdf

²¹⁰ <https://www.unodc.org/unodc/en/treaties/CTOC/index.html>

²¹¹ <http://www.un.org/en/counterterrorism/legal-instruments.shtml>

²¹² A/RES/54/109, 9 December 1999: http://www.un.org/fr/documents/view_doc.asp?symbol=A/RES/54/109&TYPE=&referer=http://www.un.org/en/terrorism/ga.shtml&Lang=E

ratified by 187 countries,²¹³ aims to prevent the financing of terrorism and to punish it by prosecuting its perpetrators.

The *Convention* defines the crime of financing terrorism as follows:

“Any person commits an offense within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offense within the scope of and as defined in one of the treaties listed in the annex,²¹⁴ or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”
(Article 2.1)

In brief, this convention aims to prosecute: any attempt at committing an act of terrorism (Article 2.4); complicity (Article 2.5.a); the organizer(s) and/or those giving the orders to commit such acts (Article 2.5.b). It requires states to “establish as criminal offenses under its domestic law the offenses as set forth in article 2” (Article 4), including for legal persons, specifying that “such liability may be criminal, civil or administrative (Article 5.1). Further, legal persons are to be “subject to effective, proportionate and dissuasive criminal, civil or administrative sanctions” which “may include monetary sanctions” (Article 5.3).

The convention requires financial institutions and entities involved in financial operations to exercise circumspection in the identification of “their usual or occasional customers, as well as customers in whose interest accounts are opened, and to pay special attention to unusual or suspicious transactions and report transactions suspected of stemming from a criminal activity” (Article 18.1.b).

Pursuant to the convention, states must prohibit “the opening of accounts, the holders or beneficiaries of which are unidentified or unidentifiable, (Article 18.1.b.i), and financial institutions are under obligation to take all necessary measures to identify legal persons.

The convention contains a series of articles that lay out the cooperation between the states parties in order to prevent and prosecute terrorist acts, pursuant to Article 2 cited above, ranging from, for example, the freezing and seizing of

²¹³ As of 4 December 2015.

²¹⁴ These are: *Convention for the Suppression of Unlawful Seizure of Aircraft* (1970); *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (1971); *Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons* (1973); *International Convention against the Taking of Hostages* (1979); *Convention on the Physical Protection of Nuclear Material* (1980); *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation* (1988); *International Convention for the Suppression of Terrorist Bombings* (1997); *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation*, (1988); *Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf* (1988).

suspected funds (Article 8.1) to legal action and extradition of persons involved (Article 9.2).

Another interesting aspect of this convention pertains to states' "extra-territorial" obligation. This last point requires states to take "all practicable measures... to prevent and counter *preparations in their respective territories for the commission of those offenses within or outside their territories*" (Article 18.1; emphasis added).

Adopted in 1989, but entered into force only 12 years later (2001), the *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*²¹⁵ encodes three sorts of offenses: 1. the recruitment, use, financing and instruction of mercenaries (Article 2); 2. offenses committed by the mercenary himself when participating directly in hostilities or committing a concerted act of violence (Article 3.1); 3. attempt to commit and complicity in a crime (Article 4). Further, the convention states that states parties "shall not recruit, use, finance or train mercenaries and shall prohibit such activities" (Article 5).

Although this convention currently is the primary binding legal instrument in this area on the international level, it is not without flaws: 1. it has no enforcement mechanism; 2. that the convention has been signed and/or ratified so far by only 33 states (no major country, neither the United States nor any of those that most frequently recur to mercenaries) limits its field of application. Worse, between the adoption of the text and its entry into force (12 years!), the definition of mercenaries in it has been rendered obsolete by the development of private military and security companies (PMSCs).

In 2010, the Human Rights Council's Expert Working Group submitted a draft convention on PMCSs providing for a committee in charge of monitoring and supervising the activities of PMSCs. The Working Group put forth the following arguments for the text's adoption, which generally are essentially those in favor of a treaty for TNCs, for PMSCs function on the same model as any TNC:

- i. serious human rights violations committed by PMSCs personnel;
- ii. lack of transparency and absence of effective accountability of PMSCs;
- iii. non-regulation of PMSCs activities in the countries in which they are operating;
- iv. prevailing uncertainty regarding the responsibility of states – be it states of origin, contracting states or states of deployment – and those of PMSCs;
- v. the definition mercenary in the *Protocol I to the Geneva Conventions* and in the *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries* does not generally apply to PMSCs personnel;
- vi. services furnished by PMSCs which do not lend themselves to self-regulation.²¹⁶

²¹⁵ A/RES/44/34, 4 December 1989: <http://www.un.org/documents/ga/res/44/a44r034.htm>

Owing to opposition from Western countries and their allies, this draft is still in abeyance.

D) Regarding the Work Place

By definition, all ILO conventions (189 to date), given the tripartite structure of this organization, are applicable to the private sector, thus to TNCs.²¹⁷ They cover practically all areas of work: minimum wage (*Convention N° 131*); women's work (*Conventions N° 45, 89, 103*); the length of the work day (*Conventions N° 1, 30, 31, 43, 47, 49, 153*); on-the-job health and safety (*Conventions N° 155, 161*); social security (*Conventions N° 102, 118, 157*); employment policy (*Convention N° 122*), firing (*Convention N° 158*); migrants workers (*Conventions N° 97, 143*); trade union freedom and the protection of trade union rights (*Convention N° 87*); the right to organize and to collective bargaining (*Convention N° 98*); forced labor (*Conventions N° 30, 105*); the worst forms of child labor (*Convention N° 182*); professional and employment discrimination (*Convention N° 111*)²¹⁸ etc.

Besides these conventions, the private sector and, consequently, TNCs are expected to respect both the spirit and the letter of the *Philadelphia Declaration*²¹⁹ concerning the aims and purposes of the ILO. It is worth citing here an extract of this declaration that states, among other things that:

*a. labor is not a commodity; b. freedom of expression and of association are essential to sustained progress; c. poverty anywhere constitutes a danger to prosperity everywhere; d. the war against want requires to be carried on with unrelenting vigor within each nation, and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare. (§ I)*²²⁰

An other original aspect of the ILO is that it insists that its conventions, contrary to other international treaties, must be observed even by states that have not formally ratified them. Consequently it requires of them periodic reports.²²¹

²¹⁶ Melik Özden and Alissa Ghils, *Mercenaries, Mercenarism and Human Rights* (Critical Report N° 8, Geneva: CETIM, November 2010): <http://www.cetim.ch/mercenaries-mercenarism-and-human-rights/>

²¹⁷ At the annual ILO conference during which decisions are made (including the adoption of the conventions and recommendations), each member state is represented by four delegates: two from government, one from the employer sector and one from the workers sector (ordinarily trade unionists) (ILO *Constitution*, Article 3.1). Each delegate has one vote (Article 4.1). The organization's Governing Body (its executive body) comprises 56 members of whom 28 represent governments, 14 employers and 14 workers. The 10 most industrialized member states (Brazil, China, France, Germany India, Italy, Japan, Russia, United Kingdom and United States) hold permanent seats, while the others are elected for three-year terms.

²¹⁸ <http://www.ilo.org/dyn/normlex/fr/f?p=1000:12000:0::NO::>

²¹⁹ Adopted 10 May 1944 at the 26th session of the International Labor Organization held in Philadelphia.

²²⁰ http://www.ilo.ch/dyn/normlex/en/f?p=1000:62:0::NO:62:P62_LIST_ENTRIE_ID:2453907:NO#declaration

²²¹ ILO *Constitution*, Article 19.e.

Moreover, in 1998, the organization adopted a declaration in which it requires of all of its members to “respect, promote and fulfill” certain conventions,²²² whether or not they have ratified them.²²³

E) Regarding Human Rights

Several international human rights instruments have specific articles concerning the private sector, including TNCs.

The *Convention on the Elimination of All Forms of Discrimination against Women*²²⁴ specifies, inter alia: “States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: (a) The right to work as an inalienable right of all human beings” (Article 11.1.a); the right to equal remuneration (Article 11.1.d); that states must prohibit, “subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status”; (Article 11.2.a); that “all contracts and all other private instruments of any kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void” (Article 15.3). Moreover, the convention requires states parties “to take all appropriate measures to **eliminate discrimination against women by any person, organization or enterprise**” (Article 2.e; emphasis added). Further, the convention lists the specific rights of rural women, which include, among others, the right to work (as an employee or independently) and social security (Article 14).

The *Convention on the Rights of the Child*²²⁵ emphasizes, among other things, “the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development” (Article 32.1), and provides for setting “a minimum age or minimum ages for admission to employment” as well as “appropriate regulation of the hours and conditions of employment” and “appropriate penalties or other sanctions to ensure the effective enforcement of the present article”. (Article 32.2)

The Committee on the Rights of the Child, the United Nations body entrusted with overseeing compliance with the convention, adopted in 2013 *General*

²²² Specifically: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced labor; the effective abolition of child labor; the elimination of discrimination in employment and in profession. That the ILO emphasizes certain conventions instead of promoting the entirety of its conventions is open to criticism. (In this regard, see Melik Özden (ed) *The Right to Work* (Geneva: CETIM, September 2008) p. 40, <http://www.cetim.ch/product/the-right-to-work/>).

