

TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS

**What is at stake in the United Nations debate over
*The Norms on the Responsibilities of Transnational
Corporations and other Business Enterprises with
Regard to Human Rights***

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

Appendix 10:

More than 30 years of CETIM publications on the theme: transnational corporations and human rights

(For presentations of our books and our issue on transnational corporations,
see our website <http://www.cetim.ch>)

Books

Suisse-Afrique du Sud: relations économiques et politiques (1972)
Ecumenical involvement in Southern Africa: investments, white migration, bank loans (1975)
Tourisme dans le Tiers Monde: mythes et réalités (1977)
Multinationales et droits de l'homme: exemple BBC-Brésil (1978)
Silence d'argent: la Suisse carrefour financier (1979)
Les médicaments et le tiers monde (1981)
Le vieil homme et la forêt: Jari une enclave en Amazonie (1981)
Pesticides sans frontières (1982)
L'aide alimentaire: un marché de dupes (1982)
La Bolivie sous le couperet (1982)
L'empire Nestlé (1983)
Tourisme et tiers monde: un mariage blanc (1984)
La civilisation du sucre (1985)
Alcool et pouvoir des transnationales (1986)
Marchands de sang: un commerce dangereux (1986)
La biotechnologie & l'agriculture du tiers monde: espoir ou illusion (1988)
Nos déchets toxiques: l'Afrique a faim, « v'là nos poubelles! » (1989)
Giftmüll: Afrika hungert, « da habt ihr unsern Dreck! » (1989)
La sève de la colère: forêts en péril, du constat aux résistances (1990)
La nature sous licence ou le processus d'un pillage (1994)
Sud-Nord: Nouvelles alliances pour la dignité du travail (1996)
Commerce mondial: Une clause sociale pour l'emploi et les droits fondamentaux? (1996)
AMI: Attention, un accord peut en cacher un autre! (1998)
La bourse ou la vie (1998)
Mondialisation excluante, nouvelles solidarités : soumettre ou démettre l'OMC (2001)
Via Campesina : une alternative paysanne à la mondialisation néolibérale (2002)
La finance contre les peuples : La bourse ou la vie (réédition revue et augmentée CADTM/Pire/
Syllepse/CETIM, 2004.)
ONU. Droits pour tous ou loi du plus fort ? Regards militants sur les Nations Unies (2005)
Mobilisations des peuples contre l'ALCA-ZLEA : Trait-€\$ de « libre échange » aux Amériques
(PubliCetim Nos 25/26, 2005)

Some recent articles of CETIM

“Les sociétés transnationales et droits humains”, published in *Associations transnationales*,
October-November 2002.
“L'urgence d'un encadrement juridique des STN au niveau international”, published in *Asso-
ciations transnationales*, October-November 2003.
“Pousser l'ONU à contrôler les transnationales”, published in *Le Courrier*, 17.09.2004.

Appendix 9:

Main reference websites

Official Websites

African Commission on Human and People's Rights. <http://www.achpr.org>
United Nations Conference on Trade and Development (UNCTAD). <http://www.unctad.org>
Council of Europe. <http://www.coe.int>
Global Compact – UN. <http://www.unglobalcompact.org>
Office of the United Nations 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 Labor Organization (ILO). <http://www.ilo.org>
World Trade Organization (WTO). <http://www.wto.org>

Activist Websites

Acción ecológica. <http://www.accionecologica.org>
American Association of Jurists (AAJ). <http://www.aaj.org.br>
Association Internationale de Techniciens (AITEC). <http://www.globenet.org/aitec>
Association Sherpa. <http://association.sherpa.free.fr>
Attac. <http://www.attac.org>
Berne Declaration. <http://www.evb.ch>
Centre for Research on Multinational Corporations (SOMO). <http://www.somo.nl>
Corporate Accountability International, formerly "Infact". <http://www.stopcorporateabuse.org>
Corporate Europe Observatory (CEO). <http://www.corporateeurope.org>
CorpWatch, formerly Corporate Watch USA. <http://www.corpwatch.org>
EarthRights International. <http://www.earthrights.org>
Global Exchange. <http://www.globalexchange.org>
Greenpeace. <http://www.greenpeace.ca>
Groupe de recherché pour une stratégie économique alternative (GRESEA).
<http://users.skynet.be/gresea/>
Ibon Foundation Inc. <http://www.ibon.org>
India Resource Center. <http://www.indiaresource.org>
International Baby-Food Action Network (IBFAN). <http://www.ibfan.org>
International Network of NGOs. <http://www.oecdwatch.org>
Les Amis de la Terre – France. <http://www.amisdelaterre.org>
Maquila Solidarity Network. <http://www.maquilasolidarity.org>
Multinationalmonitor. <http://multinationalmonitor.org>
MultiWatch – Swiss Network on TNCs. <http://www.multiwatch.ch>
OilWatch. <http://www.oilwatch.org.ec>
Observatorio de empresas Multinacionales Españolas en América Latina (OMAL).
<http://www.omal.info>
Public Citizen. <http://www.citizen.org>
Réseau des centres de documentation pour le développement et la solidarité internationale
(RITIMO). <http://www.ritimo.org>
Third World Network. <http://www.twinside.org.sg>
South Centre. <http://www.southcentre.org>

Other

Business and Human Rights Resource Centre. <http://www.business-humanrights.org>
Global Policy Forum. <http://www.globalpolicy.org>
International Chamber of Commerce (ICC). <http://www.iccwbo.org/>
International Organisation of employers (IOE). <http://www.ioe-emp.org>

INTRODUCTION

Transnational corporations (TNCs) continue to reinforce their hold on the natural resources of the planet, dictating their agendas to the weakest countries and exploiting their peoples. Directly or indirectly, they bear an enormous responsibility for the deterioration of the environment and for the systematic increase of human rights violations. Able to be both everywhere and nowhere, they escape from practically all democratic and judicial control.

Not a single day passes without news of events connected to transnational corporations: buy-outs and mergers entailing layoffs, corruption, war, pollution etc., with all the consequences that these imply. The current economic, political and ideological context has doubtless favored the TNCs' ascendancy, conferring upon them a power without precedent in history.

Of course, all TNCs do not systematically violate human rights. Some assume responsibilities more readily than others. All, on the other hand, follow the same logic: systematic use of the disparities between countries arising from unequal development in order to increase their profits. By doing so, they all, overall, accept the increase of these inequalities and the degradation of the quality of life of whole swathes of the world's population.

These practices, which are in effect throughout the whole world, have been meticulously furthered by the policies of the international financial institutions: after having largely contributed to the spiral of debt of poor countries, the International Monetary Fund (IMF) and the World Bank (WB) have imposed structural readjustment measures favorable to the TNCs. By impoverishing these countries, these measures have violated the human rights of these countries' populations such as the right to health and to life. Then, with the arrival on the scene of the World Trade Organization (WTO) and the absolute priority given to trade over all other considerations, the last brick of the edifice was put into place. The TNCs have since had essentially free rein within a framework tailor made by the IMF/WB/WTO triumvirate to serve TNC

interests. The unbridled privatizations that the WTO has championed, alone, have substantially added to the power of today's TNCs.

Employing (directly) only 3,7% of the world's total labor force,¹ TNCs control and orient most of its production, while amassing huge amounts of capital. The volume of business of the biggest TNCs equals or surpasses the gross national product (GDP) of numerous countries, and the volume of business of several of them is greater than the GDP of the 100 poorest countries combined (cf. the table on p. 6).

Notwithstanding these results, the TNCs have been elevated to the rank of "privileged development agents" by the promoters of neo-liberal globalization. They have the wind at their back, and they influence practically all aspects of life. Enjoying immense esteem, they have managed to enroll most governments in their service. The statement of the former United State Secretary of State, Colin Powell, concerning the economic agreement among the countries of the North American continent (FTAA), is, in this respect, revealing: "Our objective is the guarantee to North American businesses, through the Free Trade Agreement of the Americas, of the control of a territory that extends from the Arctic pole to the Antarctic, and to assure free access, without obstacles or difficulties, to our products, services, technologies and capital throughout the hemisphere."²

In the same vein, one might point out the arrogance of the president of the Swiss-Swedish industrial group Asea Brown Boveri (ABB), who stated: "I would define globalization by the freedom for my group to invest where it wants, for as long as it wants, to produce what it wants, supplying itself where it wants, and submitting to the least constraints possible regarding labor law and employee benefits."³

This supremacy goes hand in hand with the perpetration by TNCs of serious and widespread human rights violations, violations that rival those caused by governments, which are often complicit. These violations concern:

- damage to the environment;
- child labor;

¹ TNCs employ some 105 million persons out of a total of 2,831,501,000 employed persons in the world, according to International Labor Organization data. Cf. the ILO Sub-Commission on Multinational Corporations: GB.294/MNE/1/1 and <http://laborsta.ilo.org>.

² Quoted in *Alternatives Sud, Le Pouvoir des transnationales*, Louvain-la-Neuve, Belgium: Centre tricontinental (CETRI), 2002.

³ *Mondialisation excluante, nouvelles solidarités: soumettre ou démettre l'OMC*, published by the CETIM, GRESEA and L'HARMATTAN, October 2001.

believes that steps must be taken both in Switzerland and at international level in order to force Nestlé to respect the rights of trade unions, as stipulated by international conventions and the Columbian Constitution, and, if necessary, by taking cases to ordinary courts of law.

recommends that steps are taken in consultation with the ILO.

calls upon all international jurist organisations, churches, trade union organisations and NGOs to denounce Nestlé's actions and those of other multinationals that flout human rights and expose their employees to violence or dire poverty.

desires also that the Swiss authorities take heed of this brief, that they invite Nestlé to refocus its policies in Columbia, and implement in a more coherent manner the conditions imposed by the Swiss Ministry of external economic relations relating to the respect of human rights, and this especially with respect to the Columbian government.

We are particularly concerned by the fact that the rights and the lives of the trade unionists who came to testify in Berne will be threatened upon returning to their country. Lastly, we realise that the problems highlighted in Columbia also affect the Swiss people, who may also suffer from the consequences of globalisation and the destabilisation of work conditions. Even if the consequences are generally less severe for us, these developments should incite civil society to commit to defending the rights of workers with greater solidarity throughout the world.

Berne, 30 October 2005

Dom Tomás Balduino, Carola Meier-Seetaler, Anne-Catherine Menétrey-Savary, Rudolf Schaller, Carlo Sommaruga

globalisation prevails. Nevertheless, these consequences are particularly serious for countries such as Columbia, where those who lose their jobs risk falling into poverty or being enrolled in paramilitary violence or the guerrillas.

Third and fourth cases: out of date products and pollution

On several occasions between September and December 2002, stocks of out-of-date milk were found, which Nestlé had imported from Uruguay and Argentina and was busy repackaging, after changing the out-of-date labels. In its document, Nestlé claimed that this was a labelling error, although the company had to admit that the milk was well and truly out-of-date and unsuitable for consumption. In addition, this “error” occurred four times over a few months so it is difficult to conclude that this was simply coincidence! The witnesses and experts reported that on other occasions, Nestlé did not respect product quality and safety standards, putting the consumers' health at risk. They also recalled that children died in 1979 after being poisoned by contaminated powdered milk.

It was factory workers who discovered these problems and who informed the company managers. Realising that the latter would not listen, the authorities were informed and the merchandise was seized. Alas, the workers were the subject of reprisals and they are still being constantly threatened to this day.

Also in the chapter on contamination and poisoning, the experts denounced the serious pollution of waste waters which were released into rivers following the cleaning of tanks with toxic chemicals. These pollutants have a devastating effect not only on the aquatic fauna but also on the water tables, thus endangering the health of the population. According to the witnesses, Nestlé also lets very hot water run into the rivers and streams at times, thus causing serious damage. The council struggles to understand how a food company which aims to be unbeatable in terms of quality and safety can be caught contaminating water and adulterating milk in this way! Maybe the company imagines that its negligences are less damaging in a country like Columbia, whereas in Switzerland these events would cause a scandal! But maybe the company is wrong since, in this case, the public powers and the parliament are at last reacting, as if there was a threshold above which the State could no longer close its eyes and ignore the actions of large companies.

Conclusions

At the end of the hearing, impressed by all it had heard and by the seriousness and credibility of the evidence provided, the Council:

can only condemn Nestlé's actions in Columbia and believes that these are unacceptable from a multinational which claims to be worthy of the good reputation and trust it receives from its clients. Nestlé has overstepped all tolerable limits whether through its failings in terms of the quality of its products or the protection of the environment, or through its policies of dismantling the working conditions or its implacable hostility towards trade unions, or even through its aggressive methods in terms of economic policies.

- financial crime;
- inhuman working conditions;
- ignoring of workers' and trade union rights;
- attacks on the rights of workers and the murder of union leaders;
- the corruption and illegal financing of political parties;
- forced labor;
- the denial of the rights of peoples;
- perversion of government functions;
- the non-observance of the precautionary principle;
- criminal neglect entailing the death of thousands of persons;
- etc.

The disasters caused by TNCs are far from concerning only privatized public services (water, electricity, transports etc.); they touch practically every aspect of life. Indeed, highly sensitive sectors such as health and defense do not escape the long arm of the TNCs. The pharmaceutical corporations abandon, without the slightest compunction, insolvable AIDS victims while neglecting other illnesses such as tuberculosis or malaria. Whereas the official line vaunts the merits of the agreement on access to medicines for the countries of the South negotiated within the WTO at Doha (November 2001) and at Cancún (2003), epidemics continue to propagate, the sick continue to die (for the most part without any care), the price of medicines remains exorbitant and countries with the ability to produce generics are threatened by law suits and sanctions.

Even the “defense” of countries (it might be more realistic to speak of “attack capability”) has become a new market and is undergoing privatization. For a dozen years or more, mercenary companies, for the most part based legally in the United States, the United Kingdom and South Africa, have been offering their services to governments. They have the ability to intervene anywhere in the world and have already taken part in numerous conflicts in Africa, Latin America and Asia,⁴ Afghanistan and Iraq, where the United States army out-sources logistic and support tasks to mercenary supply corporations. Among others, Kellogg, Brown and Root⁵ are recent examples. Of course, these past few years, most of the Western countries have shifted from conscripted to professional armies. However, authorizing the setting up of mercenary corporations listed on a stock exchange and used in armed conflict

⁴ Cf. *Bilan* (Lausanne, Switzerland), September 2003.

⁵ Cf. *Le Monde diplomatique* (Paris, France), November 2004; *Le Courrier* (Geneva, Switzerland), 29 October 2003; http://agircontrelaguerre.free.fr/article.php3?id_article=97.

poses serious problems, including the functioning of democracy and the sovereignty of states, not to mention the serious violations of human rights and/or international law committed by these “new stake holders”. For example, mercenaries from DynCorp are “accused of procuring minors in Bosnia”.⁶ Moreover, this very company, in 2001, signed a contract for \$3 million with the United States Department of Defense for logistic support and training of rebels in South Sudan.⁷

This situation is all the more disturbing in that the transnational character of the activities of the TNCs allows them to be exempt from the purview of national and international laws and regulations that they consider unfavorable to their interests. It is thus urgent to find legal solutions adapted to this situation and to ask questions regarding the future.

⁶ Cf. *Bilan* (Lausanne, Switzerland), September 2003.

⁷ Cf. the investigation by François Misser, published in *La Libre Belgique* (Brussels, Belgium), 21 April 2003.
http://www.lalibre.be/article.phtml?id=10&subid=391&art_id113116.

to justice or to protect its employees, despite its power and influence within the heart of the Colombian state. According to the document handed to us, Nestlé expressed its condolences to the families concerned but without offering the slightest compensation.

The council believes that in this case, Nestlé failed in its task, whether by omission or abdication of responsibility, but that it is indirectly responsible in that its policy of blackmail and constant pressure on the workers was likely to generate violence.

Second Case: permanent layoffs and anti-trade union policies

At the beginning of 2002, the collective work agreements were due to be renewed in the Cicolac factory, but negotiations with the workers’ representatives led to nothing since Nestlé wished to dismantle its social agreements for salaries and medical services. While a strike was voted for, death threats led the trade union leaders to back down and so cancel their advance strike warning.

