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EDITORIAL

For many years, the Europe–Third World Centre (CETIM) has denounced the scandalous practices of transnational corporations (TNCs) around the world and the impunity with which they violate human rights.

Moreover the predominant place accorded to their discourse within the UN and their capacity to hamper any proposal aimed at making them respect international norms are, to us, the most worrying.

The last session of the Human Rights Sub-Commission was an occasion for CETIM to work more intensely on this subject, notably directed towards the group of five experts which was constituted in 1998, after a long campaign…

CETIM and the Association of American Jurists (AAJ) actively supported the elaboration of an international legal framework to monitor the activities of TNCs and in view of the slow progress made on this subject, we also supported the extension of the working group's mandate which was due finish this year.

Disagreeing with the US expert who thinks that the judicial norms must be only « *voluntary* »[1] in character, our two associations, supported by 32 other NGOs and social movements, have firmly declared that the judicial norms must, on the contrary, be binding.

In renewing the three-year mandate of this working group, the experts have, to a large extent, backed the positions taken by AAJ and CETIM - positions, which were formulated at a seminar we had jointly organized last May.

You will find in this bulletin a further articulation of our position and our present thoughts on this question.

We will also give you a summary of the Sub-Commission's debates on certain subjects, which CETIM follows passionately such as «*globalization* » as well as the Agreements on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement).

[1]According to CETIM this approach does not incite or promote norms of protection of human rights, which one expects from the Sub-Commission and does not correspond to the initial mandate of this group.

THIS BULLETIN IS ALSO AVAILABLE IN FRENCH AND SPANISH

53rd Session of the Human Rights Sub-Commission (30 July to 17 August 2001)

Globalization and Human Rights[1]

The last Human Rights Sub-Commission (HRSC) developed some interesting points concerning the effects of globalization on intellectual property and human rights.

The report, which attracted the most attention, was the one on globalization[2] delivered by Mr. Onyango and Ms. Udagama. For the two experts, «*globalization is neither a natural event, nor an irremediable or irreversible process. It is the fruit of certain ideologies, interests and institutions and its existence depends on the structures put in place by the international community* ». CETIM has defended this point of view for a long time.

The authors remarked that if the protection and the promotion of human rights are foremost the responsibility of the State, other bodies such as the WTO, the IMF and the World Bank are not, in any way, exempted from their responsibility. In this respect, the experts rely on point 8 of the WTO agreements[3], which confers on the WTO a legal status: « *The WTO has rights as well as obligations. Therefore, to affirm that it is up to the members States to respect human rights makes no sense at all* ». International multilateral institutions cannot clear itself of their responsibility of that sort. « *They must take the measures that will not damage the social situation of a given country* ». This point raised a lively debate during the plenary between the representatives of the WTO, the IMF, and the World Bank on one hand and the Sub-Commission, on the other. The IMF representative, Mr. Grant B. Taplin, referring to the 1974 agreement on the autonomy of his organization, said that the IMF « *has not been mandated to take into account human rights matters in its decisions and his organization is not bound by the different declarations and conventions pertaining to human rights* »[4]. This declaration caused indignation amongst most experts present.

[…]

To give substance to the IMF's position would be to question the universality of human rights. In adopting the resolution on globalization the experts knew what they were doing. In this text, the Sub-Commission affirmed, without ambiguity, the primacy of human rights over any economic consideration. The HRSC «*reminds all governments of the primacy of their human rights obligations which derives from international law on economic policies and agreements and asks them to take into full consideration with national, regional and international economic authorities, the international obligations and principles related to human rights in the formulation of international economic policies* »[5].

The authors of the report on globalization also addressed civil society, particularly, those who « *struggle against globalization* » about the need to review some of its tactics.

They said that, « *Although transnational corporations and the WTO are at the centre of their campaign, civil society has to also equally examine the role of the State and mainly the most powerful ones in the process of globalization* ».
[...]