²²³ *ILO Declaration on Fundamental Principles and Rights at Work*: <http://www.ilo.org/declaration/lang--en/index.htm>

²²⁴ A/RES/34/180, 18 December 1979; ratified by 189 states (as of 11 December 2015).

²²⁵ A/RES/44/25, 20 November 1989; ratified by 196 states (with the sole exception of the United States, which signed it; under United States law, without ratification, it is a dead letter), thus conferring upon the text an almost universal character.

General Comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights.²²⁶ Among these obligations are measures to be taken regarding TNCs, taking into account that “the way in which transnational corporations are structured in separate entities can make identification and attribution of legal responsibility to each unit challenging” (§ 67). In this regard, the Committee requests, inter alia, that states “focus their attention on removing social, economic and juridical barriers” to access to effective judicial mechanisms for children; make “provision for collective complaints, such as class actions and public interest litigation”; “provide special assistance to children who face obstacles to accessing justice, for example, because of language or disability or because they are very young” (§ 68); and “consider the adoption of criminal legal liability – or another form of legal liability of equal deterrent effect – for legal entities, including business enterprises, in cases concerning serious violations of the rights of the child, such as forced labor” (§ 70).

Taking into account that “suppliers may be involved in the use of child labor, subsidiaries may be engaged in land dispossession and contractors or licensees may be involved in the marketing of goods and services that are harmful to children”, (§ 38), the Committee considers that the extraterritorial activities of TNCs must be regulated by the states of origin (or where headquartered):

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

The **International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families**²²⁷ prohibits slavery, servitude, forced and compulsory labor (Article 11.1 and 11.2), all discrimination concerning, inter alia, remuneration and conditions of work (Article 25); recognizes the right of association (Articles 26 and 40), equality of treatment regarding dismissal and unemployment benefits (Article 54); but allows states parties to restrict – under certain conditions – free choice of remunerated activity (Article 52).

Under the **Convention on the Rights of Persons with Disabilities**,²²⁸ the states parties “recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labor market and work environment that is open, inclusive and accessible to persons with disabilities” » (Article 27.1). the convention requires the states parties “to take all appropriate measures to eliminate **discrimination on the basis of disability by any person, organization or private enterprise**” (Article 4.e; emphasis added). It further requires “...private entities that provide services to the general public, including through the Internet,

²²⁶ *General Comment N° 16*, CRC/C/GC/16, 17 April 2013.

²²⁷ A/RES/45/158, 18 December 1990; ratified by 48 states as of 11 December 2015.

²²⁸ A/RES/61/106, 13 December 2006; ratified by 160 states as of 11 December 2015.

to provide information and services in accessible and usable formats for persons with disabilities (Article 21.c). The convention also requires states parties to “prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner”(Article 25.e).

The *United Nations Declaration on the Rights of Indigenous Peoples*²²⁹ recognizes the rights of indigenous peoples regarding all sorts of activities – including economic activity – on their territory and their right to participate in the making of all decisions affecting themselves. The following are pertinent articles.

The declaration requires of member states that they “shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (Article 19).

It also stipulates that “states shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent” (Article 29.2).

Article 32.2 requires states to “consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of their mineral, water or other resources”.

The declaration also recognizes indigenous peoples' right “to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent” (Article 28.1).

In *conclusion* to this chapter, one might point out that the norms applicable to legal persons, hence to TNCs, are fragmented (each one applies to only one very specific area such as certain toxic products or organized crime); they do not deal with the entirety of human rights (with the exception of certain aspects of the rights of groups considered vulnerable such as women and children); they are not universal (have not been ratified/recognized by all states); and there is no coherent implementation (lack of enforcement mechanisms for some and/or a lack of adequate means for the mechanisms where they exist).

²²⁹ A/RES/61/295, 13 September 2007. Although for some states (e.g. the United States) this declaration is not considered legally binding, it has become the primary reference on the subject of the rights of indigenous peoples.

V. INITIATIVES TO END TNCs IMPUNITY

A) Switzerland

As the world's twentieth biggest economic power, Switzerland is home to numerous TNCs headquarters. According to a recent study by the University of Maastricht (covering over 1,800 cases), Switzerland ranks ninth among countries most frequently cited for human rights violations by its corporations.²³⁰ To end this, in 2011, a coalition of development, environmental and human rights organizations, including the CETIM, launched a petition, “Rights without Borders”.²³¹ Its purpose was to incite the Swiss parliament and government to take measures obliging corporations headquartered in Switzerland to respect human and environmental rights throughout the world. This demand was broadly supported: more than 135,000 persons signed the petition thus asserting that corporations' voluntary measures are not enough to protect human and environmental rights.²³²

Faced with the inaction of both the government and the parliament, a new, enlarged coalition (76 organizations),²³³ including the CETIM, launched a federal people's initiative²³⁴ in order to hold responsible TNCs operating from Switzerland for their human and environmental rights violations committed outside the country. These obligations will apply to registered corporations as well as to the entirety of the business relations of any given TNCs. (English not being an official Swiss language, the text below of the initiative is unofficial.)

Launched 21 April 2015, the petition must be signed by 100,000 Swiss citizens by 21 October 2016 at the latest in order to be put on the ballot. While the result of such a vote cannot be predicted, it is already sure that the required number of signatures will be forthcoming.

The interest of the Swiss initiative is its complementarity to the United Nations initiative (see below), and, in this regard, it will contribute to putting the brake on TNCs' “jurisdictional tourism”.

²³⁰ <http://konzern-initiative.ch/de-quoi-il-s-agit/examples-de-cas/?lang=fr> [French only].

²³¹ <http://www.droitsansfrontieres.ch/fr/campagne/revendications/> (French and German only).

²³² http://konzern-initiative.ch/wp-content/uploads/2015/04/KVI_Infobroschuere_F_A4_quer.pdf [French only]

²³³ <http://konzern-initiative.ch/coalition/?lang=en>

²³⁴ The people's initiative is a political right enshrined in the Swiss constitution enabling a group of citizens to request a partial or total amendment to the constitution. To have effect, the initiative must be signed by at least 100,000 citizens with the right to vote within a period of 18 months (Swiss Constitution, Articles 136 – 139).

Inset N° 15

Text of the Swiss People's Federal Initiative "Business Enterprises Responsible for Protecting the Human Being and the Environment"²³⁵

The Federal Constitution will be amended as follows:

Art. 101a Responsibility of Business

1. The Confederation shall take measures to strengthen respect for human rights and the environment through business.

2. The law shall regulate the obligations of companies that have their registered office, central administration, or principal place of business in Switzerland according to the following principles:

a. Companies must respect internationally recognized human rights and international environmental standards, also abroad; they must ensure that human rights and environmental standards are also respected by companies under their control. Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.

b. Companies are required to carry out appropriate due diligence. This means in particular that they must: identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken. These duties apply to controlled companies as well as to all business relationships. The scope of the due diligence to be carried out depends on the risks to the environment and human rights. In the process of regulating mandatory due diligence, the legislator is to take into account the needs of small and medium-sized companies that have limited risks of this kind.

c. Companies are also liable for damage caused by companies under their control where they have, in the course of business, committed violations of internationally recognized human rights or international environmental standards. They are not liable under this provision however if they can prove that they took all due care per paragraph b to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken.

d. The provisions based on the principles of paragraphs a-c apply irrespective of the law applicable under private international law.

²³⁵ <http://konzern-initiative.ch/wp-content/uploads/2015/04/unterschriftenbogen-FR-A4.pdf> [French only]

B) United Nations

In 2014, after two abortive attempts and two diversionary mandates,²³⁶ the United Nations Human Rights Council, on the initiative of Ecuador and South Africa, established an open ended intergovernmental working group to draft a legally binding international instrument to regulate under international human rights law the activities of TNCs and other business enterprises.

Adopted by a slender majority, the resolution setting up the working group²³⁷ provides that “the first two sessions of the open-ended intergovernmental working group shall be dedicated to conducting constructive deliberations on the content, scope, nature and form of the future international instrument, in this regard” (§ 2). It further provides that the working group “should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group” (§ 3).

Inset N° 16

Previous Efforts within the United Nations to Establish Binding Norms²³⁸

In 1974, the United Nations Economic and Social Council (ECOSOC) established the Commission on Transnational Corporations and the Center on Transnational Corporations with the mandate to draft a code of conduct for transnational corporations. Although the Commission on Transnational Corporations produced a compromise on “the majority of provisions” of its code of conduct (which was to be – in theory, at least – binding), the code ended up a dead letter. Moreover, in 1993 and 1994, these two bodies were dismantled.

In 2003, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*²³⁹ was adopted by the former Sub-Commission for the Promotion and Protection of Human Rights²⁴⁰. In spite of their short-comings, these norms were a serious attempt to create a binding legal framework for effective control of the activities of TNCs.