After various events linked to a supposed work stoppage, nine representatives from the trade union were dismissed. In the spring of 2003, a court of arbitration gave justification to Nestlé’s actions on the basis of a decision made in the absence of the workers representative. In this affair, the law was not respected, be it national laws or international conventions, in particular Conventions 87 and 98 of the ILO. Yet not only have the sacked workers lost their jobs but they have also lost their trade unionist status since, in Columbia, permanent employment is one of the conditions for belonging to a trade union. This manoeuvre clearly served to decapitate the trade union with a view to its permanent removal.

In the autumn of 2003, for the same reasons, Nestlé convened all its employees in separate meetings with representatives from the general management, in order to suggest that employees resign voluntarily in exchange for financial compensation. These workers were held virtual prisoners in hotels until they gave their agreement. 175 workers lost their jobs in this way. Only one employee refused this deal but he has now been relegated to an isolated office with no work to do. Instead of its regular employees, Nestlé employed temporary workers paid half the normal rate and with no social protection and no trade union rights.

This employment policy is in direct contravention with the law. It is particularly shocking that Nestlé should operate in this manner whilst boasting to be an exemplary company. We know that its management in Switzerland invests a lot of money into promoting the company’s image, in a costly marketing effort. In the document the company passed on to us, Nestlé claims to respect the freedom of unions and to be working for the greatest possible economic and social benefits for Columbia, thanks to 90% of its products being produced in the country. The witness statements that we heard give us no reason to believe this. Certainly this policy of employment deregulation and job insecurity also operates in Switzerland and everywhere where economic

Nestlé has been present in Columbia for the last 60 years and has continued to extend its empire by creating a near monopoly. Between 1947 and 1979, the company has acquired 13 factories and has closed 9. Its company policy has considerably evolved over the last few years, going from being a firm geared towards local production to being a multinational determining its imports and exports purely on the basis of its own profit, while scorning the needs of the country. In this way, the company has helped to enrich the large land owners which supply milk to Nestlé, much to the detriment of small producers and livestock-breeders who are often forced to leave their land. Its employment policy is nowadays characterised by a strong will to be rid of the unions, while 40 years of struggle had enabled the latter to greatly improve the lot of the factory workers. Nestlé is currently pursuing a restructuring policy in order to reduce its production costs, while its companies' profits continue to increase unabated.

Nestlé's dominance can also be explained by the corporation's ability to take advantage of the extremely troubled political situation reigning in the country. Currently, the State of Columbia seems to want to place itself completely at the disposal of the economy in general and of Nestlé in particular. Numerous examples were given, highlighting several areas where Nestlé benefited from substantial advantages, for instance in terms of taxation and grants. In addition, the carefully constructed and efficient network of people closely linked to the company and working in the administration and ministries, including tribunals, has ensured Nestlé's great freedom of action and near impunity. Nestlé has also succeeded in coming through the turbulences that have plagued the country and to profit from them, thanks to a connivance that borders on complicity. It is the workers who suffer most from this situation, particularly from the absence of impartial jurisdiction.

First case presented: murders and disappearances

The witnesses presented the 10 cases of workers assassinated by suspected paramilitaries between 1986 and 2005, generally trade union leaders. These murders generally took place during periods of conflict and tension within the Nestlé factories, at times when collective work agreements were being reconsidered, and, for some of these victims, the day before a strike. While Nestlé's responsibility may not be directly in question, the intimidation and blackmailing methods used are nevertheless indirectly so. When refusing to increase the price paid to land owners for their milk deliveries, Nestlé used the pay rises demanded by the workers as its excuse, while at the same time threatening to relocate its production centres. The trade unions were therefore seen as the enemies to bring down. However, it later emerged that it was the landowners who were in cahoots with paramilitary groups.

If Nestlé claims to be very concerned by the violence, its reaction was not as forceful as expected, with the pretext given that factory workers were not the only ones targeted, but managers too, and not only Nestlé's factories. Seeing this as a scourge beyond its control, Nestlé did nothing to bring the culprits

Power of TNCs			
Revenue and gross domestic product for a sampling of TNCs and countries ^a			
Rank	Corporation	Revenue in billions of US\$1998	Countries ^b (GDP approximate equivalent)
1	General motors (U.S.A.)	161.3	Denmark/Thailand
10	Toyota (Japan)	99.7	Portugal/Malaysia
20	Nissho Iwai (Japan)	67.7	New Zealand
30	AT&T (U.S.A.)	53.5	Czech Republic
40	Mobil (U.S.A.)	47.6	Algeria
50	Sears Roebuck (U.S.A.)	41.3	Bangladesh
60	NEC (Japan)	37.2	United Arab Emirates
70	Suez Lyonnaise des Eaux (France)	34.8	Romania
80	HypoVereinsbank (Germany)	31.8	Morocco
90	Tomen (Japan)	30.9	Kuwait
100	Motorola (U. S. A.)	29.4	Kuwait
150	Walt Disney (U.S.A.)	22.9	Belarus
200	Japan Postal Service (Japan)	18.8	Tunisia
250	Albertson's (U.S.A.)	16.0	Sri Lanka
300	Taisei (Japan)	13.8	Lebanon
350	Goodyear (U.S.A.)	12.6	Oman
400	Fuji Photo Film (Japan)	11.2	El Salvador
450	CSX (U.S.A.)	9.9	Bulgaria
500	Northrop Grumman (U.S.A.)	8.9	Zimbabwe
Five biggest corporations (revenue)		708.9 ^c	
The 100 poorest countries (GDP)		337.8	
Notes: ^a A more accurate comparison between countries and corporations would be based on the value added et not on the income of the corporations, but it is rare that corporations supply information on the value added in the annual reports. ^b Data from 1997. ^c General Motors, Daimler Chrysler, Ford Motors, Wal-Mart Stores et Mitsui.			
Source: Peter Utting, 2000, <i>Fortune</i> , 1999 and the World Bank, 1999, published in <i>Mains visibles : assumer la responsabilité du développement social</i> , UNRISD, Genève 2000.			

I. THE TRANSNATIONAL CHARACTER OF TNCs' ACTIVITIES AND THE EVASION OF THEIR RESPONSIBILITIES REGARDING HUMAN RIGHTS

To begin with, in order to better understand the problem of TNC responsibility, a definition of TNCs is in order.

A. Definition of TNCs

“The term 'transnational corporation' refers to an economic entity or a group of economic entities operating in two or more countries, whatever the legal framework, the country of origin or the country or countries of activity, whether its activity be considered individually or collectively. Transnational corporations are legal persons in private law with multiple territorial implantations but with a single center for strategic decision making.

“They can operate through a parent corporation with subsidiaries; can set up groups within a single economic sector, conglomerates, or alliances having diverse activities; can consolidate through mergers or acquisitions or can create financial holding companies. These holding companies possess only financial capital invested in stock shares through which they control companies or groups of companies. In all cases (parent company with subsidiaries, groups, conglomerates, alliances and holding company), the decision-making process for the most important matters is centralized. These corporations can establish domicile in one or several countries: in the country of the actual headquarters of the parent company, in the country where its principal activities are located and/or in the country where the company is chartered.

“Transnational corporations are active in production, services, finance, communications, basic and applied research, culture, leisure etc. They operate in these areas simultaneously, successively or alternately. They can segment their activities across various territories, acting through de facto or de jure subsidiaries and/or suppliers,

Nestlé refuses dialogue

The Nestlé corporation was invited to participate in this hearing, but declined the invitation, much to the council's regret. The multinational nevertheless sent a succinct document which aimed to refute, in advance, all accusations which would be made against it. On reading these few pages, the council realised that, even before knowing the content of the hearing and the composition of the jury, Nestlé was already expressing its scepticism and demonstrating a distinct disregard for this event, accusing the speakers of being partial and giving voice to “hysterical” accusations. We deplore this lack of openness towards any dialogue. Nevertheless, it was noted that the statements Nestlé made in its defence were taken into account by the members of the council, and were referred to when questioning the experts and witnesses. The answers received went far beyond the basic justifications made by the company and appeared much more convincing to us.

The council can only deplore this refusal to even consider the claims made by the Nestlé Columbia workers, since it believes that the Swiss multinational should assume responsibility wherever it is located in the world. During the day, the testimonies heard revealed that other companies in Columbia have practices which are just as worthy of criticism as those of Nestlé. But it is Nestlé which is considered here since we are in Switzerland and since we are particularly concerned with the policies of a company which are in contradiction with the commitments made in this country, both at national and international level. For example, we are shocked that Nestlé is one of the signatories of the “Global Compact” and yet apparently holds little regard for the principles enshrined therein. The council therefore considers it unacceptable that Nestlé should withdraw, as though the problems it faces with respect to its activities in Columbia should only be of concern in Columbia.

Presentation of the situation and Nestlé's place in Columbia

During the hearings, the events which unfolded exposed, first of all, the extremely difficult situation which reigns in Columbia. In this country where 20 lives are lost each day for political reasons, the workers, and in particular the trade unionists, are constantly threatened: 4000 trade union members have been murdered since 1987; thousands have disappeared; there have been 1700 cases of human rights violations against union members since President Alvaro Uribe rose to power in 2002, and 60% of the population is living in poverty.

It was also noted that legal guarantees to protect the rights of workers are non-existent. Paramilitary groups are numerous around large multinational companies, and violence is omnipresent, in a climate of threats, confrontations and fear. Within this context, the trade unions are described as organisations that are closely linked to guerrillas, even to terrorism, especially since the USA have put their “Columbian Plan” into action using billions of dollars. Nevertheless, the witnesses clearly stated that the trade unionists neither provide help nor receive help from the guerrillas. It must be highlighted that social movements remain very active and that resistance shows both determination and courage.

Public Hearing on Nestlé-Colombia

Final declaration from the Council

A public hearing and inquiry into Nestlé in Columbia was held on Saturday 29 October 2005 in Bern. This event was organised by Multi Watch, an organisation that was founded on 14 March 2005 and which consists of NGOs, trade unions, charitable organisations, political parties, church linked groups and social movements supporting the movement for “Another world is possible”.⁸⁸

On this occasion, representatives from the food trade union SINALTRAINAL denounced, in front of a council of 5 public figures acting as a sort of court of public opinion, four particularly shocking situations which occurred in factories in Columbia. At the end of the hearing, the council adopted the following declaration (outlined below).

The hearing lasted from 9am to 6pm. The Council Members included Carlo Sommaruga, Rudolf Schaller, Carola Meier-Seethaler, Dom Tomas Balduino and Anne-Catherine Menétrey-Savary. The political and social situation in Columbia was described by Miguel Puerto. The Columbian prosecutor was Alejandro Garcia Salzedo, the SINALTRAINAL union’s lawyer. His case was supported by the testimonies of Carlos Olaya Rodriguez, Alfonso Baron Sanchez, Onofre Esquivel Luna and Oswaldo Silva Ditta.

The People’s Permanent Tribunal was also present as an observer and consisted of Francesco Martone, Antoni Pigrau Solé and Gianni Tognoni.

The Council wishes to commend the excellent preparation of the event and the quality of the testimonies. The files which were presented were clearly assembled with great care and contained hundreds of pages, each with an impressive number of documents and incriminating evidence. The Council particularly commends the quality of the interventions made, as well as the courage of the experts and witnesses from Columbia, especially since the Council is very much aware that these workers face death threats and take risks by testifying openly.

⁸⁸ Founded in Switzerland “MultiWatch – campagne for Human Rights” has as its goal to alert public opinion about human right violations committed by Swiss transnational companies. MultiWatch is composed of the following groups: Alliance Sud, Attac Switzerland, Europe - Third World Centre (CETIM), Swiss Alliance of Development Organisations, Berne Declaration, EPER, Working Group Switzerland-Columbia (GTSC), Trade-unionist Youth Berne, Swiss Socialist Youth, The Greens, OeME Berne (Ecumenism - New Earth), OeME Berne-City Commission, OSEO, Bread For All, Swiss Labour Party (PDT-POP), Interprofessional Workers’ Union (SIT), Solifonds, SWISSAID, Terre des hommes Switzerland, Unia Berne (cf. <http://www.multiwatch.ch>).

subcontractors or licensees. In such cases, the transnational can maintain control over the 'know how' and the marketing.”⁸

Another definition, from the Commission on Transnational Corporations of the ECOSOC, whose efforts never bore fruit, emphasizes the quality of the business concern, independent of its legal character in private law, public law or both. Thus, according to this formulation, TNCs can be defined as:

“...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 activities 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 otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share knowledge, resources and responsibilities with the others.”⁹

B. Evasion of Responsibilities

Transnational corporations, as economic agents, are, in theory, subject to the law of a country, to the jurisdiction of its courts. The transnational group has not, as such, a distinct individual personality for each of the entities that constitute it, with the result that these entities can be held accountable for their acts only in a diffused manner, thus exploiting the different interests of the various countries within which they operate.

In order to evade their responsibilities, the TNCs recur to diverse abusive practices of which the following are some examples:

- the transfer of activities prohibited in one country to another with less stringent regulations and/or the obtaining of the least constraining regulations possible by threatening government and workers with relocation to another country (see Illustration 1);

⁸ Description formulated by the CETIM and the American Association of Jurists in *Proposed Amendments for the Draft Norms on Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, Geneva, July 2003: http://www.cetim.ch/en/documents/03stn_eng.pdf.

⁹ “Development and International Economic Co-Operation: Transnational Corporations – Annexe: Proposed Text of the Draft Code of Conduct of Transnational Corporations”, p. 5, E/1990/94 in *Economic and Social Council, Official Records, 1990, Supplement No. 1, United Nations, New York, 1991.*

- relocation of very dangerous industries and other activities to places where they will not be subject to strict regulation (see Illustration 2);
- relocation to countries with cheap labor and the least social security protection in order to reduce production costs and the use of front companies set up in such a way as to be deliberately complex (see Illustrations 1 and 3);
- fraud (see Illustration 4);
- artificial competition (see Illustration 5);
- influence networks (see Illustration 6); etc.

It goes without saying that, if this list is representative, it is far from exhaustive. The phenomenon of *maquiladoras* (located in free trade zones),¹⁰ where human rights violations (worker and trade union rights as well as the right to life) are frequently cited,¹¹ is another example. These “zones without rights” could be the subject of an entire chapter. Other issues, such as privatized prisons in certain countries,¹² where inhumane treatment and detention conditions are rampant, could also be cited.¹³ For lack of space, it is not possible to address all the problems posed by TNCs.

sion to invite the International Monetary Fund, the World Bank, the World Trade Organization, the United Nations Conference on Trade and Development, the United Nations Development Programme, the International Labour Organization, the United Nations Research Institute for Social Development and other relevant agencies to participate;

4. Decides that the agenda of the eighth session of the working group will be the following:

(a) Review of developments related to the responsibilities of business with regard to human rights;

(b) Consideration of possible situations where business may facilitate or generate human rights violations in different kinds of societies;

(c) Consideration of possible ways and means of protecting individuals or groups from harm caused by business activities; and

(d) Identification of appropriate responses in the case of specific violations of human rights;

(...)

¹⁰ Originally, the term was associated with the process of milling. In Mexico, it is still associated with the process of assembling imported components and with the exporting of finished products. United States corporations have built assembly plants in this country and enjoy numerous advantages. They are, in fact, authorized to import the components and the raw materials, to assemble them then export them, all duty free. Today, *maquiladoras* are to be found in Mexico and in Central America. They attract investors owing to the availability of cheap labor, weak labor and environmental protection legislation as well as low taxes. The finished products are mainly clothing, electronic goods, automobile parts etc. (cf. <http://www.maquilasolidarity.org>).

¹¹ Cf., among other sources, *Mobilisation des peuples contre l'ALCA-ZELA : Trait  de «libre  change» aux Am riques*, PubliCetim, Nos 25/26, 2005, in particular pp. 56-59.

¹² Primarily the United States, the United Kingdom and Australia.

¹³ Cf., among other sources, www.monde-pilomatique.fr/2004/09/DU_PASQUIER/11455 and http://www.penalreform.org/english/friset_art_en.htm: “Prison Privatisation” by Stephen Nathan.