Health Rights

The High Commissioner for Human Rights submitted a report on the Agreements on aspects of Intellectual Property Rights (IPRs) to the Sub-Commission[6]. Focusing on the right to health, the report tries to find a balance between private and public interest. It underlines the fundamental difference between IPRs and human rights: «*IPRs can be licensed or assigned to someone else, they can be revoked and they eventually expire. Similarly, IPRs can be - and often are - held by corporations. Human rights on the other hand are inalienable and universal. They are not granted by the State, they are recognized* ».

Certain statistics mentioned in this report clearly show who the beneficiaries of patents are. Of the overwhelming majority of the holders of technologies and the ones asking for them, 2'785'420 are in developed countries, 290'630 are in Eastern Asia and the Pacific, 1'716 in the Middle East, 392'959 in sub-Saharan Africa, of which only 38 were registered by the people of the region… This is because « *the protection of intellectual property is expensive not only when you register your claim but also because of the taxes that have to be paid to maintain the rights* ». This process is not without consequence: « the commercial motivation of IPRs means that research is directed, first and foremost, towards "profitable" disease *[…]Of the 1'223 new chemical entities developed between 1975 and 1996, only 11 were for the treatment of tropical disease* ». […]

In addition, the report also states, « *The constant practice of delivering licenses of great scope (in the biomedical field) can mean that these licenses are used to block research efforts* ».

It also cites the information received from the Committee on Economic, Social and Cultural Rights indicating the commercial pressure exerted on governments[7] in view of imposing a legislation on intellectual property such as « *TRIPS -Plus* », going much further than the present TRIPS Agreement.

Loss of Autonomy

In a very UN-like style, the High Commissioner, in highlighting the fact that the TRIPS Agreement takes away some of the autonomy of the States asks if it doesn't impinge on the « *States' abilities to promote and protect human rights, including the right to development* ».

Although the report is rich in information, the recommendations it contains are nonetheless disappointing. It maintains that, «*Members should therefore implement the minimum standards of the TRIPS Agreement bearing in mind both their human rights obligations as well as the flexibility inherent in the TRIPS Agreement, and recognizing that human rights are the first responsibility of Governments* ».

Moreover, the conclusions drawn in light of the report should have been to recommend that all States denounce the TRIPS Agreement. Pakistan, which acts as the spokesperson for the South, defended this position. Bitter experience shows that not only has the TRIPS Agreement fail to reach the stated objectives for the South, which was « *to lead to greater innovation, more foreign investment and development research, and therefore more technological transfer* ». These agreements also «cost more than they bring in». Pakistan concludes, « It is necessary to review the international intellectual property regime completely[8] »

In the resolution adopted on « *intellectual property andhuman rights,* » experts also addressed a message to States in view of WTO's new round of negotiations. «*[The Sub-Commission on Human Rights] exhorts all governments to take into full account the obligations that befall the States in accordance to human rights instruments in the formulation of proposals to be examined in the course of the TRIPS Agreement, particularly during the WTO's Ministerial Conference to be held in November 2001 in Doha* »[9]. […]

[1] Article published in *Le Courrier* 1st October 2001.
[2] « *Globalization and its impact on the full enjoyment of human rights* », E/CN.4/Sub.2/2001/10.
[3] Marrakech Agreement, 1994.
[4] Press release 8 June 2001, HR/SC/01/11 and 12.
[5] « *Intellectual property and human rights* », E/CN.4/Sub.2/RES/2001/21.
[6] « *The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights* », E/CN.4/Sub.2/2001/13.
[7] This means South -Africa, Brazil, Equator, India, Pakistan and Thailand.
[8] The Secretary General' report on « *Intellectual property rights and human rights* », E/CN.4/Sub.2/2001/12.
[9] « *Intellectual property rights and human rights* ». E/CN.4/Sub.2/RES/2001/21.

Selçuk's drawing

CETIM's Work on Transnational Corporations

The major conclusions of our work at the Sub-Commission meeting last year[1], (the vagueness of the definitions in the debate's main concepts: transnational companies, the amalgam between this concept and that of national enterprises; the criticism of the voluntary codes of conduct for TNCs as opposed to a binding international instrument etc.), led us, in collaboration with the AAJ, to organize a seminar last 4 and 5 May, in Céligny, near Geneva.