The reaction from the employers' sector was a frontal attack. Through the International Organization of Employers (IOE) and the International Chamber of Commerce (ICC), it firmly opposed any binding regulation and insisted that the Sub-Commission draft a voluntary code of conduct. In 2004, these two organizations sent a 40-page document to all states insisting that the Commission

²³⁶ These included the Forum on Business and Human Rights, established in 2011 to promote, in particular, John Ruggie's *Guiding Principles on Business and Human Rights*. For a detailed discussion see the CETIM's Bulletin N° 43 (August 2012): <http://www.cetim.ch/legacy/en/documents/bull43ang.pdf>

²³⁷ Human Rights Council, Resolution 26/9, 26 June 2014, adopted by 20 in favor, 14 against and 13 abstentions; Human Rights Council, Resolution 26/9, 26 June 2014 (see Annex N° 1).

²³⁸ For more information, see *Transnational Corporations and Human Rights* (CETIM, November 2005) and *Transnational Corporations: Major Players in Human Rights* (CETIM, 2011), above-mentioned.

²³⁹ E/CN.4/Sub.2/2003/12/Rev.2.

²⁴⁰ See resolution E/CN.4/Sub.2/RES/2003/16, 13 August 2003.

on Human Rights (ancestor of the current Human Rights Council and the Sub-Commission's parent body) refuse any discussion on the draft norms.²⁴¹ Their justifications:

- the norms would harm investment plans, especially in the countries of the Global South;

- the *Global Compact*, a voluntary partnership of TNCs and the United Nations was an amply sufficient tool – hence no need for binding norms;

- TNCs are not bound by human rights, for it is incumbent upon governments to respect them; hence adopting the norms would be tantamount to “privatizing” (SIC) human rights!

Acquiescing in this request, the Commission decided in 2005 to name a special representative of the Secretary General entrusted with the question of “transnational corporations and other business enterprises”: John Ruggie. The rest is history.

In 2011, the Human Rights Council established two mandates to promote John Ruggie's *Guiding Principles on Business and Human Rights*: a new working group on human rights and transnational corporations and other business enterprises and a Forum on Business and Human Rights.²⁴²

In spite of the maneuvers of the Western countries (with the European Union in the lead), the first session of the working group was held in July 2015.²⁴³ The discussion focused on the content and the form of the future treaty as well as its scope, to wit whether applicable only to TNCs or to any type of business enterprise.²⁴⁴ Some delegates went further, calling into question the very mandate of the working group, arguing that TNCs are not bound by human rights. Some of these points, requiring clarification, are discussed below.

1. The Definition of TNCs

In 1990, the ECOSOC Commission on Transnational Corporations – whose work was never completed (see Inset N° 16) – gave the following definition of TNCs:

“enterprises, irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or

²⁴¹ *Joint view of the IOE and ICC on the draft Norms on the responsibilities of transnational corporations and other business enterprise with regard to human rights.*

²⁴² This is discussed in detail in the CETIM's Bulletin N° 43 (August 2012): <http://www.cetim.ch/legacy/en/documents/bull43ang.pdf>

²⁴³ See also the CETIM's Bulletin N° 51: <http://www.cetim.ch/wp-content/uploads/Bulletin51VENweb.pdf>

²⁴⁴ *Report on the first session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, with the mandate of elaborating an international legally binding instrument, A/HRC/31/50, 5 February 2016.*

*otherwise, that one or more of them may be able to exercise a significant influence over the activities of the others, and, in particular, to share knowledge, resources and responsibilities with the others.*²⁴⁵

In the 2003 *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Right* 2003 (see Inset N° 16), the former Sub-Commission on the Promotion and Protection of Human Rights gave the following definitions of “TNC”, “other business enterprise” and “stakeholder”:

*“The term “**transnational corporation**” refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively.*

*The phrase ‘**other business enterprise**’ includes any business entity, regardless of the international or domestic nature of its activities, including a transnational corporation, contractor, subcontractor, supplier, licensee or distributor; the corporate, partnership, or other legal form used to establish the business entity; and the nature of the ownership of the entity. These Norms shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.*²⁴⁶

*The term ‘**stakeholder**’ includes stockholders, other owners, workers and their representatives, as well as any other individual or group that is affected by the activities of transnational corporations or other business enterprises. The term ‘stakeholder’ shall be interpreted functionally in the light of the objectives of these Norms and include indirect stakeholders when their interests are or will be substantially affected by the activities of the transnational corporation or business enterprise. In addition to parties directly affected by the activities of business enterprises, stakeholders can include parties which are indirectly affected by the activities of transnational corporations or other business enterprises such as consumer groups, customers, Governments, neighboring communities, indigenous peoples and communities, non-governmental*

²⁴⁵ E/1990/94, 12 June 1990.

²⁴⁶ E/CN.4/Sub.2/2003/12/Rev.2, 13 August 2003. §§ 3 and 4 are as follows:

“C. Right to security of persons

3. Transnational corporations and other business enterprises shall not engage in nor benefit from war crimes, crimes against humanity, genocide, torture, forced disappearance, forced or compulsory labour, hostage-taking, extrajudicial, summary or arbitrary executions, other violations of humanitarian law and other international crimes against the human person as defined by international law, in particular human rights and humanitarian law.

4. Security arrangements for transnational corporations and other business enterprises shall observe international human rights norms as well as the laws and professional standards of the country or countries in which they operate.”

organizations, public and private lending institutions, suppliers, trade associations, and others (§ 22).²⁴⁷

In his 2011 Guiding Principles on Business and Human Rights, J. Ruggie states that: “These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.”²⁴⁸

In its TNC definition, the UNCTAD discusses the subject of corporate control of affiliates:

²⁴⁷ E/CN.4/Sub.2/2003/12/Rev.2, §§ 20–22. In July, 2003, the CETIM and the AAJ suggested the following amendments in bold-face type: *Proposed amendments for the “Draft Norms on responsibilities of transnational corporations and other business enterprises with regard to human rights”*:

“The term **“transnational corporation”** refers to an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively. **Transnational corporations are legal persons under private law with a multiple territorial presence but a single decision-making centre for strategic decisions.**

Transnational corporations can function with a parent company and subsidiaries; can set up groups within a single activity sector, conglomerates or alliances with diverse activities; can consolidate through mergers or absorptions or set up financial holdings. The latter possess only the financial capital in shares with which they control companies or groups of companies. In all cases (parent company and subsidiaries, groups, conglomerates, alliances and holding companies), the most important decisions are centralized. These companies can establish domicile in one or several countries: in the country of the actual headquarters of the parent company, in the country where their principal activities are located and/or in the country where the corporation is chartered.

Transnational corporations are active in production, services, finance, communications media, basic and applied research, culture, leisure activities, etc. They act in these areas simultaneously, successively or in alternation. They can spread their activities over various territories, operating through *de facto* or *de jure* subsidiaries and/or suppliers, subcontractors and licensees. In these cases, the transnational corporation can maintain control of the “know how”, the marketing.

The term ‘other business enterprises’ includes any business or industrial entity, financial, service, etc. entity, regardless of [the international or domestic nature of its activities including a transnational corporation]; the corporate, partnership or other legal form used to establish the business entity; and the nature of the ownership of the entity, which maintains business relations from a position of subordination or dependence, *de facto* or *de jure*, with a transnational corporation, even if it appears to be an autonomous national or international company.

[These Responsibilities shall be presumed to apply, as a matter of practice, if the business enterprise has any relation with a transnational corporation, the impact of its activities is not entirely local, or the activities involve violations of the right to security as indicated in Paragraphs 3 and 4.] **The TNCs is jointly liable for the implementation of the legal norms in force and of this Directives and Recommendations with the “other business enterprises” defined above.**

Comments: the main feature of the “other business enterprises” included in these Directives and Recommendations, whether they are national or international, is their link of subordination to the transnational corporation.

The terms ‘subcontractor’ and ‘supplier’ designate enterprises that are de facto dependent on a transnational corporation in the sense that they receive most or all of their orders from this corporation (be it for a finished product, a part of a product, a service, etc.) or have an occasional contractual link. The term “licensee” designates the enterprise exploiting a patent, a brand or a license owned by a transnational corporation in return of a royalty paid to the transnational corporation. The transnational corporation is jointly liable for the implementation of the legal

“Transnational corporations (TNCs) are incorporated or unincorporated enterprises comprising parent enterprises and their foreign affiliates. A parent enterprise is defined as an enterprise that controls assets of other entities in countries other than its home country, usually by owning a certain equity capital stake. An equity capital stake of 10 per cent or more of the ordinary shares or voting power for an incorporated enterprise, or its equivalent for an unincorporated enterprise, is normally considered as a threshold for the control of assets (in some countries, an equity stake other than that of 10 per cent is still used. In the United Kingdom, for example, a stake of 20 per cent or more was a threshold until 1997.). A foreign affiliate is an incorporated or unincorporated enterprise in which an investor, who is resident in another economy, owns a stake that permits a lasting interest in the management of that enterprise (an equity stake of 10 per cent for an incorporated enterprise or its equivalent for an unincorporated enterprise).”²⁴⁹

2. Do TNCs Have Any Human Rights Responsibilities?

a) At the International Level

For a long time, it was considered that TNCs (and legal persons in general) could not be held accountable for human rights violations²⁵⁰ given that respect for human rights was considered incumbent on governments, which, alone, would be the subjects of international law. This is also the opinion of John Ruggie.²⁵¹ Regarding the business sector, it has done his best to avoid binding norms for them.²⁵²

norms in force and this Directives and Recommendations with the 'subcontractors', the 'suppliers' and the 'licensees' such as they are defined above.”