Resolution of the Sub-Commission on the Promotion and
Protection of Human Rights on

The effects of the working methods and activities of transnational corporations on the enjoyment of human rights⁸⁷

(Adopted by consensus, 8 August 2005, E/CN.4/Sub.2/RES/2005/6)

The Sub-Commission on the Promotion and Protection of Human Rights,
(...)

Recognizing the work done by the sessional working group on the effects of the working methods and activities of transnational corporations on the enjoyment of human rights and by the Sub-Commission, including its draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights" (E/CN.4/Sub.2/2003/12/Rev.2),

Taking note of Commission resolution 2005/69 of 20 April 2005 on human rights and transnational corporations and other business enterprises,

Taking note also of the report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights (E/CN.4/2005/91),

Noting with appreciation the appointment by the Secretary-General of John Ruggie as his Special Representative on the issue of human rights and transnational corporations and other business enterprises,

Taking into account the background document prepared by the Secretary-General (E/CN.4/Sub.2/1995/11), the report of the Secretary-General (E/CN.4/Sub.2/1996/12 and Corr.1) and the background document prepared by El Hadji Guissé (E/CN.4/Sub.2/1998/6) concerning transnational corporations and the draft "Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights",

(...)

2. Invites members of the working group and of the Sub-Commission to prepare working papers for submission to the Sub-Commission at its fifty-eighth session and to the working group at its eighth session, as follows:

(a) Gáspár Bíró: a working paper on the role of States in the guarantee of human rights with reference to the activities of transnational corporations and other business enterprises;

(b) Chin-Sung Chung and Florizelle O'Connor: a working paper on bilateral and multilateral economic agreements and their impact on the human rights of the beneficiaries;

3. Decides, in view of the discussions that will take place at the first meeting of the working group during the fifty-eighth session of the Sub-Commis-

⁸⁷ Emphasis added by CETIM.

Relocations and Chipping Away at Labor Standards

China

In China, numerous subcontractors of TNCs such as Walt Disney, Wal-Mart, Nike and Reebok, "patently violate Chinese labor laws and disregard the guidelines that the multinationals are supposed to hold them to.... Regardless of what the multinationals may be doing to assure that company audits are properly conducted, the essential content is lacking. The Chinese subcontractors operate with very slender margins, too small to be able improve the on-the-job conditions of their workers. The best solution, for the multinationals would be to accept to pay more for the products that they order, while assuring that the price increase ends up in the pockets of the workers", notes Li Quiang, former worker and current director of China Labor Watch, based in the U.S.A.

Cf. *Le Monde* (Paris), 14 October 2005

Germany

Of course, all things considered, the erosion of labor laws is not the monopoly of the "world's workshop" (China). Edgar Oehler, director of Arbonia-Forster, has noticed a change in the mentality among German workers: "The workers and the unions have become more flexible regarding the implementation of the labor laws, whose unreal aspects they are aware of [sic]." Michael Girsberg, a Swiss furniture manufacturer, confirms this: "Earnings [in Germany] are lower than in Switzerland, and it is not necessary to pay differentials when they work two shifts."

Source: *Le Temps* (Geneva) 10 September 2005

Colombia

Among the TNCs present in Colombia, those active in the food and petroleum sectors are the best known at the international level pour their frequent human rights violations. Nestlé-Colombia represents an exemplary case study in the numerous problems posed by TNCs in the world.

The accusations made by the trade union Sinaltrainal against Nestlé are the following:

- its anti-union strategy extending to the destruction of local unions, in violation of Conventions 87 and 98 of the ILO;
- its co-responsibility in acts of violence (10 workers and union officials killed between 1986 and 2005) and in threats regarding union officials by paramilitaries during various labor disputes;

- its endangering of public health by selling outdated milk (in 1979, several children died, poisoned by contaminated infant formula) and by polluting the rivers with residual waters containing toxic substances;
- its strategy of monopolizing the milk market (Nestlé has closed nine plants out of the 13 that it has acquired in Colombia between 1947 and 1979) and of putting downward pressure on prices by importing powdered milk that is often subsidized, with obvious adverse consequences for the small milk producers and cattle raisers of Colombia (forced to abandon their land, very often with a push from the paramilitaries).

During public hearings on Nestlé in Colombia held in Berne on 20 October 2005, the council of “judges”¹⁴ condemned Nestlé’s practices in this country and deemed them “unacceptable from a multinational that claims to be worthy of the good reputation and trust it receives from its customers. Nestlé has overstepped all tolerable limits, be it in the poor quality of its products, its neglect of environmental protection, its policies of undermining working conditions, its implacable hostility towards trade unions, or the aggressive promotion of its economic policies.” Further, the council launched an appeal to all concerned to “denounce Nestlé’s actions and those of other multinationals that violate human rights and expose their employees to violence or dire poverty” and to take measures in Switzerland and in the international arena “in order to force Nestlé to respect the rights of trade unions, as stipulated in international conventions and the Colombian constitution, and, if necessary, by taking cases to ordinary courts of law”.

See the full text of the final declaration of the council in Annexe 8 and, among other sources, http://www.multiwatch.ch/fileadmin/Dateien//NestleKolumbien_Olaya.pdf

¹⁴ Made up of the following public figures: M. Dom Tomás Balduino, Bishop and President of the Pastoral Commission of the Brazilian Episcopal Conference (Brazil), Mrs Carola Meier-Seethaler, philosopher and writer (Switzerland), Mrs Anne-Catherine Menétrey-Savary, member of the parliament (Switzerland), Mr. Rudolf Schaller, lawyer (Switzerland) et Mr. Carlo Sommaruga, lawyer and member of the parliament (Switzerland). It should be added that the People’s Permanent Court has been given the responsibility to verify the results or the hearing and to include them in the session to take place in Columbia in 2006.

(e) **To compile a compendium of best practices of States and transnational corporations and other business enterprises;**

2. Underlines that the Special Representative of the Secretary-General should take into account in his or her work the report of the United Nations High Commissioner for Human Rights and the contributions to that report provided by all stakeholders, as well as existing initiatives, standards and good practices;

3. *Requests* the Special Representative, in carrying out the above mandate, to liaise closely with the Special Adviser to the Secretary-General for the Global Compact and to consult on an ongoing basis with all stakeholders, including States, the Global Compact, international and regional organizations such as the International Labour Organization, the United Nations Conference on Trade and Development, the United Nations Environment Programme and the Organization for Economic Co-operation and Development, transnational corporations and other business enterprises, and civil society, including employers’ organizations, workers’ organizations, indigenous and other affected communities and non-governmental organizations;

(...)

5. Requests the High Commissioner to convene annually, in cooperation with the Special Representative, a meeting with senior executives from companies and experts from a particular sector, such as the pharmaceutical, extractive or chemical industries, to consider, within the mandate of the Special Representative as set out in paragraph 1 above, the specific human rights issues faced by those sectors, to raise awareness and share best practice, and to report on the outcome of the first meeting to the Commission at its sixty-second session, under the same agenda item;

6. *Decides to* continue its consideration of this question at its sixty-second session;

Resolution of the Commission on Human Rights on

Human rights and transnational corporations and other business enterprises⁸⁶

(Adopted by a recorded vote of 49 votes to 3, with 1 abstention. 20 April 2005, E/CN.4/RES/2005/69)

The Commission on Human Rights,

Recalling its decision 2004/116 of 20 April 2004 on the responsibilities of transnational corporations and related business enterprises with regard to human rights,

Welcoming the report of the United Nations High Commissioner for Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights (E/CN.4/2005/91),

Recognizing that transnational corporations and other business enterprises can contribute to the enjoyment of human rights, inter alia through investment, employment creation and the stimulation of economic growth,

Recognizing also that the responsible operation of transnational corporations and other business enterprises and effective national legislation can contribute to the promotion of respect for human rights and assist in channelling the benefits of business towards this goal,

1. Requests the Secretary-General to appoint a special representative on the issue of human rights and transnational corporations and other business enterprises, for an initial period of two years, who shall submit an interim report to the Commission on Human Rights at its sixty-second session and a final report at its sixty-third session, with views and recommendations for the consideration of the Commission, with the following mandate:

(a) To identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;

(b) To elaborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation;

(c) To research and clarify the implications for transnational corporations and other business enterprises of concepts such as “complicity” and “sphere of influence”;

(d) To develop materials and methodologies for undertaking human rights impact assessments of the activities of transnational corporations and other business enterprises;

⁸⁶ Emphasis added by CETIM.

Relocation of Highly Dangerous Activities

Bhopal

On the night of December 2nd, 1984, over 40 tons of lethal methyl isocyanate (MIC) gas spilled out from Union Carbide's pesticide factory in Bhopal, India. With safety systems either malfunctioning or turned off, an area of 40 square kilometers, with a resident population of over half a million, was soon covered with a dense cloud of MIC gas.... In the first three days after the accident, over 8,000 people died in Bhopal, mainly from cardiac and respiratory arrest.

Since the disaster, over 20,000 people have died from exposure-related illnesses, and of the approximately 520,000 people exposed to the poisonous gases, an estimated 120,000 remain chronically ill.

Justice has eluded the people of Bhopal for over 17 years. Union Carbide negotiated a settlement with the Indian Government in 1989 for US\$ 470 million, US\$ 370 to US\$ 533 per victim, a paltry sum too small to cover most medical bills. In 1987, a Bhopal District Court charged Union Carbide officials, including then CEO Warren Anderson, with culpable homicide, grievous assault and other serious crimes. In 1992, a warrant was issued for Anderson's arrest. In November 1989, the official figure was 3,598 dead. In October 1990, the Indian government was talking of 3,828 dead as a basis for determining claims against Union Carbide. Later, the Bhopal investigative judge reported having done 4,950 post mortem examinations during the first five or six months of the 1985. The official count then went up to 4,136 in December 1992 and to 7,575 in October 1995 – almost double the number used as the basis for the settlement between the government and Union Carbide. The local survivors' organizations estimate that 10 to 15 persons continue to die every month. Further, some 100,000 persons who never received any compensation at all still require intensive medical attention. As for the site, it still has not been cleaned up and thus continues to contaminate the area's groundwater.

This is extracted from the Greenpeace file on Bhopal: <http://www.greenpeace.org/international/campaigns/toxics/toxic-hotspots/the-disaster-in-bhopal> .

Illustration 3

Complex Montages

The file on the *Prestige*: unpunished responsibility

TNCs have often resorted to complex financial set-ups for the transport of dangerous and polluting products in order to shirk the responsibilities and the real costs of their activities. An example of this is the oil tanker *Prestige*, which in November 2002 floundered off the coasts of Portugal, Spain and France, while carrying 77,000 tons of oil. It was registered in the Bahamas, managed from Greece (Coulouthros) and was carrying the oil of a Swiss company run primarily by Englishmen and whose current owners are Russian (Crown Resources of the Alfa Group). In most cases, the captain or the crew of the boat are indicted, if there are any indictments at all. In general, it is public entities and the people who pay for most of the damage caused.

In the case of the *Prestige*, the International Oil Pollution Compensation Funds (IOPC Funds)* announced that it would pay for cleaning up and compensation to victims only to a maximum of € 150 million. However, the IOPC had itself estimated that the total losses would be as high as a billion euros.

According to its bulletin of 8 November 2005, as reported by the Associated Press, the IOPC received 421 claims for compensation in France for a total of nearly € 99 million, including a claim from the French government of over € 67 million. For the time being, it has adjudicated 351 claims for compensation. As for Spain and Portugal, they, up to now, have put in claims for, respectively € 114 million and € 740 million.

Source: Press release from "Les amis de la terre" (France, 9 May 2003) and articles published in the French newspapers *Le Nouvel Observateur* (13 November 2005) and *Le Monde* (19 November 2005).

* The **International Oil Pollution Compensation Funds (IOPC Funds)** are three intergovernmental organizations (the 1971 Fund, the 1992 Fund and the Supplementary Fund) which provide compensation for oil pollution damage resulting from spills of persistent oil from tankers. (<http://en.iopcfund.org/>). It is worth noting that the maximum amount of compensation available, according to the 1992 convention, for the *Prestige* accident is € 171.5 million (cf. <http://en.iopcfund.org/newspdfs/Oct05e27.pdf>). Following the increase of "junkships", IOPC had to increase the level of compensation to about a billion euros (US\$ 1.082 million) starting on 1 November 2005 (<http://en.iopcfund.org/SDR.htm>). But will that be enough to repair the irreversible damage caused to the flora and the fauna? Preventing these boats from plying the seas seems to us equally difficult as long as there is no strict legislation in place that prevents this sector from resorting to "sacrifices" in the area of security and to complex montages in order to reduce costs.

Appendix 5:

Resolution of the Sub-Commission on the Promotion and Protection of Human Rights on

The effects of the working methods and activities of transnational corporations on the enjoyment of human rights⁸⁵

(Adopted by consensus, 12 August 2004, E/CN.4/Sub.2/RES/2004/16)

The Sub-Commission on the Promotion and Protection of Human Rights,
(...)

Mindful that, in the Vienna Declaration and Programme of Action, the World Conference on Human Rights reaffirmed the right to development as a universal and inalienable right and an integral part of all fundamental human rights, reaffirmed that the human person was the central subject of development and underlined the need for a concerted effort to ensure recognition of economic, social and cultural rights at the national, regional and international levels,

Noting that lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level,

Deeply concerned at the preponderance of the transnational corporations in all spheres of life and at the impact of their activities and working methods on human rights,

Bearing in mind the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Organization in November 1977,

Recognizing that the activities of the various United Nations organizations should be closely interrelated and that it is necessary to draw on all the efforts made in the various disciplines relating to the human person in order to promote all human rights effectively, (...)

2. *Supports* the Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986 and underlines the multidimensional, integrated and dynamic character of this right which favours a partnership for development and constitutes a relevant framework for international cooperation and national action aiming at universal and effective respect for all human rights in their universality, indivisibility and interdependence;

3. ***Decides to extend, for a three-year period, the mandate of the sessional working group of the Sub-Commission on the working methods and activities of transnational corporations, so that it can fulfil its mandate; (...)***

⁸⁵ Emphasis added by CETIM.

- 56 Instituto Latinoamericano de Servicios Legales Alternativos (ILSA) – Colombia
- 57 International Baby Food Action Network (IBFAN) & Geneva Infant Feeding Association
- 58 International Educational Development
- 59 International Federation of Tamil
- 60 International Indian Treaty Council
- 61 International Organization for the Elimination of All Forms of Racial Discrimination (EAFORD)
- 62 International Youth and Student Movement for the United Nations (ISMUN)
- 63 Japan Lawyers International Solidarity Association (JALISA)
- 64 Japanese Association for UN Voluntary Fund
- 65 League Demanding State Compensation for the Victims of the Public Order Maintenance Law / Japan
- 66 Les Amis de la Terre – Comité du Rhône, France
- 67 Ligue Internationale pour les Droits et la Libération des Peuples (LIDLIP)
- 68 Mouvement Contre le Racisme et Pour l’Amitié Entre les Peuples (MRAP)
- 69 Movimiento Indio Tupaj Amaru
- 70 Murkele Organization
- 71 National Lawyers Guild / USA
- 72 Nord-Sud XXI
- 73 Observatorio Vasco de Derechos Humanos - Behatokia
- 74 RIDPA-GEDPA
- 75 Socialpress – Italia
- 76 Solidarité pour les Peuples Autochtones des Amériques (SOPAM)
- 77 SOLIFONDS
- 78 Swiss Federation of Tamils
- 79 Tebtebba Foundation
- 80 Vanakkam Group
- 81 Walang Alifuru
- 82 West Africa Coalition for Indigenous Peoples Rights (WACIPR)
- 83 Women’s International League for Peace and Freedom (WILPF)
- 84 World Peace Council

Illustration 4

Fraud

Since the fraudulent bankruptcy of Enron, the United States energy broker, several TNCs have hit the front pages.