Entitled, « *The Activities of TNC's and the Necessity for a Legal Framework* »[2], this seminar brought together ten experts (principally, jurists and economists) who worked on the specific problems posed by the activities of TNCs, such as the financial and economic aspect, the financial and economical criminality tied to their activities and penal responsibility.

At the end of the two-day debate, we came to the following conclusion: « *The activities of Transnational Companies are dominated by one essential goal: that of achieving maximum profit over the shortest possible time period, which is the result both of a competition logic in the globalized capitalist economy and also of the unlimited ambition for power and wealth of its foremost leaders. This essential goal will not allow any obstacle to stand in its way, and all methods are acceptable in order to achieve it, from the violation of labor law, the appropriation of knowledge which is by nature social, corruption of political elites, intellectuals and the leaders of "civil society", right through to the financing (with the logistic support of some big power or other) of terrorist activities (paramilitary groups, mercenaries, private militias and others), such as coups d'Çtat and bloodthirsty dictatorships* »[3]. Such behavior is a flagrant contradiction to the need to respect human rights.

The substitution of the normative function of the State by private rules and regulations, voluntary codes of conduct, etc. will not curb any violation of human rights. This is, unfortunately, the course of the action firmly defended by the US expert, Mr. David Weissbrodt, since his appointment last year to the Sub-Commission's Working Group.

On the basis of these conclusions, both CETIM and AAJ have called for broad support from NGOs and social movements. Despite certain negative factors (e.g. the volume of documents that needed to be examined, the short deadline for the responses, etc.), a total of 32 NGOs and social movements have manifested their support[4].

We have also been able to lobby some governmental delegates and many experts on this subject.

[1] CETIM bulletin no. 11, November 2000.
[2] The conclusion of the seminar has been published in three versions (French, English and Spanish). This brochure is available at CETIM for CHF 5.-. Or you may download it from our Internet site: www.cetim.ch..
[3] See page 30 of our brochure.
[4] See page 5 of this bulletin.

CETIM's Written Intervention

You will find below two excerpts of written interventions submitted by CETIM and the AAJ to the Sub-Commission. The first expresses concern about an existing legal framework for TNCs, while analyzing the applicable standards both at national and international levels while taking an interest in the responsibilities of States and in enumerating the fundamental limits of a voluntary code of conduct. The second analyses the stakes of the issue within the framework of the Sub-Commission's Working Group on TNCs while referring to the original mandate of the Working Group.

On the Necessity of a Binding Legal Framework for TNCs

« TNCs are legal entities and just like any individual person, they can be subjected to international law. But they are not considered as international legal entities, a quality which only States and international organizations are endowed with.

From the point of view of the defense of human rights, it is not acceptable that the legal vagueness and impunity that TNCs benefit from, should continue forever.[…]

Codes of Conduct

Often presented as a preliminary stage to the elaboration of binding codes, codes of conduct are problematic in many ways:

a) they cannot replace the norms decreed by state bodies, inter-state and international organizations;

b) they are private initiatives and, as such, are foreign to the normative activities of the state or international organizations;

c) they are incomplete;

d) the application of codes of conduct is unsure and depends only on the company's goodwill;

e) there is no exterior and independent control;

f) the demands of codes of conduct are always lower than the existing international norms.

The Responsibility of States and the International Community

The international community and all the member states are bound to respect human rights. States must, according to their own resources, do their utmost to develop and promote these rights, for their own people and humanity, in general. These rights are called « *solidarity rights* ».

Moreover, states are held responsible when they have failed in their duty of «*diligence due* ». States must prevent and penalize any human rights violation perpetrated by individuals under their jurisdiction, whether these deeds have been committed on their territory or beyond.

Applicable Norms

The common practices of big TNCs correspond to those characteristics that define organized transnational crime (permanent transnational structure, the sharing out and control of territories and zones of influence, so as to obtain a maximum profit, totally regardless of the means employed and damages caused to others). Moreover, TNCs can count on the help of the mighty powers: the IMF, the World Bank and the WTO.