²⁴⁸ A/HRC/17/31, 21 March 2011, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, § c.

²⁴⁹ <http://unctad.org/en/Pages/DIAE/Transnational-corporations-%28TNC%29.aspx>

²⁵⁰ At this point, as we did in our previous publication on the subject, it might be 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.

²⁵¹ “It does not seem that the international human rights instruments discussed here currently impose direct legal responsibilities on corporations.” Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie, A/HRC/4/35, 19 February 2007, § 44. In his *Guiding Principles*, J. Ruggie was careful to clarify that “the Guiding Principles’ normative contribution lies not in the creation of new international law obligations”, Human Rights Council, *Guiding Principle on Business and Human Rights*, A/HRC/17/31, 21 March 2011, § 14.

²⁵² In a 5 November 2014 document, the International Organization of Employers (IOE) set three “red lines” not to be crossed, regarding the open ended intergovernmental working group: “a treaty text that would make the UN Human Rights Convention directly and legally applicable to companies; a treaty text that would favor access to remedy through extraterritorial jurisdiction over local solutions and/or result in the establishment of an international tribunal for business and human rights; a treaty text that would broaden the responsibility of business in comparison to the UN Guiding Principles.” *Draft strategy on IOE engagement in the 'Ecuador resolution' intergovernmental working group on*

This argument is not only contrary to international human rights law in force but also to its evolution. The ***Universal Declaration of Human Rights***²⁵³ 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, emphasis added).

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)

As stated above, 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*** (ancestor of 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”.²⁵⁴ The ECOSOC then confirmed this.²⁵⁵

Since 2008, the ***Human Rights Council*** has emphasized that “transnational corporations and other business enterprises have a responsibility to respect human rights”²⁵⁶

In 2014, the Human Rights Council repeated this.²⁵⁷

The former Sub-Commission for the Promotion and Protection of Human Rights²⁵⁸ 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***

business and human rights”: http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-11-05_Draft_IOE_Strategy_Engagement_with_Ecuador_Initiative_IWG_Final_.pdf

²⁵³ Adopted by the United Nations General Assembly 10 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.

²⁵⁴ Commission on Human Rights, Decision 2004/116, 20 April 2004.

²⁵⁵ ECOSOC, Decision 2004/279.

²⁵⁶ Human Rights Council, Resolution 8/7, 18 June 2008, and Resolution 17/4, 16 June 2011.

²⁵⁷ Human Rights Council, Resolution 26/9.

²⁵⁸ See note 7.

human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups."²⁵⁹

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. For William Bourdon²⁶⁰ it would be a remedy "worse than the illness, for these actors [TNCs] and they alone would be asked to repair the consequences of their own vile acts..."²⁶¹

This is a concern that must be taken seriously. But is it justified? In our opinion, no. The following arguments support our position.

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"²⁶²

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 incumbent upon states. In fact, states have obligations to the overall population on their territory, besides their international obligations (see also Chapter I.C.). 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 in their own favor economic treaties. 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

²⁵⁹ *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, Article 1:
<http://www.cetim.ch/wp-content/uploads/G0316008.pdf>

²⁶⁰ French lawyer and founder of the NGO Sherpa.

²⁶¹ William Bourdon, *Face aux crimes du marché: quelles armes juridiques pour les citoyens?* Paris: Découverte, 2010, p. 185.

²⁶² *The Activities of Transnational Corporations: The Need for a Legal Framework: Acts and Conclusions of the Seminar of Céligny*, (Geneva: CETIM, July 2001).

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),²⁶³ their favorite court, which is unfailingly favorable to them (see Inset N° 11), while states are denied this right.²⁶⁴ 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, as we have already emphasized above, 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, similar to all the other treaties mentioned herein (see Chapter IV). If its enforcement is left to the good will of TNCs, what difference will there be between binding norms and voluntary codes of conduct?

Sixth, if this concern turned out to be well founded, why would TNCs ferociously oppose submitting to binding human rights norms?

Finally, TNCs STN are not democratic and transparent entities. They defend private interests (especially those of a handful of majority shareholders) and not the general interest. They can also be ephemeral, can go broke, 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 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.

²⁶³ See A. Teitelbaum, *International, Regional, Subregional and Bilateral Free Trade Agreements*, above-mentioned.

²⁶⁴ See *Report of the Independent Expert on the promotion of a democratic and equitable international order*, § 16, above-mentioned.

b) Tendencies at the National Level

For almost two decades, the tendency has been for violations of economic, social and cultural rights, including those committed by legal persons (including TNCs), to be sanctioned by national courts. We have cited several examples in our previous publications²⁶⁵ as well as in this one. The following are several further examples.

Unocal, a United States oil corporation, was prosecuted in the *United States* for complicity in forced labor, rape and murder of Burmese peasants by Burmese soldiers hired by this corporation to provide security during the construction of a pipeline in the south of *Burma*. Seeing the danger of a conviction and the highly likely opening of its archives, Unocal preferred, in April 2005, to negotiate an out of court settlement with the victim.²⁶⁶ *Total*, a French oil company, was prosecuted in *France* for the same offenses, also committed during the pipeline building in Burma,²⁶⁷ but this time for *sequestration* (under Article 224-1 of the French criminal code), for forced labor does not exist under French law.²⁶⁸ This trial also ended with an out of court settlement.²⁶⁹

In *Italy*, the managers of the TNCs *Total* and *Eternit* were tried and given heavy sentences for “intentional environmental disaster” owing to their responsibility for serious violations of the right to a healthy environment and to health. (See Inset N° 17).

Inset n° 17

The Victory of the Asbestos Victims

For decades, the *Eternit* company produced asbestos in numerous places in *Italy*, even though the dangers for those working with this substance were known to the management of the company and especially to its owner, the Swiss Stephan Schmidheiny.

Hundreds of victims filed complaints in Italy against Stephan Schmidheiny and the Belgian baron Luis De Cartier. The case against the latter was abandoned owing to his death. On the other hand, Stephan Schmidheiny was sentenced to 16 in prison following the first judgement and to 18 upon appeal, for “intentional environmental disaster”, with 3,000 victims to his credit from just the persons working or living near his factories in Casale Monferrato, Cavagnolo, Rubiera and Naples. He was also sentenced to pay €50.9 million in compensation to the

²⁶⁵ See the CETIM Human Rights Series: <http://www.cetim.ch/human-rights-series/>

²⁶⁶ *Transnational Corporations and Human Rights*, (Geneva: CETIM, November 2005), above-mentioned, p. 23. This case seems about to be resuscitated in the United States: <https://www.earthrights.org/legal/doe-v-unocal>

²⁶⁷ Total, through its affiliate Total E&P Myanmar, was the main operator for the production of Yadana gas in Burma. Total and Unocal were part of a joint venture along with a Thai company, PTT-EP, and a Burmese company, MOGE, shares in which were respectively 31.24%, 28.26%, 25.5% and 15% (*Face aux crimes du marché: quelles armes juridiques pour les citoyens?* above-mentioned, p. 220).

²⁶⁸ *Ibid.*, p. 223.

²⁶⁹ *Ibid.*, pp. 227-228.

affected communities in order to finance the clean-up of land polluted by his company's activities.²⁷⁰

This first judgement is currently on appeal.²⁷¹ A second trial is under way in Italy against Schmidheiny for similar charges, in particular in relation to the asbestos mine in Balangero, near Turin, closed in 1990, where asbestos has already caused the death of 226 former workers out of some 1.600.²⁷²

A third trial is also under way in Italy for some 200 workers' deaths in the Swiss factories of Niederurnen (Glarus) and Payerne (Vaud). This trial also involves Thomas Schmidheiny, Stephan's brother who took over running Eternit Suisse in 1989. Similar complaints were filed in Switzerland but were rejected owing to the statute of limitations under Swiss law (10 years).

In March 2014, the European Court of Human Rights handed down a judgement questioning the statute of limitations in Swiss law for victims of illnesses linked to asbestos. Seized of the case, the European Court of Human Rights declared that “the application of deadlines of preemption or prescription has limited the right of access to a court to such an extent that the right of the plaintiffs was violated in its very substance, and this also involved a violation of article 6 §1 of the Convention [right to a fair trial]”.²⁷³ Following this judgement, the Swiss Federal Tribunal (Switzerland's highest court) finally accepted “the request of appeal concerning the claims for reparations and compensation for moral tort of the daughters of an asbestos victim [who had died in 2005 of cancer of the pleura]”.²⁷⁴ Nonetheless, in December 2015, the Swiss parliament refused to change the statute of limitations to 30 years.²⁷⁵

Like Eternit, the TNC *Tamoil* was sued for “environmental disaster” following the serious pollution of lands around the oil refinery some two kilometers from the city of Cremona.

The company reported itself in order to benefit from an amnesty for the previous period in exchange for the information provided to the authorities on the real situation regarding the pollution and its commitment to clean up the land and water.