Parmalat: “the robbery of the century”

Parmalat, the Italian agri-business transnational, collapsed two years ago following a financial scandal, leaving a loss of CHF 22 billion (€ 14 billion) and wiping out some 135,000 investors. The indictments related to the manipulation of its share price on the stock exchange, interference with the oversight authority Consob and false audits. Saved in extremis from bankruptcy by the Italian government, the company is now undergoing a “restructuring” by Enrico Bondi, its current director. According to Bondi’s attorney, Marco De Luca, “A crash leaving a hole of € 14 billion is impossible without the support of financial institutions.” For this reason, Bondi has filed claims for damages of over CHF 60 billion against the following banks: UBS, Deutsche Bank, Bank of America, Citigroup and J.P. Morgan. This last has already paid out some CHF 230 millions to settle court actions and claims for damages.

Source: *Le Courrier* (Geneva), 27 September 2005.

Illustration 5

False Competition

Swissair

Following the collapse of Swissair, its profitable subsidiaries were allotted to various share holders. Gate Gourmet, for example, was bought by Texas Paris Pacific, which is financed – just as Swissair was – by the biggest Swiss bank, UBS. Gate Gourmet, which still employs 34,000 workers through the world, artificially lowered the prices of sandwiches in London in order to put pressure on the workers in Geneva to accept a 12% reduction in pay, refusal of which would have resulted in closing down Gate Gourmet, according to a document containing the manipulated figures given to the workers...

Source: testimony of the union official Rémy Pagani, during the 3rd Assises de la Commission internationale d’enquête pour la sauvegarde des droits fondamentaux in Geneva 21-22 May 2004.

Additionally, the “grounding” of Swissair and the Swissair-Crossair-Swiss saga which followed cost the Swiss taxpayers CHF 4.7 billion before the new company was sold off to Lufthansa for CHF 70 million. This does not take into account the concomitant disasters inflicted on the Belgian and French taxpayers through Sabena and Air Liberté. (Cf. <http://www.tsr.ch/tsr/index.html?siteSect=370501&sid=6168524&ckey=113109459200>)

Illustration 6

Influence Networks

A minority of powerful men wields enormous force by virtue of not only the financial means at their disposal but also through the networks of influence in the upper echelons of politics and finance. The close ties between, on the one hand, several members of the United States government and president George W. Bush and, on the other, certain TNCs, in particular those of the energy sector, were openly cited during the run up to the invasion of Iraq 2003. (Cf. among other sources, <http://webplaza.pt.lu/greenpea/nowar/barons.htm>).

Two more examples follow.

Nestlé

Peter Brabeck-Letmathe, CEO and chairman of the board of Nestlé, also sits on other prestigious boards of directors such as Oréal, Crédit Suisse, Alcon, Cereal Partners Worldwide, Roche etc. He is also a founding member of the World Economic Forum and a member of the European Roundtable of Industrialists (ERT). But Brabeck is not at all the only member of the Nestlé board of directors with close and strong ties to other corporations as well as to private and governmental institutions. Thus, Helmut Maucher, CEO of Nestlé from 1981 to 1997, is currently the chairman of the ERT (since 2003) and sits on the board of Bayer A.G., Deutsche Bahn A.G., Henkel, Koc Holding, Ravensburger A.G. and Oréal. Rainer Gut, chairman of Nestlé until the spring of 2005, is also honorary chairman of Crédit Suisse, chairman and CEO of Uprona, as well as being a member of the board of Oréal, Péchiney S.A. and Sofina S.A. André Kudelski, member of the board at Nestlé, is also a member of the board of his own company, Kudelski S.A., as well as a member of the board at Dassault Systems and Groupe Edipresse. He also sits on the Crédit Suisse Advisory Board, on the board of the Swiss-American Chamber of Commerce and on the steering committee of Economiesuisse. Nestlé has counted among its board members persons such as Kaspar Villiger, a former Swiss Federal Council member and an ardent defender of Swiss banking secrecy, and the late Arthur Dunkel, the director of the GATT (since 1995, the WTO) between 1980 and 1993, one of the main drafters of the Marrakech agriculture agreement that has allowed the liberalization of the agricultural products markets.

Source: *Attac contre l'empire Nestlé* published by ATTAC-Vaud, May 2005.

- 13 Associação Brasileira de Advogados Trabalhistas (ABRAT)
- 14 Associação Luso-Brasileira de Juristas do Trabalho – Portugal
- 15 Association Américaine de Juristes (AAJ)
- 16 Association des Juristes Saharaois (UJS)
- 17 Association internationale de techniciens, experts et chercheurs (AITEC)
- 18 Association internationale des juristes démocrates (AIJD)
- 19 Association Taralift
- 20 Attac Espagne
- 21 Attac Maroc-Groupe de Rabat
- 22 Bangsa Adat Alifuru
- 23 Campaña la deuda o la vida - Mar del Plata, Argentina
- 24 Centre de Documentation et d'Information pour le Développement, les Libertés et la Paix (CEDIDELP)
- 25 Centre de Documentation Solidarité Internationale Développement Durable Droits de l'Homme (CRISLA)
- 26 Centre de Documentation Tiers Monde (CDTM)
- 27 Centre d'Etudes et d'Initiatives de Solidarité Internationale (CEDETIM)
- 28 Centre Europe -Tiers Monde (CETIM)
- 29 Centro de Derechos Económicos y Sociales (CEDES) - Ecuador
- 30 Comisión para la defensa de los derechos humanos en Centroamérica (CODEHUCA)
- 31 Comité pour l'Annulation de la Dette du Tiers-Monde (CADTM)
- 32 Commission Socialiste de Solidarité Internationale (CSSI)
- 33 Confederación General del Trabajo (CGT) – España
- 34 Confederación indígena tayrona
- 35 Confederación Sindical de Comisiones Obreras (CC.OO.)
- 36 Confédération Mondiale du Travail (CMT)
- 37 Conseil International des Femmes
- 38 Conseil national des droits des peuples autochtones
- 39 Consejo Indio Exterior
- 40 Consejo Regional Indigena del Cauca (CRIC)
- 41 Conservation Cultural Act
- 42 Déclaration de Berne
- 43 Dignidad y Desarrollo para el Sur (DiDeSUR)
- 44 Echanges et Partenariats
- 45 Emaus fundación social - España
- 46 Estudio jurídico Tilsa Albani – Moira Villarroel - Argentine et Uruguay
- 47 Federación Mundo Cooperante de España
- 48 Fédération Internationale des Mouvements d'Adultes Ruraux Catholiques (FIMARC)
- 49 Fédération nationale des éleveurs centrafricaine
- 50 Fédération Syndicale Mondiale (FSM)
- 51 Front Siwa-Lima
- 52 Fundación Española para la Cooperación Solidaridad Internacional
- 53 Fundación Paz y Solidaridad Serafin Aliaga
- 54 German Peace Council / Berlin
- 55 Groupe de Réalisations et d'Animation pour le Développement (GRAD)

being simultaneously everywhere and nowhere, of externalizing costs and risks while retaining the profits. The practical application of this acknowledged legal principle would permit victims to demand reparation either of all those responsible or of those of the victims' choice and convenience, in function of the targeted TNCs' profitability and other criteria.

2. The introduction of the **individual civil and criminal responsibility** of the **directors** of TNCs, namely those who make decisions of a strategic order, as owners, managers or members of the board of directors. It is known that in the case of violations and trials, it is the executors, middle-level managers or workers, who are sanctioned – if, indeed, there is any sanction at all! – as the chain of command leading to the incriminating actions is, for the most part, discreetly broken, camouflaged or hidden.

3. Monitoring measures. This is one of greatest shortcomings of the project. A considerable amount of work must yet be undertaken to sketch out **compulsory enforcement mechanisms that are really effective**, especially at the international level.

Thus, we call also upon governments and upon UN bodies, in conformity with the duty to promote human rights above all other considerations, to dare to confront **collectively** the pressure of these corporations in order not only to make this project succeed but also to improve it.

Given the claims of transnational corporations that go on acting in spite of and outside the law, it is up to the governments and the relevant UN bodies to show determination in the accomplishment of their mandates and their obligation to defend democracy and human rights.

The abandonment or the indeterminate postponement of the draft study will be considered as the abdication of the United Nations Commission on Human Rights and the governments in view of the arrogance of the international economic power.

Those who have signed this declaration:

- 1 Actares – actionariat pour une économie durable
- 2 Akuaipa Waimakat - Asociación para la divulgación, promoción y defensa de los derechos humanos e indígenas de los territorios y asentamientos Wayuu de la Guajira
- 3 Alternativa Solidaria - Plenty
- 4 Amorces
- 5 Anti-Racism Information Service (ARIS)
- 6 Arbeitskreis Tourismus & Entwicklung
- 7 Asociación Anahí - La Plata, Argentina
- 8 Asociación Latinoamericana de Abogados Laboralistas
- 9 Asociación Libre de Abogados de Madrid
- 10 Asociación PROYDE (Promoción y Desarrollo)
- 11 Asociación Vasca de Abogados (ESKUBIDEAK)
- 12 Assemblée Européenne des Citoyens

Dow, Shell, Dole, Chiquita...

Nemagon is the commercial name of the chemical dibromochloropropane (DBCP) designed to fight the nematodes that thrive on banana plants, causing a discoloration of the fruit and thus making it less attractive – a problem in an international market obsessed by appearances. This pesticide, used widely since the 1970s, helps the plant grow faster and produce bigger bunches of bananas, but it is a toxic chemical substance that is slow to decompose (known also as a persistent organic pollutant or POP). It can remain in the ground for hundreds of years causing harm to living beings and to the environment.

A 1958 internal report of the Dow Chemical Company showed that DBCP caused sterility and other serious afflictions in laboratory rats. In 1975, the United States Environmental Protection Agency determined that nemagon had carcinogenic properties. Two years later, studies demonstrated that a third of the workers making DBCP at the laboratories of Occidental Chemical Corporation had become sterile.

The use of nemagon has been prohibited in the United States since 1979, but it was still used in Nicaragua until the TNCs left the country in 1982, leaving behind them thousands of sick farmers. These people are still suffering today from various forms of contamination, and the number of cases of liver failure and cancer has increased exponentially.

In January 2001, the Nicaraguan Congress passed Law 364 (Ley Especial para la Tramitación de Juicios Promovidos por las Personas Afectadas por el Use de Pesticidas Fabricados a Base de DBCP). This law is the only hope that the farmers have of any compensation by granting them economic and legal support from the government in bringing law suits against the companies in question. Thanks to this law, the first claims against the Shell Oil Company, Dow Chemical, Occidental Chemical, Standard Fruit, Dole Food and Chiquita Brands International were filed in March 2001.

On the basis of Law 364, the pesticide manufacturers Dow and Shell, as well as the grower Dole, were ordered by the courts, in December 2002 and March 2004, to pay almost US\$ 600 million to several hundred workers who had been contaminated on the banana plantations.

It is estimated that the total amount of compensation will be US\$ 17 billion. This amount has attracted many opportunists in search of a windfall, among whom have been law firms and several political leaders who claim to represent the interests of “those legitimately ill”, while at the same time accusing each other of representing people “who never pealed a banana in their life”. These disputes have allowed the TNCs to complain of a fraudulent inflation of the number of the sick. Thus, the

struggle for compensation is made to look illegitimate, and the court cases drag on and on.

Today, the corporations are trying by any and all means to have these judgements overturned, even requesting help from the United States government so that it will put pressure on the Nicaraguan authorities. The United States has also threatened Nicaragua with stopping their investments if the law in question is not repealed. In this way, the United States government has become an accomplice to the corporations' violations of the Nicaraguan workers' right to health.

At the same time, Dow Chemical has introduced an amendment to the fourth version of the free trade agreement between the United States and the Central American countries that allows investors to sue a country for compensation if they consider that a law of the country or a judgement by a local court violates the principle of "just and equitable treatment".

As for Dole, it has proposed this year to invest once again in Nicaragua if the government withdraws the claim against it for the use of pesticides.

Extracts of articles by Jesus Ramirez Cuevas, 7 November 2005, translated from Spanish into French by the Réseau d'information et de solidarité avec l'Amérique latine (http://risal.collectifs.net/article.php3?id_article=1462#nb5) and from *L'Événement syndical*, No. 28/29, 7 July 2004.

C. What are the Governments Doing?

In general, many countries not only tolerate on their national territory the violations committed by TNCs, but they give them their blessing and even participate actively in them. The ruling elites of the North spare no effort to assure the expansion of their own TNCs. As for those in the South, for the most part they worry very little about these violations, aiming above all to integrate themselves into the world's upper social crust, to enrich themselves and to maintain their power, oblivious to the needs of the overall population of their countries. It is also true that certain countries of the South simply do not have the means nor the ability to supervise the harmful activities of TNCs, not to mention facing up to the threats and blackmail to which they are subjected.

On the other hand, those governments that can exercise their jurisdiction over TNCs do not wish to do so and content themselves with empty declarations. Thus, the French president, Jacques Chirac, stated on the occasion of the G-8 meeting in Evian, that "the role of the

Appendix 4:

Declaration of 84 NGOs regarding the

Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights

During its sixtieth session (15 March to 23 April 2004), the Commission on Human Rights (CHR) requested the High Commissioner for Human Rights to organize a consultation regarding the document *Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights* adopted by the United Nations Sub-Commission for the Promotion and Protection of Human Rights (SCHR) in August 2003.

In response to this request, we, the undersigned movements and organizations, declare the following:

We commend the initiative of the SCHR for having, **finally**, tackled the problem of the working methods of transnational corporations (TNCs), which today constitute one of the primary causes, direct or indirect, of human rights violations and of the regression of basic social, political economic and environmental rights.

We approve without reservation the willingness of the SCHR to impose on TNCs an international legal framework in order to monitor their activities and to sanction the violations which such activities might give rise to.

We recall, along with the SCHR, that norms of international law in the area of human and environmental rights listed in the draft are **already applicable** to TNCs, as they are to all other business enterprises and all other individuals. Moreover, we have pointed out that the problem is not one of a lack of norms – for such norms exist already – but one of a lack of ability or willingness on the part of governments to enforce them. To this must be added the insufficiency, indeed the inexistence, of international jurisdictional mechanisms that might adequately compensate for such inability or unwillingness.

Consequently, we call upon the High Commissioner to support the initiative of the SCHR in order that it may succeed, and we enjoin our governments, in particular those of countries currently members of the CHR, **to examine in a positive light** this draft document, which will constitute, once the necessary improvements introduced, an important progress towards the legal and social control of TNCs' activities.

The improvements that we recommend appertain to three important points that, in the present text, are treated in an unsatisfactory manner :

1. The **responsibility** to be attributed to TNCs for the overall process of production, distribution and marketing that they effectively control, in particular the **jointly shared responsibility** of TNCs with all their suppliers, sub-contractors and licensees, in so far as it is here a matter of a single economic process under their direction. It is known that TNCs have acquired the "art" of

Appendix 3:

Resolution of the Commission on Human Rights on

Responsibilities of transnational corporations and related business enterprises with regard to human rights⁸⁴

(Adopted by consensus, 20 April 2004, E/CN.4/DEC/2004/116)

At its 56th meeting, on 20 April 2004, the Commission on Human Rights, taking note of resolution 2003/16 of 13 August 2003 of the Sub-Commission on the Promotion and Protection of Human Rights, taking note also of Sub-Commission document E/CN.4/Sub.2/2003/12/Rev.2 and expressing its appreciation to the Sub-Commission for the work it has undertaken in preparing the draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, which contain useful elements and ideas for consideration by the Commission, decided, without a vote, to recommend that the Economic and Social Council:

(a) **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;**

(b) **Request the Office of the High Commissioner for Human Rights to compile a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the draft norms contained in the above-mentioned document and identifying outstanding issues, to consult with all relevant stakeholders in compiling the report, including States, transnational corporations, employers' and employees' associations, relevant international organizations and agencies, treaty monitoring bodies and non-governmental organizations, and to submit the report to the Commission at its sixty-first session in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation;**

(c) **Affirm that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing, and that the Sub-Commission should not perform any monitoring function in this regard.**

⁸⁴ Emphasis added by CETIM.

corporation is to produce, but not in just any conditions. We cannot accept that the pirates of globalization prosper.”¹⁵

Worse, when a corporation finds itself on the verge of bankruptcy, it appeals to the government to “clean up the mess”, whereas public funds are less and less available owing to the tax breaks accorded to TNCs at the expense of public expenditures. For example, the French government allocated € 16 billion in 2004 to save Alstom and France Télécom. The British government has had to invest € 375 billion since 1993 to support its railroads (Railtrack, now Network Rail), even though they were privatized over ten years ago. The United States government has injected some \$ 35 billion into the airline industry since 2001 to save both the construction and the travel sector. And the Swiss government spent CHF 2 billion (see Illustration 5) in an effort to save its national airline, Swissair.¹⁶

Considering all the preceding, it is obvious that there is a pressing need for governments to act to promote an international legal framework for TNCs protecting human rights.

