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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Written statement* submitted by the Europe-Third World Centre, a non-governmental organization in general consultative status and the American Association of Jurists (AAJ), a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[31 January 2004]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Draft Norms on Responsibilities of Transnational Corporations approved by the Sub-Commission on the Promotion and Protection of Human Rights

I. Introduction

The Draft Norms on Transnational Corporations approved by the Sub-Commission on the Promotion and Protection of Human Rights, is completely different – in a positive sense – to the initial draft submitted to the Working Group four years ago. But several essential matters have been left unresolved.

Therefore, this draft is still dissatisfactory to our two organizations (American Association of Jurists, AJJ, and Europe Third-World Centre, CETIM) despite several years of debates, the organization of an interdisciplinary seminar[1], the production of a large number of documents and the meeting that both NGOs held on the 6th and 7th March 2003 with the Working Group of the Sub-Commission that drew up the Draft.

II. Several issues that are essential for the project to offer a serious and coherent answer to problems raised by TNCs are lacking in the draft.

Transnational corporations are a phenomenon of contemporary societies that have a great magnitude and raise some specific economic, financial, legal, social and human problems.
Their transnational character, their economical and legal versatility, their enormous .economic and financial power and their great political and social influence are not TNCs' minor problems besides, such features are important obstacles to any attempt to exert on them a legal and social control.

The draft formulates obligations that are, in the main, valid to any company (national or transnational, big, medium or small) yet hardly taking into account TNCs specificities and, consequently, not giving answer to essential questions such as securing their legal and social control and making them really responsible for any activity contrary to human rights.

1. In this draft there is no joint and several liability of TNCs for activities that constitute a violation of human rights carried out by their branches (*de facto* or *de jure*), their suppliers, subcontractors and licencees.

The AAJ and the CETIM appropriately proposed to include this aspect in the draft to the Working Group of the Sub-commission that drew it up.

Such a responsibility of TNCs arises out of the principle of collective liability or joint and several liability, even by omission, of all those who take part, in a way or another (collective action) in the causing of a damage. Thus, a joint obligation accrues, grounded on the fact that all damage must offer the victim the right to reparation. This right can be claimed to all responsible jointly, or to one or some of them and, if they are insolvent, to the one that is solvent.

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[1] American Association of Jurists, Europe Third-World Centre, "The activities of transnational corporations and the need of their legal framing". International multidiscipl held in Céligny, Switzerland, 4th and 5th May 2001, CETIM Edition, Geneva, June 2001.

The principle of joint and several liability of TNCs is an essential question, if we bear in mind TNCs' regular practice to externalise costs and risks as well as the consequent responsibilities – that are assumed exclusively or almost exclusively by suppliers, subcontractors, licensees and branches – while the TNCs get extraordinary profits.

This problem cannot be avoided if there is a real will to move forward to the legal framing of TNCs, that delocate their production to countries where wages are low, social laws leave much to be desired or is inexistent, where laws to protect the environment do not exist or are not respected at all, where they are granted tax privileges and "national treatment" even as regards public services.

TNCs do not assume any responsibility for violating labour law and norms that protect environment in the countries where they delocate their production. On the contrary, thanks to bilateral or regional treaties such as North American Free Trade Agreement (NAFTA in English), and Free Trade Area of the Americas (FTAA in English), if it finally takes shape, they take cover not only to be responsible of the damages caused but them, but they get warranties from the state that receives the delocalised industry against possible loss of benefits derived from amendments positive to labour law and/or environmental law, thus hindering, in the facts, progressive reforms concerning human rights.

Another way for TNCs to externalise costs and risks is subcontracting some of the services, as is the case with big oil transnationals that freight tanker cargo ships that belong to a sort of phantom ship owners in order to carry their oil. Thus, they avoid to assume responsibility deriving from the frequent ecological catastrophes provoked by those ships.

The omission of the principle of joint and several liability of transnational corporations grants impunity to TNCs that violate human rights.

2. The draft does not reflect the proposal made by AJJ and CETIM to set civil and criminal liability for executives of TNCs (managers, CEO, members of the administrative board) empowered by statutes to take decisions on behalf of the company. The vague allusion, stated in the preamble, is different; it does not meet the concern which distinguishes the liability of the executives of TNC's concerning the responsibilities in matter of human rights from the workers' liability (i.e. mere white collars and workers).