In spite of reporting itself, the company continued to dump toxic products onto the land, owing to the poor sewerage situation of the refinery, a situation well known to the directors, who consciously ignored the situation.

²⁷⁰ “Processo Eternit, Schmidheiny condannato in appello a 18 anni”, *ilfattoquotidiano.it* (June 2013): <http://www.ilfattoquotidiano.it/2013/06/03/processo-eternit-schmidheiny-condannato-in-appello-a-18-anni/614639/>

²⁷¹ “Processo Eternit Italia, Stephan Schmidheiny si difende”, *tio.ch* (April 2014), <http://www.tio.ch/News/Svizzera/787849/Processo-Eternit-Italia-Stephan-Schmidheiny-si-difende/Mobile>

²⁷² “Eternit - Italie: La plus grande mine d’amiante d’Europe a tué 226 travailleurs”, *levif.be* (July 2013), <http://www.levif.be/info/belga-generique/eternit-italie-la-plus-grande-mine-d-amiante-d-europe-a-tue-226-travailleurs/article-4000346951545.htm>

²⁷³ *Howald Moor et autres c. Suisse*, <http://hudoc.echr.coe.int/eng/?i=001-141567>

²⁷⁴ Swiss Federal Tribunal statement, 26 November 2015, http://www.bger.ch/fr/press-news-4f_15_2014-t.pdf

²⁷⁵ <http://www.humanrights.ch/fr/droits-humains-suisse/cas-credh/cas-suisse-expliques/arret-credh-howald-moor-c-suisse>

Four of the directors were sentenced in July 2014 to up to six and a half years in prison.²⁷⁶

As just seen, the obligation to respect human rights already exists for private actors such as TNCs and also regarding economic, social and cultural rights, at both the national and the international level. It is thus appropriate to clarify this obligation, to develop instruments enabling its implementation and, accordingly, the sanctioning of the violators.

3. Why are Binding Human Rights Norms Necessary for TNCs?

Already in 1974, the United Nations General Assembly advocated regulation and control of TNC activities in these terms:

“All efforts should be made to formulate, adopt and implement an international code of conduct for transnational corporations:

a) to prevent interference in the internal affairs of the countries where they operate and their collaboration with racist regimes and colonial administrations; b) to regulate their activities in host countries, to eliminate restrictive business practices and to conform to the national development plans and objectives of developing countries, and in this context facilitate, as necessary, the review and revision of previously concluded arrangements; c) to bring about assistance, transfer of technology and management skills to developing countries on equitable and favourable terms; d) to regulate the repatriation of the profits accruing from their operations, taking into account the legitimate interests of all parties concerned; e) to promote reinvestment of their profits in developing countries.”²⁷⁷

These arguments are not only more relevant than ever, but the situation has worsened since the adoption of this resolution, for the concentration of economic and political power in the hands of the biggest TNCs and the monopoly they exercise over practically all sectors of economic activity allows them to dictate their law while ignoring the human rights of millions, even billions, of persons.

Complex legal montages, special status accorded certain major TNCs in some countries, short-circuiting of the national courts with jurisdiction granted to arbitration tribunals, and legislative differences among countries (criminal offense for legal persons does not exist in many countries) result in TNCs guilty of human rights violations very often escaping from legal action and, consequently, from sanctions.

²⁷⁶ “Cremona, i manager della Tamoil condannati per disastro ambientale”, *ilfattoquotidiano.it* (July 2014), <http://www.ilfattoquotidiano.it/2014/07/19/cremona-i-manager-della-tamoil-condannati-per-disastro-ambientale/1065835/>

²⁷⁷ *Program of Action on the Establishment of a New International Economic Order*, A/RES/S-6/3202, 1 May 1974, Chapter V.

When they are not complicit, states are often unarmed faced with the economic power of these entities. Many TNCs are richer and more powerful than the states that seek to regulate them. Most states simply do not have the ability to do it.

There is also a Global North-South dimension. More than 80% of the biggest TNCs have their headquarters in a country of the Global North, and the overwhelming majority of unpunished crimes and violations are committed in the countries of the Global South.

The same holds for sanctions against TNCs. For example, in 2015, the United States made the oil company BP pay \$18.7 billion for the pollution in the Gulf of Mexico.²⁷⁸ At the same time, the victims of Chevron in Ecuador are still waiting for justice and compensation after 26 years of litigation and in spite of an Ecuadorian court ruling. (See Chapter III.B.)

At present, there is no international mechanism for monitoring and sanctioning these entities. The initiatives taken until now have been limited and far from adequate, as we have analyzed in the preceding chapters.

Worse, owing to a multitude of free trade and investment treaties, TNCs can even sue states at the international level for any public decision contrary to their interests, their investments or even their future profits (see Inset N° 11). There is thus an anomaly at the international level: the TNCs benefit from a battery of legal instruments in defending their interests while their victims are bereft of any effective redress in their search for justice and for respect of human rights, workers' rights and environmental protection norms.

Another important argument important in favor of binding human rights norms for TNCs is statutes of limitations because of which some environmental crimes, even killings, are never prosecuted. Holding TNCs responsible for human rights violations, which by their very nature cannot be subjected to statutes of limitations²⁷⁹, would surely constitute an effective instrument in the fight against impunity.

Finally and most important is the danger that TNCs represent for democracy and the fulfillment of all human rights (civil, political, economic, social and cultural).

4. What Should A Future Treaty Cover?

In a written statement submitted to the first session of the open-ended intergovernmental working group on TNCs, the Global Campaign to Dismantle Corporate Power and Stop Impunity,²⁸⁰ of which the CETIM is a member, made

²⁷⁸ <http://tempsreel.nouvelobs.com/topnews/20150702.AFP2850/maree-noire-du-golfe-du-mexique-bp-annonce-un-accord-de-18-7-milliards-de-dollars.html>

²⁷⁹ These are: the crime of genocide; crimes against humanity; war crimes; the crime of aggression (as defined in Articles 6, 7, 8 and 8bis of the Rome Statute of the International Criminal Court), and also in the “economic and political rights of the indigenous population” as mentioned in the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity, adopted by the United Nations General Assembly, 26 November 1968.

²⁸⁰ The campaign comprises over a hundred social movements and organizations world-wide (<http://www.stopcorporateimpunity.org/>) and is a founding member of the 2013 *Treaty Alliance*, comprising many NGOS active within the United Nations (<http://www.treatymovement.com/>)

eight proposals regarding the content of the future treaty. In this chapter, we shall discuss in detail several of them that, in our opinion, are crucial.

a. Why a future treaty to deal with TNCs?

During the open-ended intergovernmental working group's first session (July 2015), the European Union and certain NGOs ferociously defended extending the future treaty to all business enterprises (local and international), regardless of size or structure. This was also defended by John Ruggie in his *Guiding Principles on Business and Human Rights*.²⁸¹ He went yet further in his oral presentation of the *Guiding Principles* to the Human Rights Council (June 2011), claiming that they were applicable even to “street vendors”.²⁸² Following this logic, the International Organizations of Employers (IOE) deplored that “extraterritorial jurisdiction” did not concern local businesses.²⁸³ The IOE made this point a pillar of its sabotage strategy.²⁸⁴

However, the open-ended intergovernmental working group's mandate is unequivocal. In the Human Rights Council's resolution defining the mandate, “other enterprises” denotes “all business enterprises that have a transnational character in their operational activities, and does not apply to local businesses registered in terms of relevant domestic law”.²⁸⁵

This definition seems appropriate to us given that the target is TNCs (in particular a few hundred of the most powerful of them)²⁸⁶ and not the corner baker or grocer nor a medium-size cleaning company or sawmill operating on the border of two countries. With their economic and political power and special status, the most powerful TNCs can escape all democratic, administrative and legal control. This is not at all the case of small and medium-size businesses that are part of the social and economic fabric of a given country. Moreover, one might characterize these businesses as “victims”, for they are often the losers in the TNCs' quest for monopoly. The TNCs' strategy consists of reinforcing their dominant position in the market, in practically all areas of production and services (agriculture/food, construction, industry, finance, leisure, IT etc.) by acquisitions and mergers, such as practiced by Google and other IT giants, to cite only this sector, in order to nip in the bud any competition or to acquire any innovation by starts-ups.

Further, besides the problems inherent in international arbitration tribunals such as the ICSID, TNCs are entitled to bring states before these instances (see

²⁸¹ “General Principles”, *Guiding Principle on Business and Human Rights*, A/HRC/17/31, 21 March 2011, p. 6: <http://www.cetim.ch/wp-content/uploads/G1112190.pdf>

²⁸² *Transnational Corporations: Major Players in Human Rights Violations*, Critical Report N° 10, Geneva: CETIM, December 2011, above-mentioned.

²⁸³ Oral statement of the IOE to the open-ended intergovernmental working group (July 2015): [http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel5/Others/Int
ernational_Organization_of_Employers_IOE.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session1/Panel5/Others/International_Organization_of_Employers_IOE.pdf)

²⁸⁴ In the above mentioned IOE document, one reads: “The IOE should also endeavor to push for the treaty to apply to all businesses, and not just MNEs [TNCs].” (See note 251)

²⁸⁵ Human Rights Council, Resolution 26/9, 26 June 2014, footnote N° 1.