1. TNCs must legally and civilly account for any violation or non-compliance to the regulations in force. TNCs are also responsible for transgressions committed by subcontractors as co-authors, participants or beneficiaries.

2. States are internationally responsible for the application of laws internal to major international norms (e.g. the Universal Declaration of Human Rights, International Human Rights Pacts and Conventions, etc.) These norms are binding or compulsory because they are by nature *jus cogens.*

3. Amongst the applicable international instruments, one can cite the United States Convention Against International Organized Crime (Palermo Convention 2000), the OECD's Against Corruption (1999), and the European Penal Convention on Corruption (1999). This last one is much more complete and compelling.

[…]

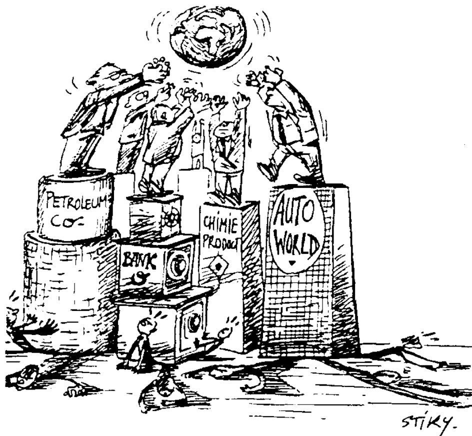
GET YOUR FRIENDS TO JOIN CETIM

The Competent Jurisdictions

1. On an international level, the mechanisms to apply the norms directly to private entities such as TNCs are non-existent The International Penal Court's status approved in Rome does not enable it to judge private individuals, nor crimes committed against economic, social or cultural rights.

2. On a regional or international level only the states can be the object of a legal action.

[…]



Drawn of : Denis Horman, *Les sociétés transnationales dans la mondialisation de l'économie, Gresea, Bruxelles, 1996.*

Activities of the Working Group on the Transnational Corporations and Definition of its Mandate

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

1) to identify and examine the effects of the working methods and activities of transnational corporation;

2) to examine, receive and gather information;

3) to analyze the compatibility of the various international human rights instruments with the various investment agreements;

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

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

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

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

The AAJ and CETIM deem that voluntary conduct codes (whose usefulness is highly relative, as demonstrated by experience) are private initiatives and as such are not part of the normative activities of the States, of any normative activities (agreement, resolution, declaration, etc.) or initiatives to promote norms (directives, Declaration of Principles, etc.) of intergovernmental organisms directly received by the States and indirectly by private entities.

AAJ and CETIM consider that the elaboration of such codes is a task outside of the realm of an organism of the United Nations and more appropriate for a consultant contracted by a transnational society.

[…]

To accept this project of Directives[1], formulated in the name of « *realism* », would mean establishing a treatment of exceptions, contrary to equal treatment under the law, favouring immunity and impunity for transnational companies. This would be a giant step backwards in the promotion, universal application and progressive development of International Human Rights Law.

The AAJ and CETIM consider that the proposal presented by Mr. Weissbrodt is outside of the functions of the Working Group, in its character as an organism of the system of the United Nations that should involve itself in proposing orientation to the States and the international community through the organisms of the system to promote universal respect for human rights and cannot and should not act as a consulting body for private companies, proposing voluntary codes adapted to particular interests.

On the contrary, the Working Group should be involved in complying with the mandate conferred upon it by the Sub-Commission, and within the context of points 4 and 6 of this mandate should try to establish directives or orientations for the international community and for the States to achieve a framework for transnational corporations of current international and national norms relating to human rights (civil, political, economic, social, cultural and environmental) and to insure that these corporations respond to the appropriate jurisdictions in cases of transgression from the norms.

[…]

[1] For a more detailed vision of our criticisms on this document, they are available on our Website: www.cetim.ch.