¹⁵ Cf. *Le Temps* (Geneva), 2 June 2003, and see Illustration 5.

¹⁶ Cf. *Le Temps* (Geneva) 18 August 2003.

D. What is “Civil Society”¹⁷ Doing?

The huge power of the TNCs and their non-respect of human rights have given rise to ever more numerous and more vocal citizen movements demanding that these companies respect human rights. One example of such a movement is the “Clean Clothes” campaign against child labor, against financial crime, against inhumane working conditions, for the respect of trade union rights and the rights of peoples etc. The objects of most of these campaigns are also dealt with by the Permanent People’s Tribunal,¹⁸ which has denounced:

- seven sports clothing TNCs¹⁹ for their “generalized assault on workers’ rights in the garment industry..., the use of child labor..., of forced labor etc.”;
- two oil company TNCs²⁰ and the French government for “violation of the rights of the African peoples, linked to oil exporting in Africa”;
- three other TNCs²¹ for “undermining the legal functions of governments, non-respect of the precautionary principle, serious negligence causing death to thousands of persons”.²²

These campaigns and symbolic citizen actions have played – and continue to play – an important role in mobilizing public opinion. They have, among other things, contributed much to alerting judicial authorities in various countries, who have demonstrated ever greater interest in the illicit activities of TNCs. Thus, numerous court cases against TNCs and their managers and directors, indicted for several categories of human rights violations, are currently under way in different national jurisdictions.

However, these actions at the national level, as significant as they may be, will not suffice, given the capacity of TNCs to be “everywhere and nowhere” and the transnational character of their activities. These actions need to be completed by measures at the international level.

¹⁷ By “civil society” we mean exclusively NGOs concerned with public interest and social movements. It in no way comprises the private (commercial) sector, even though some people lump them together, deliberately or not.

¹⁸ Heir to the Bertrand Russell Tribunal on Vietnam, the Permanent People’s Tribunal was created in 1979 by Lelio Basso. A tribunal of opinion, its authority derives from no government. It draws on the universal conscience and is composed of 60 members, of whom 23 are lawyers and five are Nobel Prize winners, coming from 31 different countries.

¹⁹ Nike, H&M, Levi Strauss, Otto Versand, C&A, Walt Disney and Adidas (Brussels, May 1998).

²⁰ Shell and Elf Aquitaine (Paris, May 1999).

²¹ Monsanto, Union Carbide, Rio Tinto Zinc (Warwick, March 200).

²² Cf. Note 3.

5. *Requests* the working group on the working methods and activities of transnational corporations to receive information from Governments, non-governmental organizations, business enterprises, individuals, groups of individuals and other sources concerning the possible negative impact of the activities of transnational corporations and other business enterprises on human rights, and particularly affecting implementation of the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, and to invite the transnational corporations or other business enterprises concerned to provide any comments they may wish within a reasonable time;

6. *Also requests the working group to study the information submitted and to transmit its comments and recommendations to the appropriate transnational corporations or other business enterprises, Governments and relevant non-governmental organizations or other sources of information;*

7. *Recommends* that the working group continue its discussions in accordance with its mandate under resolutions 1998/8 of 20 August 1998 and 2001/3 of 15 August 2001 and, in particular, that it pursue its efforts to explore possible mechanisms for implementing the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights, such as the continuation by Mr. El-Hadji Guissé of his work on the impact of the activities of transnational corporations on economic, social and cultural rights, as part of its future work;

8. *Requests* the Secretary-General to provide the working group with whatever services it requires to complete its tasks;

9. *Requests* the Working Group on Indigenous Populations to gather the views of indigenous peoples and indigenous organizations and communities as well as other interested parties to supplement the Commentary on the Norms and/or to draft a new set of principles which would include further references to indigenous concerns and rights with regard to transnational corporations and other business enterprises;

(...)

Appendix 2:

Resolution of the Sub-Commission on the Promotion and Protection of Human Rights on

Responsibilities of transnational corporations and other business enterprises with regard to human rights⁸³

(Adopted by consensus, 13 August 2003, E/CN.4/Sub.2/RES/2003/16)

The Sub-Commission on the Promotion and Protection of Human Rights,
(...)

Noting that the working group agreed by consensus upon and submitted to the Sub-Commission the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/Sub.2/2003/12/Rev.2) which take into account comments received during the past four years, including at this year's sessions of the working group and the Sub-Commission,

Recognizing that the Norms, as explicated by the Commentary (E/CN.4/Sub.2/2003/38/Rev.2), reflect most of the current trends in the field of international law, and particularly international human rights law, with regard to the activities of transnational corporations and other business enterprises,

Aware that the Norms provide for several basic measures of implementation and that the Commentary sets forth a number of other procedures for implementing the Norms,

1. Approves the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights submitted by the working group (E/CN.4/Sub.2/2003/12/Rev.2);

2. Decides to transmit to the Commission on Human Rights the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights for consideration and adoption by the Commission;

3. Recommends that the Commission on Human Rights invite Governments, United Nations bodies, specialized agencies, non-governmental organizations and other interested parties to submit to it at its sixty-first session and to the Sub-Commission at its fifty-seventh session comments on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights and the Commentary on the Norms;

4. Also recommends that after having received comments from Governments, United Nations bodies, specialized agencies, non-governmental organizations and other interested parties, the Commission on Human Rights consider establishing an open-ended working group to review the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights and the Commentary on the Norms;

⁸³ Emphasis added by CETIM.

II. TOWARD AN INTERNATIONAL JUDICIAL FRAMEWORK FOR TNCs FAVORING THE PROTECTION OF HUMAN RIGHTS

Under pressure from NGOs and social movements, some TNCs have made declarations of good intentions, claiming to support good governance and the use of ethical rules in business management.²³ But this produces little in the way of a change in their behavior. In fact, enforceable legal instruments are non-existent, and the state of current legislation does not admit the regulation of TNCs' responsibilities. Hence, it is necessary to create a legal framework such as the norms adopted by the United Nations Sub-Commission for the Promotion and the Protection of Human Rights, with certain reserves. (Cf. III.A)

A. The Inconsistency of Voluntary Codes of Conduct

TNCs are opposed to all enforceable regulations that might affect them, preferring voluntary codes of conduct. Thus, they have adopted numerous voluntary codes of conduct, while spending considerable sums on advertising. These codes have no enforceable legal status. They act only to define a minimum of what TNCs might tolerate. Observing this minimum is presumed to exempt them from any further responsibility.

A study done by the ILO in 1998 pointed out that, of the of all the voluntary codes of conduct reviewed, only 15% mentioned freedom of association, 25% forced labor, 40% earning levels, 45% child labor, 66% non-discrimination and 75% health and on-the-job safety.

Generally, the codes are very selective regarding international labor standards. The World Bank, for example, prohibits forced child labor but rejects the principle of freedom of association and has been distrustful of trade unions owing to the their ability to affect the labor market.

²³ Cf. among other articles, "L'intégrité est désormais la chose plus importante pour PricewaterhouseCoopers", *Le Temps* (Geneva), 26 August 2003.

Voluntary codes pose other problems:

- they cannot replace authoritative standards established by national governments and intergovernmental organizations;
- as private initiatives, they fall outside the normative activity of governments and international organizations;
- they are woefully inadequate;
- their implementation is erratic for it depends entirely upon the good will of the corporation(s) in question;
- there are no independent mechanisms for monitoring compliance;
- their requirements are almost always below already existing international standards.

In sum, transnational corporations do not take seriously their own codes of conduct. The numerous TNCs that have signed on to the *Global Compact* (a partnership between the United Nations and TNCs), claiming to be “socially responsible corporations”, often violate human rights and workers’ rights. (Cf. II.B.3. of this paper)

B. Possibilities and Limits of National, Regional and International Legislation: a Brief Overview of the Situation

Although there is no comprehensive and harmonious legislation designed specifically to address the harmful activities of TNCs in the area of human rights, the existing jurisprudence at the national, regional and international level can serve as a basis for bringing corporations to law, in certain cases at least, so that their crimes do not go entirely unpunished.

1. At the National Level

a. The United States of America – *The Alien Tort Claims Act*

Passed in 1789, the *Alien tort Claims Act* (ACTA) allows “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”²⁴

Originally, this law was passed to prosecute cases of piracy, then the slave trade. It remained largely unused for almost two centuries before being resuscitated in 1979, when the father and sister of Joel Filartiga, a seventeen-year-old who had been tortured to death in Paraguay, used the act against Joel’s torturer, who was living in Brooklyn at the time.²⁵

not entirely local, or the activities involve violations of the right to security as indicated in paragraphs 3 and 4.

22. 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, neighbouring communities, indigenous peoples and communities, non-governmental organizations, public and private lending institutions, suppliers, trade associations, and others.

23. The phrases “human rights” and “international human rights” include civil, cultural, economic, political and social rights, as set forth in the International Bill of Human Rights and other human rights treaties, as well as the right to development and rights recognized by international humanitarian law, international refugee law, international labour law, and other relevant instruments adopted within the United Nations system.

²⁴ Cf. <http://www.globalpolicy.org/intljustice/atca/atcaindx.htm>

arrangements and dealings with contractors, subcontractors, suppliers, licensees, distributors, or natural or other legal persons that enter into any agreement with the transnational corporation or business enterprise in order to ensure respect for and implementation of the Norms.

16. Transnational corporations and other business enterprises shall be subject to periodic monitoring and verification by United Nations, other international and national mechanisms already in existence or yet to be created, regarding application of the Norms. This monitoring shall be transparent and independent and take into account input from stakeholders (including non-governmental organizations) and as a result of complaints of violations of these Norms. Further, transnational corporations and other business enterprises shall conduct periodic evaluations concerning the impact of their own activities on human rights under these Norms.

17. States should establish and reinforce the necessary legal and administrative framework for ensuring that the Norms and other relevant national and international laws are implemented by transnational corporations and other business enterprises.

18. Transnational corporations and other business enterprises shall provide prompt, effective and adequate reparation to those persons, entities and communities that have been adversely affected by failures to comply with these Norms through, inter alia, reparations, restitution, compensation and rehabilitation for any damage done or property taken. In connection with determining damages, in regard to criminal sanctions, and in all other respects, these Norms shall be applied by national courts and/or international tribunals, pursuant to national and international law.

19. Nothing in these Norms shall be construed as diminishing, restricting, or adversely affecting the human rights obligations of States under national and international law, nor shall they be construed as diminishing, restricting, or adversely affecting more protective human rights norms, nor shall they be construed as diminishing, restricting, or adversely affecting other obligations or responsibilities of transnational corporations and other business enterprises in fields other than human rights.

I. Definitions

20. 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.

21. 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

The ATCA is based on norms of international customary law such as the prohibition of slavery, torture, genocide, war crimes, crimes against humanity etc.

However, it deals only with torts, namely cases (as opposed to criminal), with the result that the only outcome possible for a successfully argued case is the awarding of damages.

In the 1990s, numerous suits against TNCs were launched under this law. The first plaintiffs to win, in 1997, pleaded against Unocal, a transnational petroleum company accused of complicity in forced labor, rape and murder committed against Burmese peasants by Burmese soldiers hired by Unocal to assure the security of an oil pipeline construction site across the south of Burma.²⁵ Fearing a conviction and the court-ordered opening of its archives to public scrutiny, Unocal chose, in April 2005, to negotiate an out-of-court settlement with the victims.²⁷ The Swiss banks, under attack for having profited from the Holocaust, had already chosen this route in 1998. To preserve their image and their business in the United States, they agreed to pay US\$ 1.25 billion to the representatives of the victims (Jewish organizations based in the United States).²⁸

Currently, several cases have been brought on the same grounds in the United States. The most recent (July 2005) concerns the biggest agri-food companies in the world, Nestlé, Archer Daniels Midland and Cargill. They are accused of complicity in the trafficking of children, torture and the forced labor of Malian children who harvest the cacao that these corporations import from Ivory Coast. Of 12 to 14 years of age, these children work up to 14 hours a day, are not paid, are barely fed and are often beaten. However, in 2001, following several scandals linked to child labor, numerous corporations, by signing the voluntary initiative known as "The Harken-Engel Protocol", pledged to observe a system of certification of their cocoa suppliers assuring that the suppliers used no child labor on the plantations and that they treated their employees properly...²⁹

²⁵ Cf. *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 & n.21 (2d Cir.1980): <http://cyber.law.harvard.edu/torts3y/readings/update-a-02.html>.

²⁶ Cf. *Doe v. Unocal* and *Roe v. Unocal*, <http://www.earthrights.org/unocal/index.html>

²⁷ Cf. <http://www.golbalpolicy.org/intljustice/atca/atcaindx.htm> and the press release from Earthrights: http://www.earthrights.org/news/press_unocal_settle-shtml.

²⁸ Cf. http://www.geneve-finance.ch/index.cfm?page=/fgpf/dossiers/archives/fonds_desherence&langauge=FR&Language=EN.

²⁹ Cf. the *Bulletin Suisse des droits de l'enfant* (Swiss Bulletin on the Rights of the Child), Nos 2/3, September 2005.

The increasing attention – and use – that the ATCA has received has triggered a series of counterattacks, particularly from the Bush administration, which has invoked, as justification for amending it, the threat to the sovereignty of other countries [sic] and to international investment. It is supported in its efforts by other governments, such as the Swiss government, which considers the ATCA “contrary to international law”. In a letter to the United States Supreme Court in January 2004, the Swiss authorities argued that the ATCA “interferes with national sovereignty and entails an additional financial cost to government administrations”, while requesting that the law be restricted to cases with “an appropriate link” to the United States or “implicating United States citizens”.³⁰

Along the same lines, on 17 October 2005, Senator Dianne Feinstein (Democrat from California), who was given in May of the same year US\$ 10,000 by the Chevron oil company political action committee, sponsored a reform bill (S.1874) that would have effectively rendered the ATCA null and void. This proposal would have barred any complaint against a foreign government for abuses on its own territory, war crimes, crimes against humanity, terrorism and cruel and inhuman treatment. It would have required direct participation in the crime by the accused, not their complicity. And it would have been up to the administration to decide whether a case could be heard by a United States court.³¹ Under pressure from human rights groups and unions, Senator Feinstein withdrew the bill on 25 October 2005, claiming that she needed more time to work on its language.³²

b. France

In August 2002, with the help of the Sherpa Association,³³ Burmese refugees took the managers of Totalfinaelf and its affiliate Totalfinaelf E & P Myanmar, respectively Thierry Desmarest and Hervé Madeo, to court for incidents of “illegal confinement” going back to 1995.

³⁰ Cf. <http://ch.altermedia.info/news/suisse>.

³¹ Cf. <http://www.globalpolicy.org/intljustice/atca/atcaindx.htm>.

³² For commentary by Marcel Herbke see <http://www.globalpolicy.org/intljustice/atca/2005/1026oil.htm> and by Anthony J. Sebok see <http://writ.news.findlaw.com/sebok/20051031.html>.

³³ An international lawyers network based in Paris, the SHERPA undertakes both civil and criminal suits against businesses (both parent corporations and subsidiaries) guilty of crimes in countries of the South, once the jurisdiction of courts where the company is headquartered or where its primary office is located can be ascertained. Cf. <http://association.sherpa.free.fr/lesactions.html>.