²⁸⁶ According to a study published in 2011, 737 TNCs, through dense and complex networks at the international level, control the majority of TNCs, 80% of their overall assets, while 147 of them control 40%, *Transnational Corporations: Major Players in Human Rights Violations*, above-mentioned.

Inset N° 11). Small and medium-size businesses do not have this right, much less the financial resources necessary for undertaking such costly procedures. As the United Nations Independent Expert on the Promotion of a Democratic and Equitable International Order pointed out: “The 60 per cent of cases lost by States do hurt, and the billions of dollars awarded to investors are ultimately paid by the public, meaning that there is that much less money available for education, health care or infrastructure. Statistics show that about 64 per cent of the awards went to companies with over \$10 billion in annual revenue and 29 per cent to companies with between \$1 billion and \$10 billion in annual revenue, or to individuals with a net wealth of over \$100 million, indicating that the primary beneficiaries of financial transfers in investor-State dispute settlement awards have been ultra-large companies and super-wealthy tycoons.”²⁸⁷

Obviously, extending the treaty's scope to all businesses is a diversionary tactic, as is the claim by certain “experts” that TNCs are already subjected to too much regulation and that now small and medium-size businesses should be the focal point.²⁸⁸ The contrary is indisputably true, but one would be justified in suspecting that there are those who would paralyze the future mechanism, making it thus inapplicable to TNCs, for it could never oversee millions of “business enterprises” if the category included cooperatives, family farms and similar small businesses. The objective must therefore be to bring under the law entities that are outside the law, to wit the TNCs, by establishing an effective mechanism.

b. Sanctions and Double Imputation Liability of TNCs

As emphasized above, there is no provision for the criminal sanctioning of legal persons in many countries. Thus, it is indispensable that the future treaty provides not only for civil, criminal and administrative sanctions for legal persons (including TNCs) but also for double imputation liability: sanctions for legal persons **and** their managers and directors. This is already provided for in the international norms discussed in Chapter IV.

On the national level, the tendency is in this direction, if French legislation is any indication. Amended in 2004 and effective since the end of 2005, Article 121-2 of the French criminal code provides for double imputation liability in the case of legal persons: “***Legal persons***, except of the State, ***are criminally responsible***, under Articles 121-4 to 121-7, ***for offenses committed for their benefit by their bodies or their representatives***. (...) ***Criminal responsibility of legal persons does not exclude that of physical persons perpetrators or accomplices of the same acts***, subject to the provisions of the fourth paragraph of Article 121-3.”²⁸⁹

²⁸⁷ See *Report of the Independent Expert on the promotion of a democratic and equitable international order*, A/70/285, 5 August 2015 § 26.

²⁸⁸ “While small and medium-sized enterprises make up the vast majority of the world’s companies, they have been given considerably less attention in the global business and human rights debate, in spite of the fact that such enterprises could affect human rights in the same way as transnational corporations do and are less often subject to the same level of scrutiny. Human Rights Council, *Report of the Experts Working Group on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/29/28, 28 April 2015, § 76.

²⁸⁹ Emphasis added:

<https://www.legifrance.gouv.fr/affichCode.do;jsessionid=A1D614FF9B56E51972ED43B0A1E5FA0>

c. Joint and Several Responsibility of TNCs with the Contractual Chain

The future treaty must establish the obligation of TNCs to conform to international norms for human rights, workers' rights and environmental protection. It must also establish joint and several responsibility of TNCs with their contractual chain (affiliates, sub-contractors, licensees etc.) – the local companies that they control *de facto*. In other words, TNCs must answer for every violation committed by the contractual chain.

“The principle of joint and several responsibility of TNCs is an essential question when one takes into account the current practices of the entities in 'externalizing the costs' by pushing them onto their suppliers, sub-contractors, licensees and affiliates, while keeping the exorbitant profits for themselves. 'Externalization of costs' is a euphemism, for it allows TNCs to realize disproportionate profits relative to immensely low costs that they pay to their suppliers and sub-contractors for products or services free of accountability.”²⁹⁰

While it is limited to work-place relations, the tendency in Europe is in this direction. The 2013 Swiss *Ldét/Odét* law forces business owners to “take necessary contractual measures in order to be able to demand from their sub-contractors carrying out work within the framework or at the end of the contractual chain that they demonstrate their respect of minimal wage and working conditions”.²⁹¹ In this vein, the City of Geneva recently signed an agreement with the Geneva employers and trade unions to prohibit sub-contracting chains in the building sector.²⁹² In 2014, the European Union, too, adopted a directive concerning “posted workers” in order to combat wage dumping.²⁹³

Regarding the liability of TNCs for an affiliate enjoying distinct legal status, Professor Eric David pointed out the rulings of the European Court of Justice which, in the 1970s, recognized that “the parent company was responsible for the offenses committed its affiliate from the day that it held a majority of its capital and, especially, when it exercised a real 'power of control' over its affiliate”.²⁹⁴ For

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²⁹⁰ Alejandro Teitelbaum, *La armadura del capitalismo: El poder de las sociedades transnacionales en el mundo contemporáneo* (Barcelona: Icaria Editorial, January 2010) pp. 318 - 319.

²⁹¹ www.baumeister.ch/fileadmin/media/3_Politik_und_Kommunikation/Politische_Themen/Subuntern_ehmerhaftung/beilage2_mustervertragsklauseln_f.pdf

²⁹² See, inter alia, *L'événement syndical* (3 February 2016).

²⁹³ <http://eur-lex.europa.eu/legal-content/FR/TXT/?uri=URISERV%3Ac10508>. While the effectiveness of this measure is questionable (see in particular the article by Jacques Freyssinet: <http://www.lasaire.net/upload/files/Note%20Lasaire%20n%C2%B02042%20-%20La%20directive%20Europe%CC%81enne%20sur%20les%20travailleurs%20de%CC%81tache%CC%81s%20%28posted%20workers%29%20-%20par%20Jacques%20Freyssinet.pdf>), that the European authorities, under trade union pressure, adopt such measures is significant.

²⁹⁴ Eric David & Gabrielle Lefèvre, *Juger les multinationales : droits humains bafoués, ressources naturelles pillées, impunité organisée* (Brussels: GRIP and MARDAGA, 2015) p. 86. See, inter alia, two recent cases of price-fixing and unfair competition: Case T-566/08, *Total Raffinage Marketing*, 13 September 2013: <http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:62008TJ0566&from=FR> (French only) and Case T-372/10, *Bolloré*, 27 June 2012; <http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:62010TJ0372&from=FR> (French

him these criteria “are perfectly operational and applicable outside Europe as a means of holding TNCs accountable for the acts of their affiliates.”²⁹⁵

At the same time, there were similar rulings in Argentina. In 1973, the Argentine Supreme Court ruled that when the legal status of the affiliate is that of an independent entity, it is right to “lift the veil” of legal fiction and establish the economic reality so that the parent company cannot shirk its responsibilities. The Argentine affiliate of Parke Davis deducted as expenses from its tax liability abundant royalties that it paid to the parent company with headquarters in Detroit. This is a common practice of transnational corporations: declaring royalties paid to the parent company by the affiliate as expenses, thus hiding part of the profits. Also, in 1973, the same Supreme Court, in the Swift-Deltec case, ruled that when the parent company declared its affiliate bankrupt, thus absolving itself of the obligation to pay creditors and employees, the parent company must assume responsibility for the debts of the affiliate.”²⁹⁶

d. Obligations TNC Host States

The future treaty must establish the responsibility of host states to assure that TNCs respect their obligations and must take all necessary measures, including sanctioning these entities and chief directors under criminal and civil legislation.

In other words, the treaty must establish “universal jurisdiction”,²⁹⁷ enabling legal action in the host state for offenses committed by TNCs, regardless of where they occur.

This is a major part of the fight against TNCs impunity when one realizes that in 2013, according to UNCTAD data, 93 of the 100 biggest TNCs (in terms of foreign assets) had their main headquarters in “developed” countries (Europe, United States Israel, Japan, South Korea and Australia).²⁹⁸ Thus, the formal establishment of jurisdiction of the host state in a small number of countries would mean jurisdiction over a great number of TNCs and, consequently, prevention of future violations.

Host countries must guarantee access to their courts to the victims of violations committed by these entities in foreign countries. This is provided for in certain specific international norms mentioned above (those on the environment, on corruption and on organized crime in particular; see Chapter IV). It is also the case for the jurisprudence of the United Nations treaty bodies (see Inset N° 1). It is thus not an innovation.

It would be useful for the treaty to establish states' obligation to cooperate at the international level to assure that TNCs respect their obligations. Finally, it would also be useful for the treaty to reassert the hierarchical superiority of human rights norms over trade and investment treaties.

only).

²⁹⁵ Ibid.

²⁹⁶ A. Teitelbaum, *La armadura del capitalismo: El poder de las sociedades transnacionales en el mundo contemporáneo*, above-mentioned, pp. 25-26.