CETIM'S CONFERENCE

The CETIM has also defended its position on TNC's by organizing a parallel conference July 31 2001. Around 80 people listened to Alejandro Teitelbaum (AAJ representative in Geneva), Béatrice Fauchère (WCL's representative at the ILO in Geneva) and Peter Utting (head of research program on TNC's at the United Nations Research Institute for Social Development -UNRISD)

In his speech Mr.Teitelbaum went over the positions defended by AAJ and CETIM which we have mentioned above. The interventions of Béatrice Fauchère and Peter Utting give a new light on the problem, which we would like to share with you.

Ms. Fauchère's position on codes of conduct is clear, they must be constraining. They can not replace national legislation or international regulations. The actual tendency of TNCs of giving themselves voluntary codes of conduct, which are often

lower than regular working norms have the effect of privatizing human rights. « *It is therefore indispensable that an independent control system, complain procedures and sanctions should be set up […] and these constraining codes must be applied to the whole production process* », this means to subcontracting companies and their suppliers! « *The argument that say that companies can not control their subcontractors is not valid, if the companies can control the products they receive, than they can also supervise the social and environmental aspects, etc* ».

The speaker also underlined the necessity of taking into account development right and the interests of developing countries, and the necessity of establishing a hierarchy of rights. «*The right to live for example must come before intellectual property rights* ». She also reminded that the ILO's international norms are constraining instruments and the ILO has the means to control the application of these norms and has complaint procedures.

M. Utting presented the UNRISD's research on voluntary codes of conduct. This study shows that their impact is limited. « *The report shows that, for example only 100 to 200 TNCs have a code of conduct although there are more than 60'000 TNCs worldwide* ». According to an OECD inventory, 48% of TNCs based in a member state have a company code of conduct. These codes have a tendency to concentrate mainly on certain aspect « *touching on consumer sensitive issues* » in the north such as child labor, forest protection etc, while neglecting others (such as the concentration of power, director's salaries, their lobbying and political influence). Workers are often not informed about their companies' codes. The companies rarely accept an independent control of their codes and practices, and for those that accept to be controlled the general tendency is to turn to big consulting firms which are more lenient in that matter.

Note that the swiss newspaper « *Le Courrier* » has written two excellent articles on the subject in its editions of the 4th and 25th August 2001.

THE BULLETIN ARE NOW AVAILABLE ON OUR WEBSITE: www.cetim.ch

CAMPAIGN FOR A INTERNATIONAL LEGAL FRAMEWORK FOR TRANSNATIONAL CORPORATIONS : WHICH POSSIBLE CONTRIBUTIONS?

The debate on TNCs and their responsibility for human rights violations now occupy a significant place within the United Nations.

The role of NGOs, trade unions and social movements is primordial if they desire to exert the maximum influence on the work of the Working Group. This is why it is fundamental that mobilization on this crucial question continues because it is unacceptable that TNCs are put on the margins or above international law in regard to human rights.

Only a massive mobilization can bring the concerned UN bodies to put in place an international framework for TNCs that conform to national and international human rights norms that are in force and to ensure that they are accountable to competent jurisdictions in case of violation of these norms.

We count on you not only to continue to participate in our campaign on TNCs but also to contribute to a process of reflection on the role of TNCs.

Your participation may take different forms:

1. analytical contributions;
2. information and awareness-raising campaigns within your own network;
3. making interventions and pressuring your respective government to respect and make TNCs respect national a and international norms relating to human rights;
4. participating in the meetings of the Working Group on TNCs of the Sub-Commission.

We thank you deeply for the collaboration and support that you have offered and will continue to offer to the realization of our common objective.

Here NGO and social movements which support our action:

American Association of Jurists - Association des Juristes Arabes - Associación Nacional de Usuarios Campesinos Unidad y Reconstruccion - Association Internationale de Techniciens, Experts et Chercheurs - Censat Agua Viva - Centro de Estudios Europeos - Centro Nuovo Modello di Sviluppo - CETIM -Communauté de travail - CADTM - COTMEC (Suisse) - Déclaration de Berne - FIMARC - France Libertés Fondation Daniel Mitterrand - Fundacio Ficat Barcelona - General Arab Women's Federation - Human Rights Association Turkey - Indian Movement « *Tupac Amaru* »- International Indian Treaty Council - International Student Movement of the United Nations - LIDLIP - Médecine pour le Tiers Monde - Mouvement Mondial des Mères - Nord-Sud XXI - Pain pour le prochain - Pax Romana (USA-ICMICA) - Pax Romana (Soudan) - Union Nacional de Juristas de Cuba - Via Campesina South East Asia and East Asia - World Federation of Democratic Youth - WILPF - Young Women's Christian Association.