11. Transnational corporations and other business enterprises shall not offer, promise, give, accept, condone, knowingly benefit from, or demand a bribe or other improper advantage, nor shall they be solicited or expected to give a bribe or other improper advantage to any Government, public official, candidate for elective post, any member of the armed forces or security forces, or any other individual or organization. Transnational corporations and other business enterprises shall refrain from any activity which supports, solicits, or encourages States or any other entities to abuse human rights. They shall further seek to ensure that the goods and services they provide will not be used to abuse human rights.

12. Transnational corporations and other business enterprises shall respect economic, social and cultural rights as well as civil and political rights and contribute to their realization, in particular the rights to development, adequate food and drinking water, the highest attainable standard of physical and mental health, adequate housing, privacy, education, freedom of thought, conscience, and religion and freedom of opinion and expression, and shall refrain from actions which obstruct or impede the realization of those rights.

F. Obligations with regard to consumer protection

13. Transnational corporations and other business enterprises shall act in accordance with fair business, marketing and advertising practices and shall take all necessary steps to ensure the safety and quality of the goods and services they provide, including observance of the precautionary principle. Nor shall they produce, distribute, market, or advertise harmful or potentially harmful products for use by consumers.

G. Obligations with regard to environmental protection

14. Transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, bioethics and the precautionary principle, and shall generally conduct their activities in a manner contributing to the wider goal of sustainable development.

H. General provisions of implementation

15. As an initial step towards implementing these Norms, each transnational corporation or other business enterprise shall adopt, disseminate and implement internal rules of operation in compliance with the Norms. Further, they shall periodically report on and take other measures fully to implement the Norms and to provide at least for the prompt implementation of the protections set forth in the Norms. Each transnational corporation or other business enterprise shall apply and incorporate these Norms in their contracts or other

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.

D. Rights of workers

5. Transnational corporations and other business enterprises shall not use forced or compulsory labour as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

6. Transnational corporations and other business enterprises shall respect the rights of children to be protected from economic exploitation as forbidden by the relevant international instruments and national legislation as well as international human rights and humanitarian law.

7. Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and humanitarian law.

8. Transnational corporations and other business enterprises shall provide workers with remuneration that ensures an adequate standard of living for them and their families. Such remuneration shall take due account of their needs for adequate living conditions with a view towards progressive improvement.

9. Transnational corporations and other business enterprises shall ensure freedom of association and effective recognition of the right to collective bargaining by protecting the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without distinction, previous authorization, or interference, for the protection of their employment interests and for other collective bargaining purposes as provided in national legislation and the relevant conventions of the International Labour Organization.

E. Respect for national sovereignty and human rights

10. Transnational corporations and other business enterprises shall recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.

According to the plaintiffs, Burmese military battalions financed by the Total affiliate, between October and December 1995, forcibly recruited workers for the construction of the gas pipeline being built between the Burmese gas field of Yadana, in the Andaman Sea, and an electric power generating plant in Thailand. On 17 May 2004, the Nanterre prosecutor estimated, in a finding sent to the examining judge, that the crimes “of kidnapping and illegal confinement” cited by the plaintiffs in their case were not applicable and should be dropped. In a ruling dated 25 June, the Nanterre examining judge Katherine Corner, declared that she was opposed to dropping the charges as requested by the prosecutor and filed an appeal with the appellate court of Versailles. In keeping with the request of the examining judge, the appellate court, on 11 January 2005, rejected the Nanterre prosecution’s request for a suspension of the proceedings.³⁴

On 29 November 2005, in a move similar to Unocal’s, Total chose to settle out of court, agreeing to pay the Burmese plaintiffs (eight, originally, but one had died in the meantime) € 10,000 a piece and to set up a fund of € 5.2 million for other persons “who might be able to prove that they had been forcibly employed and for other collective humanitarian acts in favor of housing, health and education”.³⁵

It goes without saying that preparing and bringing cases at the national level requires considerable investments of time and money, and the cases often drag on seemingly endlessly. However, this remains one of the most effective means of reining in the voracious appetite of TNCs. Further, once a conviction has been brought down, it stands as a precedent that can deter future violations.

2. At the Regional Level

a. The Organization of Economic Cooperation and Development

Adopted in 1976 and revised in 2000, the *Guidelines for Multinational Enterprises* of the Organization of Economic Cooperation and Development (OECD) are non-binding recommendations drafted by member governments for the “multinational businesses” operating in or from OECD countries.³⁶ They cover such matters as employment and

³⁴ Cf. <http://www.birmanie.net/birma/ab101.html>.

³⁵ Cf. the French daily *Libération*, 30 November 2005.

³⁶ The OECD came into being in 1961. It superseded the Organization for European Economic Cooperation, which had been founded in 1948 to coordinate the Marshall Plan for European economic recovery following World War II. The organization has 29 full members: Australia, Austria, Belgium, Canada, the Czech Republic, Denmark,

industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation. The only reference to human rights in the *Guidelines* is the exhortation that TNCs “respect the human rights of those affected by their activities consistent with the host government’s obligations and commitments.”³⁷

Five years after the 2000 revision, OECD Watch³⁸ conducted an investigation into the effectiveness of these principles and published its report in September 2005. Its conclusion: “Five years on, there is no conclusive evidence that the *Guidelines* have had a positive, comprehensive impact on multinational enterprises.... As a global mechanism to improve the operations of multinationals, the *Guidelines* are simply inadequate and deficient.”³⁹

According to this report, several of the National Contact Points (NCPs)⁴⁰ of the biggest OECD countries have made it known, quite clearly, that they do not want to get involved in conflicts with business enterprises that have violated the *Guidelines*. The United Kingdom NCP openly declared that its role was not to sanction or to hold companies to account, thus eliminating the only possible deterrent effect of the procedures. The United States NCPs also fall into this category.⁴¹

However, it appears that some governments and business federations have recently started to proclaim the virtues of the *Guidelines*, presumably because of the perceived threat of a binding U.N. instrument on the human rights responsibilities of transnational companies.⁴²

Finland, France, Germany, Great Britain, Greece, Hungary, Iceland, Ireland, Italy, Japan, Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, and the United States. Cf. <http://www.oecd.org>.

³⁷ Part I, Chapter 2, § 2; cf. <http://www.oecd.org/dataoecd/56/36/1922428.pdf>.

³⁸ Set up in March 2003 at Amersfoort in the Netherlands, OECD Watch is an international network comprising 47 NGOs whose purpose is “to inform the wider NGO community about policies and activities of the OECD Investment Committee and to test the effectiveness of the OECD Guidelines for Multinational Enterprises”. *Five Years On: A Review of the OECD Guidelines and National Contact Points*: http://www.somo.nl/html/paginas/pdf/OECD_Watch_five_years_NL.pdf.

³⁹ *Ibid.*

⁴⁰ NCPs are government offices established to promoted multinationals’ adherence to the *Guidelines*.

⁴¹ *Ibid.*, note 38.

⁴² *Ibid.*

human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities,

Noting also that new international human rights issues and concerns are continually emerging and that transnational corporations and other business enterprises often are involved in these issues and concerns, such that further standard-setting and implementation are required at this time and in the future,

Acknowledging the universality, indivisibility, interdependence and interrelatedness of human rights, including the right to development, which entitles every human person and all peoples to participate in, contribute to and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realized,

Reaffirming that transnational corporations and other business enterprises, their officers - including managers, members of corporate boards or directors and other executives - and persons working for them have, inter alia, human rights obligations and responsibilities and that these human rights norms will contribute to the making and development of international law as to those responsibilities and obligations,

Solemnly proclaims these Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights and urges that every effort be made so that they become generally known and respected.

A. General obligations

1. States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including ensuring that transnational corporations and other business enterprises respect human rights. Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfilment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

B. Right to equal opportunity and non-discriminatory treatment

2. Transnational corporations and other business enterprises shall ensure equality of opportunity and treatment, as provided in the relevant international instruments and national legislation as well as international human rights law, for the purpose of eliminating discrimination based on race, colour, sex, language, religion, political opinion, national or social origin, social status, indigenous status, disability, age - except for children, who may be given greater protection - or other status of the individual unrelated to the inherent requirements to perform the job, or of complying with special measures designed to overcome past discrimination against certain groups.

Substitutes adopted by the World Health Assembly; the Ethical Criteria for Medical Drug Promotion and the "Health for All in the Twenty-First Century" policy of the World Health Organization; the Convention against Discrimination in Education of the United Nations Educational, Scientific, and Cultural Organization; conventions and recommendations of the International Labour Organization; the Convention and Protocol relating to the Status of Refugees; the African Charter on Human and Peoples' Rights; the American Convention on Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; the Charter of Fundamental Rights of the European Union; the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organization for Economic Cooperation and Development; and other instruments,

Taking into account the standards set forth in the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy and the Declaration on Fundamental Principles and Rights at Work of the International Labour Organization,

Aware of the Guidelines for Multinational Enterprises and the Committee on International Investment and Multinational Enterprises of the Organization for Economic Cooperation and Development,

Aware also of the United Nations Global Compact initiative which challenges business leaders to "embrace and enact" nine basic principles with respect to human rights, including labour rights and the environment,

Conscious of the fact that the Governing Body Subcommittee on Multinational Enterprises and Social Policy, the Governing Body, the Committee of Experts on the Application of Standards, as well as the Committee on Freedom of Association of the International Labour Organization have named business enterprises implicated in States' failure to comply with Conventions No. 87 concerning the Freedom of Association and Protection of the Right to Organize and No. 98 concerning the Application of the Principles of the Right to Organize and Bargain Collectively, and seeking to supplement and assist their efforts to encourage transnational corporations and other business enterprises to protect human rights,

Conscious also of the Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, and finding it a useful interpretation and elaboration of the standards contained in the Norms,

Taking note of global trends which have increased the influence of transnational corporations and other business enterprises on the economies of most countries and in international economic relations, and of the growing number of other business enterprises which operate across national boundaries in a variety of arrangements resulting in economic activities beyond the actual capacities of any one national system,

Noting that transnational corporations and other business enterprises have the capacity to foster economic well-being, development, technological improvement and wealth as well as the capacity to cause harmful impacts on the

b. The African Commission on Human and Peoples' Rights

The decision adopted by the African Commission on Human and Peoples' Rights during its 30th regular session (Banjul, October 2001) regarding violations committed against the Ogoni people by the Nigerian national oil company and the TNC Shell with the complicity of the Nigerian government constitutes a case study.

According to the Commission, the government "should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves". Noting violations of numerous rights listed in the *African Charter on Human and Peoples' Rights*, such as the right to health (Art. 16), and that "all peoples shall have the right to a general satisfactory environment favorable to their development." (Art. 24), the Commission:

"Appeals to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoniland by:

"stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory;

"conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC [Nigerian National Petroleum Corporation] and relevant agencies involved in human rights violations;

"ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations;

"ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry; and

"providing information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations."⁴³

⁴³ The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 155/96. <http://www1.umn.edu/humanrts/africa/comcases/155-96b.html>.

c. The European Court of Human Rights

In its 10 November 2004 ruling, the European Court of Human Rights unanimously⁴⁴ condemned Turkey on grounds of non-respect of the right to private and family life (Art.8) for having authorized the corporation E.M. Eurogold Madencilik (later renamed Normandy Madencilik A.S.) to use cyanide processing in gold extraction in Bergama.⁴⁵ In challenging this authorization, the residents of Bergama had alleged that there would be health risks, pollution of the water tables and destruction of the local ecosystem. Although they won their case in court in 1997, the Turkish government on several occasions reaffirmed its trust in the company. So, the plaintiffs went to the European Court of Human Rights in September 1998.

3. At the International Level

a. The Tripartite Declaration of the ILO

In 1977, the International Labor Organization approved the *Tripartite Principles concerning Multinational Enterprises and Social Policy*, whereas in 1976 the OECD had adopted the *Guidelines for Multinational Enterprises* and in 1974 already the United Nations had begun to draft guidelines for TNCs that were never completed.

The *Tripartite Declaration* is not binding; this is obvious from the text, for it merely recommends to governments, to employers' and workers' organizations and to TNCs voluntary observance of principles dealing with employment, training, working and living conditions as well as professional relations. Although the *Declaration* was amended in November 2000, its 35 recommendations, as well as references to 35 ILO conventions, are all of a non-binding character for TNCs.

A procedure for monitoring compliance with the *Declaration* was provided for, based on Article 10 of the ILO constitution. During its March 1978 sessions, the Administrative Council requested member states to submit periodic reports on their progress in implementing the *Declaration*, in consultation with employers' and workers' organizations. After examining the reports that it had received, the Administrative Council, during its November 1980 sessions, created a permanent commission in charge of monitoring the *Declaration*, which would meet at least once a year. It was also decided that governments should submit reports every three years. A procedure for examining differences of interpretation of the provisions of the *Declaration* was also set up. The

⁴⁴ Cf. Taşkin et al. v. Turkey, No. 46117/99.

⁴⁵ Cf. [http://press.coe.int/cp/2004/560f\(2004\).htm](http://press.coe.int/cp/2004/560f(2004).htm).

Preamble

Bearing in mind the principles and obligations under the Charter of the United Nations, in particular the preamble and Articles 1, 2, 55 and 56, inter alia to promote universal respect for, and observance of, human rights and fundamental freedoms,

Recalling that the Universal Declaration of Human Rights proclaims a common standard of achievement for all peoples and all nations, to the end that Governments, other organs of society and individuals shall strive, by teaching and education to promote respect for human rights and freedoms, and, by progressive measures, to secure universal and effective recognition and observance, including of equal rights of women and men and the promotion of social progress and better standards of life in larger freedom,

Recognizing that even though States have the primary responsibility to promote, secure the fulfilment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights,

Realizing that transnational corporations and other business enterprises, their officers and persons working for them are also obligated to respect generally recognized responsibilities and norms contained in United Nations treaties and other international instruments such as the Convention on the Prevention and Punishment of the Crime of Genocide; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Slavery Convention and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery; the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the four Geneva Conventions of 12 August 1949 and two Additional Protocols thereto for the protection of victims of war; the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms; the Rome Statute of the International Criminal Court; the United Nations Convention against Transnational Organized Crime; the Convention on Biological Diversity; the International Convention on Civil Liability for Oil Pollution Damage; the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; the Declaration on the Right to Development; the Rio Declaration on the Environment and Development; the Plan of Implementation of the World Summit on Sustainable Development; the United Nations Millennium Declaration; the Universal Declaration on the Human Genome and Human Rights; the International Code of Marketing of Breast-milk

V. APPENDIXES

Note: the United Nations Sub-Commission for the Promotion and Protection of Human Rights is a subsidiary body of the Commission on Human Rights. It is made up of 26 experts, and its principal mandate is to conduct studies on various themes.

Appendix 1:

UNITED
NATIONS

E



Economic and Social
Council

Distr.
GENERAL
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26 August 2003
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COMMISSION ON HUMAN RIGHTS
Sub-Commission on the Promotion
and Protection of Human Rights
Fifty-fifth session
Agenda item 4

ECONOMIC, SOCIAL AND CULTURAL RIGHTS
NORMS ON THE RESPONSIBILITIES OF TRANSNATIONAL
CORPORATIONS AND OTHER BUSINESS ENTERPRISES
WITH REGARD TO HUMAN RIGHTS⁸²

⁸² Adopted by consensus 13 August 2003.

monitoring is carried out by means of a questionnaire sent to governments and to employers' and workers' organizations (but not to TNCs). Once the responses have been examined, they constitute baseline data for an analytical report drafted by a tripartite group, which, in turn, is examined by the Sub-Commission on Multinational Enterprises and approved by the Administrative Council. For the March 2001 session, 100 of the 175 member states of the ILO had responded to the questionnaire. As this is a voluntary procedure, governments are under no obligation to respond. Moreover, the Sub-Commission on Multinational Enterprises can make only recommendations, for it is not authorized – unlike the WTO – to impose sanctions and take effective measures.

b. The Global Compact

Launched with much pomp and ceremony in July 2000 by U.N. Secretary General Kofi Annan, the *Global Compact* aspired to encourage TNCs, on a voluntary basis, to commit themselves to observing ten principles based on respect for human rights and work and environmental standards as well as to fighting corruption. Although at its inception several “major” organizations (NGOs and unions, in particular) supported this initiative, the overwhelming majority of NGOs and social movements denounced it as a fraud. In fact, the agreement is without any legal fundament and says nothing about verifying TNC compliance with the commitments that they claim to have made.