²⁹⁷ For more information, see: <https://trialinternational.org/fr/topics-post/competence-universelle/>

²⁹⁸ [http://webcache.googleusercontent.com/search?](http://webcache.googleusercontent.com/search?q=cache:b7QrRi5ULRoJ:unctad.org/Sections/dite_dir/docs/WIR2014/WIR14_tab28.xls+&cd=1&hl=it&ct=clnk&gl=ch)

[q=cache:b7QrRi5ULRoJ:unctad.org/Sections/dite_dir/docs/WIR2014/WIR14_tab28.xls+&cd=1&hl=it&ct=clnk&gl=ch](http://webcache.googleusercontent.com/search?q=cache:b7QrRi5ULRoJ:unctad.org/Sections/dite_dir/docs/WIR2014/WIR14_tab28.xls+&cd=1&hl=it&ct=clnk&gl=ch)

e. International Financial Institutions

The treaty must include the obligations of the international financial institutions, in particular the IMF and the World Bank. As we have already demonstrated in previous publications,²⁹⁹ the structural adjustment programs and economic policies imposed by these institutions affect the enjoyment of human rights and favor TNC interests. Yet, the IMF and the World Bank are United Nations specialized agencies, hence their decisions must conform to the *Charter of the United Nations* and respect human rights. These institutions must thus at a minimum be required to refrain from taking measures contrary to human rights.

5. Implementation Mechanism

The Global Campaign to Dismantle Corporate Power and Stop Impunity is proposing to set up a new ***International Tribunal on Transnational Corporations and Human Rights*** in order that persons, communities and states affected can have access to an independent international judicial instance to obtain justice regarding human rights violations committed by TNCs. It is also proposing the setting up of a public center for the control of transnational corporations to investigate, document, analyze and examine the practices of TNCs and their effects on human rights.

This proposal is favored over a United Nations treaty body for two reasons: 1) while United Nations bodies do remarkable and very important work, they, unlike the WTO's Disputes Settlement Board or the World Bank's International Center for the Settlement of Investment Disputes (ICSID), cannot enforce their decisions; 2) the treaty bodies are already submerged with work and their means are limited. If the implementation of a future treaty on TNCs were to be entrusted to such a treaty body, it would be necessary to endow it not only with the necessary financial means but also with enforcement powers.

For the future treaty and its enforcement mechanism to be effective, ***international cooperation and legal assistance among states*** are indispensable and must be made compulsory.

6. Victims' Rights

Besides the already mentioned five major principles established in international law to fight impunity for human rights violations (right to know, to justice, to compensation, to guarantees of non-recurrence of violations and states' obligation to take effective measures to fight impunity), four extremely important aspects of judicial procedure for victims of TNCs in their quest for justice need to be mentioned:

- no court costs;
- the possibility of class-actions;
- speedy trial;
- limits on out-of-court settlements.

²⁹⁹ Melik Özden, *Debt and Human Rights* (Geneva: CETIM, December 2007): <http://www.cetim.ch/product/debt-and-human-rights/>

a. No Court Costs

One of the biggest problems confronting the victims is the lack of financial means to file a complaint and carry the case through to a conclusion. This is all the more so that victims are sometimes facing TNCs endowed with means greater than those of the country under whose purview the case is to proceed. (e.g. the Chevron-Ecuador case, Chapter III.B.)

For example, the budget of the United Nations human rights protection mechanisms for 2014 was US\$34.6 million,³⁰⁰ 40% of what *General Motors* spends in two years (\$118 million) to sponsor the shirts of the *Manchester United* football team!³⁰¹ In the same vein, *Apple's* \$37 billion 2013 profit would suffice to pay for the work of these bodies until the year 3014!³⁰²

In order to limit the harmful consequences of this inequality, the procedures for victims of human rights violations should be free. This means that, once the person appealing to a court presents sufficient evidence of being a victim of human rights violations, that person should be exempted from any court costs including the possible obligation to pay the court costs of the accused in the event of an acquittal. Moreover, lawyers' fees, which usually represent the biggest cost in any case and constitute biggest impediment for victims seeking justice, should be assumed by the state.

Such a possibility, moreover, is explicitly provided for by the *Rules of the European Court of Human Rights*,³⁰³ although it is limited to persons without means. It is the same under some national legislation. For example, the Spanish law for "victims of terrorism"³⁰⁴ exempts these persons from all court costs and provides them with free legal counsel for the duration of the case. It should be emphasized that this law was voted in September 2011 when Spain was in a full economic recession. This demonstrates that the choice by a state of assuring cost-free judicial procedures to a limited group of plaintiffs is without influence on budgetary considerations and derives strictly from political decisions.

That being said, the financing of such procedures could be problematic for some countries without the necessary financial resources. Besides states' being obligated to take legislative measures against TNCs that often use delaying tactics against the victims (e.g. Chevron-Ecuador in the United States, Chapter III.B), one could also imagine the setting up of a fund that would be supported by a tax on TNCs.

³⁰⁰ Office of the United Nations High Commissioner for Human Rights, *OHCHR Report 2014*: http://www2.ohchr.org/english/OHCHRReport2014/WEB_version/allegati/Downloads/1_The_whole_Report_2014.pdf

³⁰¹ "Manchester United to get \$559 million in GM shirt sponsor deal", *Reuters* (4 August 2012): <http://www.reuters.com/article/us-soccer-manchesterunited-jerseys-idUSBRE8730KV20120804>

³⁰² "Fortune Global 500 (2013)", Wikipédia: [http://fr.wikipedia.org/w/index.php?title=Fortune_Global_500_\(2013\)&oldid=105977188](http://fr.wikipedia.org/w/index.php?title=Fortune_Global_500_(2013)&oldid=105977188)> (as of 6 August 2014).

³⁰³ Rules of Court, 1 January 2016, Article 100 ff.: http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf

³⁰⁴ Ley de reconocimiento y protección integral a las víctimas del terrorismo, (2011), Ley 29/2011, de Reconocimiento y Protección Integral a las Víctimas del Terrorismo, art. 48.1.

b. Possibility of Class-Actions Suits

Human rights violations, in particular those of economic, social and cultural rights, often affect a great number of victims. In order to facilitate court action, the victims should have the possibility of joining in a class-action suit.

This means that the victims must be able to designate one from among themselves as their representative who will file the suit in her/his own name and in the name of all the others, thus defending everybody's interests.

Such a measure would make it possible to avoid multiple and possibly contradictory suits, to reduce substantially the costs to the judicial system and to concentrate all means available to the victims on a single case.

Such procedures are provided for within the United Nations treaty bodies such as the Committee on Economic, Social and Cultural Rights.³⁰⁵ They are also provided for in some national legislation such that of Brazil, Canada, Portugal Sweden and the United Kingdom and the United States.³⁰⁶ In other countries, it is possible to bring action through an association having the status of a legal person encompassing all the victims.

c. Speedy Trial

The principles of a fair trial must be respected throughout the entire procedure. This involves, among other things, providing for a speedy trial, which is in the interest of both the victim and the accused. Thus, any instance recurred to must have the means necessary to allow the victims, in a reasonable amount of time, to obtain the conviction of those responsible as well as compensation. Otherwise, as the adage says, justice delayed is justice denied. This, for example, is what happened to the victims of asbestos who died before having their day in court.

d. Limits on Out-of Court Settlements

Another problem often observed is that of transactional solutions offered to victims to avoid a conviction. This is particularly important since the victims of human rights violations are in a vulnerable situation encouraging them to accept a prompt partial compensation in exchange for abandoning all litigation with its risks of a long, expensive trial, even if the trial would allow them to obtain full compensation as well as conviction of those responsible. From Unocal-Burma to *Probo Koala*, the examples are numerous.

In an era of neoliberal justice, everything seems to have a price, including serious crimes. For example, the head of Formula 1 Bernie Ecclestone in 2014 avoided a conviction for his involvement in a case of corruption and incitement to major fraud in return for paying US\$100 to the German judiciary.³⁰⁷ This sum, at first glance very big, must be put into context taking into account that it corresponds roughly 3% of the total assets of the accused; that Ecclestone's

³⁰⁵ <http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm>

³⁰⁶ Bruno Deffains, Myriam Doriat-Duban, Eric Langlais & Tatiana Markova, *Analyse économique de la prise en charge des victimes d'accidents collectifs par le droit*, University of Nancy 2, 2005, p. 29: <http://www.gip-recherche-justice.fr/catalogue/PDF/rapports/143-RF_Deffains_AZF.pdf> (data for 2004).

³⁰⁷ http://www.lemonde.fr/sport/article/2014/08/05/le-proces-ecclestone-prend-fin-contre-100-millions-de-dollars_4467052_3242.html

accomplice, Gerhard Gribkowsky, had been sentenced in 2013 to eight and a half years in prison for similar misdeeds.³⁰⁸

Even if sanctions imposed on banking institutions for tax evasion by the United States and some European countries amount to several hundreds of millions of United States dollars, or even billions of dollars, they are not dissuasive, since the banks can allow for such costs in their budgets without needing to change their way of doing business. (See Inset N° 12).