TO READ

« *The Activities of Transnational Corporations: The Need for a Legal Framework* »

held on May 4 and 5, 2001, at Céligny
CETIM / AAJ, 42 p., 2001, at the price of CHF 5.-

Summary:

- The International Status of Transnational Companies *Professor Jordi Bonet Perez*
- The Financial and Economic Nature of Transnational Companies - *Professor Dimitri Uzunidis*
- TNCs and countries of the South *Professor Yash Tandon*
- An International (Criminal) Court for Transnational Companies?- *Professor Francois Rigaux*
- Economic and Financial Crime and Organized Crime - *Professor Nicolas Queloz*
- Criminal responsibility of transnational companies *Professor David Baigún*
- The ILO Declaration of Tripartite Principles on Multinational Companies and Social Policy and other initiatives of international organizations to establish norms of conduct for Transnational Companies - *Mr. Loïc Picard*
- International labor norms and codes of conduct for TNCs *Mr. Claude K. Akpokavi*
- General observations and also Comments on a draft voluntary Code of Conduct presented to the Working Group on Transnational Companies of the Subcommittee for the Promotion and Protection of Human Rights of the United Nations - *Professor George Lebel*

Conclusions :

A. Introduction
B. The legal Framework for Transnational Companies
I. Legal Characteristics of Transnational Companies
II. Economic and financial Characteristics
III. Responsibility of States and of the International Community for the Actions of TNCs
IV. Applicable Norms
V. Competent Jurisdictions

Also in English and Spanish. Available on our Website.

SIGN OUR PETITION (SWISS ONLY)

SAY NO TO THE WORLDWIDE SELLING OFF OF PUBLIC SERVICE ! SEND YOUR POST CARD TO THE SWISS GOVERNMENT !

The 140 World Trade Organization state members are now negotiating the General Agreements on Trade in Services (GATS). This agreement administrated by WTO since 1995 is the first bilateral agreement concerning services. It has been elaborated with the complicity of multinational companies and aims at progressively liberalizing services. 160 sectors from tourism to telecommunication, banks, environment, energy, insurance and transport are today included in the GATS. Only non-competitive services are explicitly excluded, those that are completely financed and administered by the state: (the army, the police, justice etc.). Other public services: health, education, cultures, social insurance, postal services, etc. are submitted to it.

World leaders at exporting services, the United States of America, Switzerland and other European countries look forward to the opening of new markets. Developing counties on the other hand, which have practically nothing to export in the line of services are afraid of this agreement which will limit their sovereignty. They have very little means of opposing it.

GATS, because it excludes practically no service, undermines the ability of governments to make sure that everybody without any distinction gets the essential public services such as education health or water.

The present negotiating phase of the GATS could weaken governments' sovereignty and greatly limit « *local regulations* » that a parliament has the right to set up or maintain.

STOP THE DAMAGES !

The poor in the north and in the south, might be the losers at this «*sell out* » of services. The negotiations have barely started, there is still time to influence the discussions. This is why the Bern Declaration, Attac Swiss and many unions have decided to join forces and to start a new campaign: No to the sell out of worldwide public services!

1. Fundamental public services should not come under WTO regulations. Health, energy, education, environment must be regulated by governments. Everybody is entitled to a minimum of social benefits.

2. Governments must keep the possibility to make national laws on investment. GATS must not replace the failed multilateral agreement on investments. Every state must retain the right to protect its fledgling industries from the competition of big enterprise.

3. The obligations already entered into in the GATS must be reconsidered and discussed publicly. The consequences of the GATS must be assessed before new negotiations are started.

Cetim encourages you to bring your support to this campaign. Distribute and send the post card included here to « *Conseiller Fédéral* » Pascal Couchepin.