This “partnership” seems above all designed to offer TNCs signing on to it – often accused of human rights violations – a means of enhancing the image they project before the public.⁴⁶ Today, many NGOs that originally supported the *Global Compact* have come to acknowledge its limits and now favor standards such as those proposed by the United Nations Sub-Commission for the Promotion and the Protection of Human Rights (see part III). In reaction to this, TNCs attempted to restore credibility to the *Compact* by holding a summit conference in June 2004 in New York involving a group of NGOs.

The analysis of the United Nations Research Institute for Social Development (UNRISD), which has been working for over a decade on the question of the responsibility of TNCs, is unequivocal concerning public-private partnerships such as the *Global Compact*:

⁴⁶ Cf. among other sources, *Building on Quicksand: The Global Compact, Democratic Governance and Nestlé*, published by the CETIM, IBRAN-GIFA (Geneva) and the Declaration of Berne, October 2003.

“... *Public Private Partnerships provide transnational corporations with the opportunity to enhance their image and to influence policies as a result of privileged relations that they entertain with the governments of developing countries and multilateral organizations. Many of these partnerships are used to break into a new market, to obtain preferential access to developing countries’ markets and to exploit this advantage and get a jump on the competition. The partnership approach sometimes ignores certain fundamental incompatibilities existing between developing countries’ interests and those of the TNCs. The world macro-economic regime, centered on trade and investment liberalization, which creates conditions favorable to TNCs but often limits the options of developing countries’ governments at the same time as it limits their revenue, illustrates this very well. TNCs and powerful trade pressure groups actively support this regime and are opposed to political reforms proposed by numerous intellectuals, militants and decision-makers. Partnerships with United Nations institutions offer TNCs the means of pursuing their particular political interests within the United Nations, and the U.N. will thus see its public mission undermined if it begins to accept policies that enjoy the preference of business enterprises but are far from enjoying unanimous support throughout the world.*”⁴⁷

According to the UNRISD, “The notion of ‘partnership’ between the U.N. and corporations must be reconsidered”. This is why the UNRISD is calling upon the U.N. to “combat the impression that it is conveying” regarding a legal framework for TNCs and, among other things, to “reinforce the procedures designed to control the respect of ILO and of international human rights standards, to support complaint procedures...”⁴⁸

c. International Center for Settlement of Investment Disputes

Within the World Bank, there is a powerful structure called the International Center for Settlement of Investment Disputes (ICSID) established under the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention). Its headquarters are within the World Bank headquarters, and the chairman of the World Bank is also chairman of board of directors of the ICSID. Little known to the public, this instance “arbitrates” disputes

⁴⁷ Cf. *Responsabilité sociale et encadrement juridique des sociétés transnationales : Synthèse I*, Geneva, United Nations Research Institute for Social Development, April 2005.

⁴⁸ Ibid.

Social and Cultural Rights. This would allow referral of cases to the Committee on Economic, Social and Cultural Rights in the case of violations of these rights, including violations by TNCs.

3. The Sub-Commission could recommend to governments the modification of the *Statute of the International Criminal Court* in order to allow cases to be referred to it for violations of economic, social and cultural rights.

As the procedures that we have just mentioned do not yet exist and/or cover only partially the problems posed by the activities of TNCs, it would be judicious to provide for a specific mechanism within the ECOSOC or the General Assembly, for example the setting up of a committee or a working group that would deal with implementation of the Sub-Commission *Norms* or, as certain observers have suggested, the creation of an International Criminal Court specifically for TNCs.

The implementation of these proposals, the adopting of the Sub-Commission *Norms*, the commitment of governments, of social movements and of NGOs to better monitor the harmful activities of TNCs, just as the promotion of human rights within TNCs, will surely contribute to a better protection of these universal, indivisible and interdependent rights.

IV. CONCLUSION

The current tendency is privatization of human rights through the recruitment of human rights consultants working for TNCs. Their very existence is the result of voluntary guide lines whose limitations and ineffectiveness are already established. The United Nations, like several rare NGOs (usually from among the bigger ones) and unions, has unfortunately accepted this tendency by legitimizing the *Global Compact*.

The role played by government organizations such as the U.N. has been transformed, for the system is no longer an intergovernmental one. The challenge consists now of constructing a system which takes account of the new reality and which plays an active role within it. However, when designing new systems, the right to development and the interest of developing countries must be considered, contrary to what countries such as the United States does in defending their own interests and those of their TNCs. In the case of South Africa, where 39 pharmaceutical companies took the government to court for having passed a law authorizing low-priced generic medicines against HIV/AIDS, it was international public opinion, in the North as much as in the South, that forced these companies to back off.

This is proof that there are indeed means of fighting the policies imposed by the TNCs, for they also depend on consumers and must cultivate their public image, neglect of which can affect the valuation of their stock. It is thus imperative not only that networks for monitoring TNCs be set up but that the *Norms* of the Sub-Commission be adopted.

However, without an effective monitoring and enforcement mechanism, these *Norms* will be reduced to the status of moral suasion. The CETIM has already suggested several ways ahead to the Sub-Commission's Working Group on TNCs with a view of implementing the *Norms*.

1. The treaty bodies, namely the seven conventional committees, could request governments to furnish information on the activities of TNCs working out of or on their territory. The committees with complaint procedures should receive complaints concerning human rights violations, for civil and political rights are as relevant to the subject as economic, social and cultural rights.
2. Governments should be encouraged to accelerate the drafting of an optional protocol to the *International Covenant on Economic,*

between TNCs and governments. In practice, this means that governments no longer recur to their own courts for settlement of a dispute with a TNC. As its name indicates, the ICSID Convention is an international treaty, ratified by 136 countries as of 15 December 2002.⁴⁹

The ICSID has proven to be a powerful ally of TNCs, for it is subject to heavy-handed influence from the commercial sector and, as already noted, is under the direction of the president of the World Bank. It goes without saying that the World Bank is a long-standing and firm advocate of privatization. Moreover, the norms of the ICSID exclude any mention of human rights and environmental standards. (See the following illustration.)

Privatization of Water: the World Bank at the Service of TNCs

The United Nations Commission for Human Rights' Special Rapporteur on the Right to Adequate Housing is disturbed, and justifiably so, by the privatization of water, for "No dwelling should be deprived of water because such deprivation would render it unlivable".⁵⁰ In the study of a preliminary case, he showed that the privatization of water has not brought about an improvement in the quality of service for the poorest. The Special Rapporteur has expressed his concern that, in spite of this statement, the World Bank and the regional development banks consistently support, in the poorest regions of the world, the privatization of water supply services.

According to him, the privatization of public services can have "devastating effects on the economy and on social cohesion in case of default."⁵¹ He cites two examples in the annual report that he presented to the Commission on Human Rights in 2002.

In 1999-2000, Bolivia, at the request of the World Bank, turned over the management of its water supply and treatment system for the city of Cochabamba to a single bidder representing several TNCs. Within the framework of this arrangement, which was to last for 40 years, the water rates immediately rose, going from an admittedly negligible level to something in the neighborhood of 20% of monthly household income. The armed forces intervened to stop citizen demonstrations, causing six deaths, but the demonstrations continued until the consortium was forced to leave the country.

⁴⁹ cf. www.worldbank.org

⁵⁰ Cf. *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mr Miloon Kothari*: E/CN.4/2002/59, § 56.

⁵¹ *Ibid.*, § 61.

In the United Kingdom, where the privatization of water supply and treatment services is subject to rigorous control, a study revealed that after privatization, the profits of the water companies had risen dramatically in real terms while the customers had had to face repeated rate hikes. The high salaries and the prerequisites accorded to the directors and managers of the private companies triggered a general outcry.

The Special Rapporteur concluded that not only “several initiatives of water privatization were considered a failure during the previous years”, but also that “a multicountry comparison of public service delivery in developing countries found that ‘purely public water supply systems were among the best performing systems overall’”.⁵²

d. Disputes Settlement Body of the WTO

Comprising all the member states of the WTO, the Disputes Settlement Body (DSB) constitutes a system designed to settle trade disputes between member states. It allows for a preliminary consultation procedure between the disputing parties. If, after 60 days, no agreement has been arrived at, a panel composed of three independent experts is appointed by DSB. The conclusions of the panel are binding and can be rejected only by a consensus decision of all the WTO member states.

DSB decisions can be challenged before the permanent Appellate Body, composed of six persons. Appellate Body decisions can also be rejected by a consensus decision of all the WTO member states within the 30 days following the decision.

The “violating” country must provide compensation for the violation to the affected country within 20 days. If it persists in its violation of a WTO agreement, it must offer further compensation or be subject to retaliatory measures. In this way, the plaintiff country can apply limited trade sanctions while waiting for the “losing” country to bring its policy into line with the ruling or recommendations.

Theoretically, the sanctions must be imposed in the same sector as that which was the object of the complaint. If that is not possible or effective, they can be imposed in another sector covered by the trade agreement that has been violated. If that, in turn, is neither possible nor effective either, the sanctions can be applied under another trade agreement.⁵³

This power to apply sanctions accorded to the WTO poses numerous problems.

crimes and abuses of TNCs. If some activities have been successful and have led to a raising of awareness about this subject among the public, the lack of a legal instrument at the international level for monitoring the behavior of criminal TNCs makes it imperative that governments and pertinent United Nations bodies show determination in carrying out their duty to defend democracy and human rights. In this spirit, 84 NGOs and social movements have appealed to the High Commissioner for Human Rights and to the governments urging them to take measures to counter the “claims of TNCs to act in spite of and outside of the law” and to examine the *Norms* adopted by the Sub-Commission on the responsibilities regarding human rights of TNCs and other business enterprises. (See Annexe 4).

⁵² Ibid., § 62 The following cities were cited by the Special Rapporteur: São Paulo (Brazil), Debrecen (Hungary), Lilongwe (Malawi) and Tegucigalpa (Honduras).

⁵³ Cf. <http://www.wto.org> .

Fortunately, the Sub-Commission has not given up the fight and is continuing its efforts within its working group on TNCs, whose mandate was extended for another three years.⁷⁹ The agenda for its next session has been modified.⁸⁰

C. TNCs Opposition

From the outset, the employers' sector, through the International Organization of Employers (IOE) and the International Chamber of Commerce (ICC) were opposed to the *Norms*. Throughout the drafting process, these organizations were vehemently against any binding rules and insisted that the Sub-Commission should draft a set of voluntary guidelines.

Currently, the business sector and certain governments are campaigning against the *Norms*,⁸¹ for, in their estimation:

- the *Norms* would hinder investment, especially in countries of the South;
- the *Global Compact*, as a voluntary partnership between TNCs and the United Nations, is largely sufficient, obviating any need for binding standards;
- TNCs are not concerned by human rights, for this is the responsibility of governments, with the result that involving TNCs in this area would "privatize" [sic] human rights!

Yet, it has been shown that TNC investments are often ephemeral, do not correspond to the needs of local populations or are harmful to human health and the environment.

The TNCs reject any legal constraints and support the adoption of voluntary guide lines. They justify this by arguing that to adopt the *Norms* would be to "privatize human rights". In fact, voluntary guide lines mean no legal constraints and result in a privatization of human rights.

D. The Position of NGOs and Social Movements

Numerous activities and campaigns are under way by civil society militants, sometimes at the cost of their lives, to protest against the

⁷⁹ Cf. Sub-Commission resolution E/CN.4/Sub.2/RES/2004/16.

⁸⁰ Cf. Sub-Commission resolution E/CN.4/Sub.2/RES/2005/6.

⁸¹ In 2004, the International Organization of Employers and the International Chamber of Commerce sent a document of some 40 pages to all the member states requesting that the Commission on Human Rights not take up the subject of the draft *Norms*. (Cf. *Joint view of the IOE and ICC on the draft Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*).

First, the decisions of the DSB are based on the WTO Agreements. The WTO was created to promote and regulate international trade, and its Agreements are, above all, favorable to TNCs. Thus, the DSB refuses to take into account the precautionary principle, general public interest or human rights. This is illustrated in, among other matters, its treatment of the question of beef containing hormones and that of asbestos. (See the following illustration.)

Second, there is a problem of "access, of cost and of structural obstacles" in the DSB system.⁵⁴ Thus, for example, the chances of success are conditional upon the choice of defense teams, whereas a veritable international bar, dominated by Western legal experts, has grown up in this area. Further, the countries of the South, with the exception of the emerging countries, of course, are not at all implicated in the naming of the judges, for the major countries have managed to maintain a decisive influence in this matter.⁵⁵

Finally, the DSB jurisprudence, which does not take into account human rights, constitutes a danger not only in that it gives primacy to trade and financial matters over human rights,⁵⁶ but in that it reinforces the practical prevalence of the WTO agreements over human rights.

WTO: Trade at Any Price

The two cases given below were dealt with by the Disputes Settlement Body (DSB) and show that trade takes precedent over human rights, in general, and over public health, food sovereignty, the precautionary principle and the general interest in particular; governments thus find themselves forced to modify their legislation in order to guarantee trade at any price.

Beef Treated with Hormones

In 1988 (before the creation of the WTO!), the European Union decreed an embargo on meat treated with growth hormones. On 26 January 1996, the United States and Canada brought this matter before the DSB. On 18 August 1997, the panel of the DSB decided that the EU embargo was "inconsistent" with the SPS [sanitary and phytosanitary

⁵⁴ Cf. Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, Item 4 of the provisional agenda, Economic, Social and Cultural Rights, *Globalization and its impact on the full enjoyment of human rights, Final report submitted by J. Oloka-Onyango and Deepika Udagama*, in accordance with Sub-Commission decision 2000/105, E/CN.4/Sub.2/2003/14: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.14.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.14.En?Opendocument).

⁵⁵ Cf. <http://attac.org>.

⁵⁶ Cf. inter alia, note 54 supra.

measures] Agreement of the WTO. On 16 January 1998, the Appellate Body confirmed this decision,⁵⁷ ordering the EU to lift the embargo, unless it could demonstrate scientific proof of the dangerousness of meat treated with hormones.⁵⁸

On 12 July 1999, the DSB authorized the United States to impose import tariffs on US\$ 116.8 million worth of European products per year and Canada to impose tariffs on CA\$ 11.3 million.

On 7 November, the European Union informed the DSB that it had adopted a new directive (2003/74/CE) “regarding the prohibition on the use in stockfarming of certain hormones” and that “there was no legal basis for the continued imposition of retaliatory measures by Canada and the US”.⁵⁹

Asbestos

On 28 May 1989, Canada brought a complaint to the DSB against France (represented by the European Union) for its Decree of 24 December 1996 prohibiting the importing of asbestos and products containing it. On 28 September 2000, the DSB panel decided, among other things, that “the ‘prohibition’ part of the Decree of 24 December 1996 does not fall within the scope of the TBT [Technical Barriers to Trade] Agreement”. On appeal by Canada, the Appellate Body, in its 12 March 2001 ruling, confirmed the merit of the French decree, arguing that the French Decree is “necessary to protect human ... life or health”, but, in favor of Canada, it “reversed the Panel’s finding that the TBT Agreement does not apply to the prohibitions in the measure concerning asbestos and asbestos-containing products and found that the TBT Agreement applies to the measure viewed as an integrated whole.... At its meeting of 5 April 2001, the DSB adopted the Appellate Body report and the panel report, as modified by the Appellate Body report.”⁶⁰

e. Conventional U.N. Human Rights Bodies *Committee on Economic, Social and Cultural Rights*

The Committee on Economic, Social and Cultural Rights is the U.N. body to which is entrusted monitoring of the implementation of the International Covenant on Economic, Social and Cultural Rights by countries that have ratified it. Since 1990, the Committee has sounded the alarm concerning violations committed by TNCs. Its *General Observation No 3*⁶¹ regarding the obligations of governments, in conformity with Article 2 §3 of the Covenant, was cited by in the working

⁵⁷ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm .

⁵⁸ <http://www.ladocumentationfrancaise.fr/dossiers/omc/ord.shtml> .

⁵⁹ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds26_e.htm .

⁶⁰ http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds135_e.htm .

eral in charge of “transnational corporations and other business enterprises”.⁷⁸ Although the resolution on TNCs provides for the naming of a special representative of the Secretary General, it cannot hide the intention of governments to postpone indefinitely dealing with the subject. In fact, the approved text totally ignores the work done over the past several years by the Sub-Commission’s independent experts, that is to say the *Norms* adopted in 2003. Notwithstanding our criticism of these *Norms*, which are not without their failings, it is undeniable that there is no other instrument of reference at the international level for controlling the activities of TNCs that violate human rights. Furthermore, the spirit of the mandate given to the special representative is worrisome in its resemblance to the *Global Compact*.

In spite of its reserved tone and content, this resolution was not adopted by consensus. There were 49 votes for it, three against (the United States, Australia and South Africa) and one abstention (Burkina Faso). The United States and Australia voted against it because they deny the right of the Commission to even discuss this subject. South Africa, on the other hand, along with Burkina Faso, disagreed with its substance. It is noteworthy that the countries that lobbied in favor of the resolution (Argentina, India, Nigeria and Russia, under the leadership of the United Kingdom), contended that the proposed text was the result of a compromise arrived at in order to keep the subject on the Commission’s agenda and to garner the support of the United States. This, of course, did not stop the United States from requesting a vote and then voting against the resolution.

Be that as it may be, there is no way around the behavior of the overwhelming majority of Commission members that caved in to the pressure from the employers’ sector and put the interests of a minority from among the elites of their countries over the general interest of the majority of their people.

In July 2005, Kofi Annan, the United Nations Secretary General named John Ruggie as his representative in charge of the question of “transnational corporations and other business enterprises” within the Commission. Although it would be premature to judge him and his work, it must be remembered that he is considered as the “father” of the *Global Compact* and thus risks being more receptive to the arguments of the TNCs than to those of social movements and NGOs.

⁷⁸ Cf. E/CN.4/RES/2005/69, in Commission on Human Rights, Report on the Sixty-first Session, 14 March – 22 April 2005, E/CN.4/2005/135: <http://www.ohchr.org/english/bodies/chr/docs/61chr/reportCHR61.pdf>.

of the *Norms* and has declared “that document E/CN.4/Sub.2/2003/12/Rev.2 has not been requested by the Commission and, as a draft proposal, has no legal standing”. (See Annexe 3)

This “snubbing” of the Sub-Commission is a response to the concern of governments, under employer pressure, to muzzle yet further the Sub-Commission and cater to the TNCs. It is worth recalling that the *Norms* were in fact drafted within a legal framework and are based on existing international instruments.

Reporting to the 61st session of the Commission,⁷⁶ the High Commissioner for Human Rights acknowledged that “a large part of the consultation process was centered around the Norms” of the Sub-Commission. She stressed that the employers groups, a fair number of member states and certain business enterprises had been critical of the *Norms*, whereas the NGOs, certain member states, certain business enterprises and interested independent sectors, such as universities, lawyers and consultants, had supported them.

The High Commissioner pointed out that these *Norms* are currently being tried out with corporations in different international sectors with the purpose of “showing how human rights can be put into practice”. Led by the Business Leaders’ Initiative on Human Rights,⁷⁷ this experiment will continue until December 2006.

Specifying that it is necessary “to make sure that business enterprises respect human rights, and that such rights are the responsibility of the government at the national level”, the High Commissioner stated that “there is a great need to develop ‘tools’ to help corporations assume their responsibilities”. She emphasized also a “growing interest” in the establishment of a declaration by the United Nations on “universal human rights norms applicable to business enterprises”.

Finally, the High Commissioner recommended that the Commission “define and clarify the responsibility of Business enterprises regarding human rights” and “maintain the draft Norms [adopted by the Sub-Commission] among the existing initiatives and norms regarding business enterprises and human rights”.

Ignoring these recommendations, the Commission decided this year to appoint, for two years, a special representative of the Secretary Gen-

⁷⁶ *Report of the Sub-Commission on the Promotion and Protection of Human Rights: Report of the United Nations High Commissioner on Human Rights on the responsibilities of transnational corporations and related business enterprises with regard to human rights*, Commission on Human Rights, Sixty-first session, E.CN.4/2005/91: <http://daccessdds.un.org/doc/UNDOC/GEN/G05/110/27/PDF/G0511027.pdf>

⁷⁷ Cf. <http://www.blihr.org/>.

document prepared by the Sub-Commission, that is to say:

*“...that the adoption of legislative measures is by no means way exhaustive of the obligations of States parties, for the phrase ‘by all appropriate means’ must be given its full and natural meaning, which is to say that the provision of judicial remedies in support of those rights should be included in those measures; it also means that States should be careful not to take any deliberately retroactive measures. In that context, States should draw up a range of legislative measures criminalizing all activities by transnational corporations which violate the above-mentioned [economic, social and cultural] rights.”*⁶²

Moreover, in its *General Observation No 15* on the right to water, adopted in November 2002, the Committee on Economic, Social and Cultural Rights states that:

“The obligation to protect requires State[s] parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporation and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measure 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.

*“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.”*⁶³

⁶¹ Adopted on 14 December 1990.

⁶² *Working document on the impact of the activities of transnational corporations on the realization of social, economic and cultural rights*, prepared by Mr El-Hadji Guissé pursuant to Sub-Commission resolution 1997/11, “Conclusions and recommendations” § 24, E/CN.4/Sub.2/1998/6: <http://daccessdds.un.org/doc/UNDOC/GEN/G98/128/35/PDF/G9812835.pdf>.

⁶³ E/C.12/2002/11, § 23, 24. These paragraphs refer to Article 11 (recognizing “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and adequate housing”) and to Article 12 (re-

In its final conclusions, adopted in 2004, following the examination of the periodic report of Ecuador, the Committee declared that it was “deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities”. It was also concerned about “the negative health and environmental impacts of natural resource extracting companies' activities at the expense of the exercise of land and culture rights of the affected indigenous communities and the equilibrium of the ecosystem”. (§ 12)

The Committee also requested that the government “ensure that indigenous people participate in decisions affecting their lives” and, further, requested particularly “...that the State party consult and seek the consent of the indigenous people concerned prior to the implementation of natural resources-extracting projects and on public policy affecting them, in accordance with ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. The Committee strongly recommends that the State party implement legislative and administrative measures to avoid violations of environmental laws and rights by transnational companies.” (§ 35)⁶⁴

Human Rights Committee⁶⁵

In its *Concluding Observations* regarding the report of Surinam, the Human Rights Committee declares itself to be:

“concerned at the lack of legal recognition and guarantees for the protection of indigenous and tribal rights to land and other resources. It regrets that logging and mining concessions in many instances were granted without consulting or even informing indigenous and tribal groups, in particular the Maroon and Amerindian communities. It also notes allegations that mercury has been released into the environment in the vicinity of such communities, which continues to threaten the life, health and environment of indigenous and tribal peoples. The latter are also said to be victims of discrimination in employment and education, and generally with respect to their participation in other areas of life (arts. 26 and 27).

cognizing “the right of everyone to the highest attainable standard of physical and mental health”) of the International Covenant on Economic, Social and Cultural Rights.

⁶⁴ Committee on Economic, Social and Cultural Rights, Thirty-second session, 26 April – 14 May 2004, *Consideration of reports submitted by the States parties under Articles 16 and 17 of the Covenant – Concluding observations of the Committee on Economic, Social and Cultural Rights: Ecuador*: E/C.12/1/Add.100: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/E.C.12.1.Add.100.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/E.C.12.1.Add.100.En?Opendocument).

⁶⁵ Entrusted with monitoring implementation by the states parties of the International Covenant on Civil and Political Rights.

However, being the result of a consensus, the Norms are not without gaps. They are thus not specific about the interdependent responsibilities of TNCs and their subsidiaries, sub-contractors and licensees, and it is nowhere specified how they are to be implemented, to cite only two important points.⁷³

In spite of these gaps, the CETIM supported the Sub-Commission’s request that the Commission examine the *Norms* with a view to adopting them.

According to U.N. procedure, currently only the Commission on Human Rights⁷⁴ is authorized to decide what will be the next step for the *Norms*, whether they can be approved by the ECOSOC and the General Assembly and submitted for ratification by the member states. For the past two years, the Commission has evaded the recommendation of the Sub-Commission, endeavoring by all and any means to avoid taking up the matter.

B. The Commission on Human Rights and its Maneuvers

In 2004, the *Norms* were referred to the Commission on Human Rights for an examination and referral to the ECOSOC, but the Commission did not act. Rather, it referred the question to the High Commissioner for Human Rights, requesting “a report setting out the scope and legal status of existing initiatives and standards relating to the responsibility of transnational corporations and related business enterprises with regard to human rights, inter alia, the draft norms [from HRSC...] in order for it to identify options for strengthening standards on the responsibilities of transnational corporations and related business enterprises with regard to human rights and possible means of implementation.”⁷⁵

It must be stressed, moreover, that the Commission has forbidden the independent experts of the Sub-Commission to monitor the implementation

⁷³ See Proposed Amendments for the Draft Norms on Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights/AAJ, CETIM (2003).

⁷⁴ A reform process for the Commission on Human Rights was initiated following the World Summit held in New York in September 2005. During this gathering, it was decided to create a Human Rights Council to replace the Commission on Human Rights. However, the decisions regarding its mandate and the implementation of that mandate were left to the General Assembly and had not been worked out at the time this brochure was ready to be printed. (Cf. our *Comments and Proposals* on the U.N. reform on our web site: http://www.cetim.ch/en/act_reformeonu.php).

⁷⁵ Cf. Decision E/CN.4/DEC/2004/116.

*Enterprises with Regard to Human Rights*⁷¹ that had been drafted by the working group.

The Europe – Third World Centre (CETIM), in collaboration with the American Association of Jurists (AAJ), contributed substantially to the setting up of this working group and to its efforts, particularly in the drafting of the *Norms*.

The first two versions (originally guide lines) were a catastrophe, for they subordinated the role of national and international norms, which by nature are binding, to voluntary, private codes of conduct for TNCs.⁷² After a energetic mobilization by numerous social movements and NGOs, and in particular at the instigation of the CETIM and the AAJ, the *Norms* adopted by the Sub-Commission in 2003 were considerably improved.

In fact, the *Norms* stress, and justly so, that the task of protecting and promoting human rights falls first and foremost to governments. This claim sets out an essential and vital principle of democracy and law (in all cases at the current historic stage of development of societies): only government can legitimately claim the quality of legally representing nations on the international level and of implementing the law. TNCs, like any other enterprise, are not endowed with the democratic legitimacy necessary to create law; on the other hand, like any other physical or legal person, they must obey the law.

More generally, the *Norms* recognize the responsibility of TNCs for the harmful activities regarding human rights and impose upon them general conditions for the respect of these rights. They require, inter alia, that TNCs “recognize and respect applicable norms of international law, national laws and regulations, as well as administrative practices, the rule of law, the public interest, development objectives, social, economic and cultural policies including transparency, accountability and prohibition of corruption, and authority of the countries in which the enterprises operate.” (Article 10)

The *Norms* thus appertain to a legal framework aiming at an effective control of TNCs. They will no doubt help governments to clarify their obligations and to establish binding norms for TNCs in their legislation.

⁷¹ E/CN.4/Sub.2/2003/12 /Rev.2, adopted on 13 August 2003 by the United Nations Sub-Commission for the Promotion and the Protection of Human Rights, E/CN.4Sub.2/RES/2003/16 (see Annexes`).

⁷² See our file on TNCs on our web site: http://www.cetim.ch/en/dossier_stn.php.

*“The State party should guarantee to members of indigenous communities the full enjoyment of all the rights recognized by article 27 of the Covenant, and adopt specific legislation for this purpose. A mechanism to allow for indigenous and tribal peoples to be consulted and to participate in decisions that affect them should be established. The State party should take the necessary steps to prevent mercury poisoning of waters, and thereby of inhabitants, in the interior of the State party's territory.”*⁶⁶

There are other U.N. mechanisms dealing with human rights that could be used against TNC human rights abuses. There is, for example, the Special Rapporteur on the Right to Food with whom the commercial sector should “cooperate fully” in the realization of this right.⁶⁷ Furthermore, the Committee on Elimination of Discrimination against Women had clarified that:

*“discrimination under the Convention is not restricted to action by or on behalf of Governments (see articles 2 (e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”*⁶⁸

Regarding the new Working Group on mercenaries set up in 2005 by the Commission on Human Rights, it should, inter alia:

*“monitor and study the effects and activities of private companies offering military assistance, consultancy and security services on the international markets on the enjoyment of human rights, particularly the right of peoples to self-determination”*⁶⁹

As shown above, the existing procedures are varied, incomplete – indeed, ineffective – or even biased in favor of the TNCs. Further, there is the difficulty for the victims and social movements to make themselves heard, given the complexity and the cost (in terms of money,

⁶⁶ Human Rights Committee, Eightieth session, *Consideration of reports submitted by states parties under article 40 of the Covenant – Concluding observations of the Human Rights Committee: Surinam* § 21, CCPR/CO/80/SUR, 4 May 2004: [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.CO.80.SUR.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.80.SUR.En?Opendocument).

⁶⁷ Resolution 19 of the 2004 Commission on Human Rights: E/CN.4/RES/2004/19 in *Commission on Human Rights : report on the 60th session, 15 March -23 April 2004*.

⁶⁸ Recommendation No 19, adopted in 1992: [http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.pdf).

⁶⁹ Resolution 2 of the 2005 Commission on Human Rights § 12 (e), E/CN.4/RES/2005/2 in *Commission on human Rights, Report on the Sixty-first Session, 14 March – 22 April 2005*, E/CN.4/2005/135.

time, energy etc.) of these procedures. The creation of an international legal instrument such as the Sub-Commission's *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights* would not only help – with certain reserves – to fill this legal void at the international level but would serve as model for harmonizing procedures at the national and regional levels.

III. FUTURE PERSPECTIVES

Given the current situation, the future depends largely on the Sub-Commission's *Norms*. If they are adopted (which depends above all on the commitment of governments and the fight by social movements and NGOs), these *Norms* will give hope of being able to deal with human rights violations by TNCs. The adoption of these *Norms*, now in the hands of the Commission on Human Rights, would constitute a test of the credibility of the future Human Rights Council.

A. The *Norms* of the United Nations Human Rights Sub-Commission

The United Nations Sub-Commission for the Promotion and the Protection of Human Rights is a subsidiary body of the Commission on Human Rights. It is made up of 26 independent experts, and its principal mandate is to conduct studies on diverse human rights themes and to make recommendations to the Commission.

In 1998, the Sub-Commission set up a working group on transnational corporations⁷⁰ and adopted in 2003 a document entitled *Norms on the Responsibilities of Transnational Corporations and Other Business*

⁷⁰ Created by virtue of the resolution entitled "the relationship between the enjoyment of economic, social and cultural rights and the right to development and the working methods and activities of transnational corporations". The mandate of this group consisted of, inter alia, 1. identifying and examining the effect of the working methods and activities of TNCs on the enjoyment of economic, social and cultural rights and on the right to development, as well as on civil and political rights; 2. examining, receiving and assembling information, including all working documents established by any member of the Sub-Commission, on the effects of the working methods and activities of TNCs on the enjoyment of economic, social and cultural rights and on the right to development, as well as on political and civil rights; 3. formulating recommendations and proposals dealing with the working methods and activities of TNCs, in order to assure that these working methods and activities correspond to the economic and social objectives of the countries in which they operate and in order to promote the enjoyment of economic, social and cultural rights, of the right to development and of civil and political rights; 4. examining the extent of governments' obligations regarding the regulation of the activities of TNCs when their activities have, or may be likely to have, significant repercussions on the enjoyment of economic, social and cultural rights, of the right to development and of civil and political rights of all persons within their jurisdiction. Cf. E/CN.4/Sub.2/RES/1998/8: [http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.SUB.2.RES.1998.8.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.1998.8.En?Opendocument).