Worse, out of court settlements can be interpreted as “permission” to continue to commit the violations and the crimes. This is what the late **Roland Arnall**, founder of **Ameriquest**³⁰⁹, did to avoid convictions and turned to advantage his out of court settlements (donations to minority associations in the United States):

*“The case-by-case settlements with Ameriquest were worse than useless: they dissuaded neither fraud nor further depredation against minorities. Arnall saw in the fines and donations imposed by these settlements a veritable license to defraud. The fines were not – by far – heavy enough to cancel out the profits from the fraud. These out of court settlements only improved Arnall’s image and the reputation. He came out of it richer and more powerful.”*³¹⁰

Obviously, this is not a matter of prohibiting transactional solutions. On a case-by-case basis, they can be considered, but they must be sufficiently dissuasive to put an end to certain practices and to not perpetuate impunity.

³⁰⁸ He was finally released on 3 March 2016: <http://www.motorsinside.com/fl/2016/actualite/20694-Gerhard-Gribkowsky-va-sortir-de-prison.html>

³⁰⁹ A mortgage lending institution that was at the heart of the United States sub-prime crisis (2007-2010) owing to its fraudulent transactions.

³¹⁰ *Les banquiers contre les banques*, above-mentioned, p. 64.

CONCLUSION

It has been demonstrated many times,³¹¹ including in this publication, that one of the major obstacles to the full enjoyment of human rights, and especially economic, social and cultural rights, is the concentration of economic power in the hands of the biggest TNCs while this power has no counterpart accountabilities.

Although it is clear that TNCs are supposed to respect human rights, there is currently no international mechanism enabling the monitoring and sanctioning of these entities. The initiatives taken so far have been limited and far from responding to what is at stake, as we have analyzed above.

One must also take into account that some environmental crimes or even killings elude justice through the statute of limitations. Clarifying the obligations of TNCs regarding human rights, which by definition can have no statute of limitations, would constitute an effective instrument in the fight against impunity.

Given the colossal magnitude of the violations committed by TNCs, an international instrument (future treaty) might appear insufficient. However, this would be a significant first step, and one must not forget the dissuasive role that such a treaty would play. In fact, the existence of such an instrument would be a clear message to human rights violators: such behavior will not be tolerated. It could also put an end – let us hope! – to the legal tourism of TNCs.

The adoption of the treaty in question necessitates obvious changes in states' policies regarding TNCs. Its implementation would also require effective international cooperation among countries.

To bring to fruition the process recently launched at the United Nations and obtain binding norms for TNCs, it seems to us indispensable that the people mobilize and create an alliance among those countries in favor of these norms, involving also social movements and even small and medium business enterprises.

Fighting TNC impunity also means fighting the danger that TNCs represent for democracy, for the fulfillment of all human rights (civil, political, economic, social and cultural) and for the very existence of states. If states wish to maintain the little credibility they still have and put an end to the principle that might makes right, they must act promptly against TNCs to subject them to the rule of law.

³¹¹ See also, CETIM human rights series and critical reports in which are cited numerous reports, studies and jurisprudence from regional and international human rights protection mechanisms: <http://www.cetim.ch>

VI – ANNEXES

Annex 1

Human Rights Council Resolution Establishing the Mandate for the Drafting of Binding Norms on TNCs

United Nations

A/HRC/RES/26/9



General Assembly

Distr. Générale
14 July 2014
Original: English

Human Rights Council

Twenty-sixth sessions

Agenda item 3

**Promotion and protection of all human rights, civil
political, economic, social and cultural rights,
including the right of development**

Resolution adopted by the Human Rights Council

**26/9 Elaboration of an international legally binding instrument on
transnational corporation and other business enterprises with respect to human rights**

The Human Rights Council,

Recalling the principles and purposes of the Charter of the United Nations,

Recalling also the Universal Declaration of Human Rights, International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights,

Recalling further the Declaration on the Right to Development, adopted by the General Assembly through its resolution 41/128 on 4 December 1986,

Recalling Commission on Human Rights resolution 2005/69 of 20 April 2005, in which the Commission established the mandate of Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and all previous Human Rights Council resolutions on the issue of human rights and transnational corporations and other business enterprises, including resolutions 8/7 of 18 June 2008 and 17/4 of 16 June 2011,

Bearing in mind the approval of the Guiding principle on Business and Human Rights by the Human Rights Council in its resolution 17/4,

Taking into account all the work undertaken by the Commission of Human Rights and the Human Rights Council on the question of the responsibilities of transnational corporations and other business enterprises³¹² with respect to human rights,

Stressing that the obligations and primary responsibility to promote and protect human rights and fundamental freedoms lie with the State, and that States must protect against the human rights abuse within their territory and/or jurisdiction by third parties, including transnational corporations,

Emphasizing that transnational corporations and other business enterprises have a responsibility to respect human rights,

Emphasizing also that civil society have an important and legitimate role in promoting corporate social responsibility, and in preventing, mitigating and seeking remedy for the adverse human rights impacts of transnational corporations and other business enterprises,

Acknowledging that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth, as well as causing adverse impacts on human rights,

Bearing in mind the progressive development of this issue,

1. *Decides to* establish an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights; whose mandate shall be to elaborate an international legally binding instrument to regulate in international human rights to law, the activities of transnational corporations and other business enterprises;

2. *Also decides* that the first two sessions of the open-ended intergovernmental working group shall be dedicated to conducting constructive deliberations on the content, scope, nature and form for the future international instrument, in this regard;

3. *Further decides* that the Chairperson-Rapporteur of the open-ended intergovernmental working group should prepare elements for the draft legally binding instrument for substantive negotiations at the commencement of the third session of the working group on the subject, taking into consideration the discussions held at its first two sessions;

³¹² "Other business enterprises" denotes all business enterprises that have an international character in their operational activities, and does not apply to local business registered in terms of relevant domestic law.



4. *Decides* that the open-ended intergovernmental working group shall hold its first session for five working days in 2015, before the thirtieth session of the Human Rights Council;

5. *Recommends* that the first meeting of the open-ended intergovernmental working group serve to collect inputs, including written inputs, from States and relevant stakeholders on possible principles, scopes and elements of such an international legally binding instrument;

6. *Affirms* the importance of providing the open-ended intergovernmental working group with independent expertise and expert advice in order for it to fulfill its mandate;

7. *Requests* the United Nations High Commissioner for Human Rights to provide the open-ended intergovernmental working group with all the assistance necessary for the effective fulfillment of its mandate;

8. *Requests* the open-ended intergovernmental working group to submit a report on progress made to the Human Rights Council for consideration at its thirty-first session;

9. *Decides* to continue consideration of this question in conformity with its annual work.

37th meeting
26 June 2014

[Adopted by a recorded vote of 20 to 14, with 13 abstentions. The voting was as follows:

In favour:

Algeria, Benin, Burkina Faso, China, Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, Philippines, Russian Federation, South Africa, Venezuela (Bolivarian Republic of), Vietnam

Against:

Austria, Czech Republic, Estonia, Germany, Ireland, Italy, Japan, Montenegro, Republic of Korea, Romania, the former Yugoslav Republic of Macedonia, United Kingdom of Great Britain and Northern Ireland, United States of America

Abstaining:

Argentina, Botswana, Brazil, Chile, Costa Rica, Gabon, Kuwait, Maldives, Mexico, Per, Saudi Arabia, Sierra Leone, United Arab Emirates]

Some Reference Websites

Intergovernmental organizations

- United Nations Conference on Trade and Development (UNCTAD). <http://www.unctad.org>
- Council of Europe. <http://www.coe.int>
- Global Compact - ONU. <http://www.unglobalcompact.org>
- High Commissioner for Human Rights. <http://www.ohchr.org>
- United Nations Research Institute for Social Development (UNRISD). <http://www.unrisd.org>
- Organisation for Economic Co-operation and Development (OECD). <http://www.oecd.org>
- International Labour Organization - OIT. <http://www.ilo.org>
- World Trade Organization - WTO. <http://www.wto.org>
- South Centre. <http://www.southcentre.org>

Business international organizations

- International Organisation of Employers (IOE). <http://www.ioe-emp.org>
- International Chamber of Commerce. <http://www.iccwbo.org/>

Civil society organizations³¹³

- Global campaign to dismantle corporate power and end TNCs' impunity. <http://www.stopcorporateimpunity.org>
- Treaty Alliance. <http://www.treatymovement.com/>
- MultiWatch – Swiss Network Organizations on TNCs. <http://www.multiwatch.ch>
- Initiative Suisse pour des multinationales responsables.
- <http://konzern-initiative.ch/?lang=fr>
- Mirador.
- <http://www.mirador-multinationales.be/>
- Observatoire des multinationales. <http://multinationales.org/>
- Observatorio de Multinacionales en América Latina, <http://omal.info/>
- Transnational Institute. <https://www.tni.org/en>,
- Corporate Watch. <https://corporatewatch.org/>
- Finance Watch. <http://www.finance-watch.org>

³¹³ It is a non-exhaustive list, bearing in mind that many organizations have been created in the last two decades. It refers mainly to collectives and/or specialised organizations in a given field (finance for example).

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- *Giftmüll: Afrika hungert, « da habt ihr unsern Dreck! »* (1989)
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