3. Although the Sub-commission and the Committee on Economic, Social and Cultural Rights have recently expressed similar opinions on these matters[2], the draft does not reflect the

[2] In resolution 2000/7 of 17/08/2000, the human rights Sub-commission stated among other things: *"Affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest; Declares, however, that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including the right of everyone to enjoy the benefits of scientific progress and its applications, the right to health, the right to food and the right to self-determination, there are apparent conflicts between the intellectual*

following issues, which were appropriately proposed by the AAJ and the CETIM to the Working Group that drew it up:

TNCs, their suppliers, subcontractors and licensees and "other companies" (*their branches de facto or de jure*) must recognise the principle of primacy of human rights and of public interest over the particular economic interest.

States should adopt legal, and other, measures in order to give priority to the notion of public service, particularly regarding health, feeding (including drinking water), education and housing, preventing and hindering formation of private oligopolies and monopolies in those fields. States should prohibit patents on any form of life and establish a right of preference to public domain over inventions and discoveries that are fundamental to health.

The sentence on paragraph 10 of the Draft: "Transnational corporations and other companies recognise and respect…. public interest", is not at all equivalent to previous proposals, that refer to the "primacy of human rights and public interest.

III.. Some other important clauses, proposed by AAJ and CETIM to the working group of the sub-commission that do not appear in the draft.

1. The clause destined to protect employees and shareholders of TNCs, their suppliers and subcontractors, as well as workers in the latter:

> States should establish and, when necessary, strengthen legal and regulatory provisions on civil and criminal liability of executives of TNCs and "other companies" (*branches de facto or de jure*) and those of their suppliers, subcontractors and licensees in all that concerns financial and commercial operations, including pension funds management, towards their shareholders and employees that hold shares of the enterprise or shares of its pension funds. States should also pass or reinforce existent legislation on the corporations' transparency (reports and periodic controls, etc.) about these matters.

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property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other;
Reminds all Governments of the primacy of human rights obligations over economic policies and agreements";
The Economic, Social and Cultural Rights Committee declares: *"(...) In opposition to human rights, intellectual property rights are in general provisory and can be removed, or conceded to someone else. If intellectual property rights can be conceded, have a limited duration, can be negotiated, limited or lost; human rights on the contrary are everlasting and constitute the expression of fundamental prerogatives that belong to the human being (..)"*
(Paragraph 6 of the Declaration of the Economic, Social and Cultural Rights Committee on " Human rights and intellectual propriety", E/C.12/2001/15 adopted on December 14th 2001.

2. The clause destined to the assumption, in practice, by TNCs of their liability for working conditions of their suppliers and subcontractors' personnel:

> TNCs should pay their suppliers, subcontractors and licensees reasonable prices for goods and services so as to allow them to pay their employees and workers decent wages and assure them and their families an adequate standard of living, and to permit suppliers and subcontractors to offer good working conditions, while allowing for reasonable profit margins for suppliers and subcontractors. Royalties asked by transnational corporations to their licensees should remain within reasonable limits in order to allow licensees to pay their employees and workers decent wages so as to assure them and their families an adequate standard of living, and to provide them with good working conditions, while, allowing for reasonable profit margins.

3. It is well known that the monopoly exercised by transnational corporations over mass media causes big problems to freedom of expression and communication, as well as the damage caused to objectivity in information by a dominant participation of big industries, including arming industry, over powerful world-range media.

However, the Working Group did not accept nor incorporate into the draft the following clause proposed by AAJ and CETIM:

In order to guarantee freedom of speech and the right to have access to an objective and impartial information, states should adopt legal, and other, measures, in order to prohibit the constitution of media monopolies, as well as the formation of groups or inter-companies agreements, etc., between communication companies and other sectors of industrial, financial or commercial activities.

4. In front of the problem arisen from the growing privatisation of armed and security forces, the AAJ and the CETIM, proposed the following clauses, that were not incorporated to the drat neither:

> Security staff employed by TNCs, their suppliers, subcontractors and licensees as well as security staff from other companies cannot work outside the site of the company for which they work. This proposal tends to prevent security staff from becoming a private militia working also in public areas.
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> TNCs, their suppliers, subcontractors and licensees, as well as "other companies", are not allowed to make use of the armed and security forces of a state, nor to engage private militia.

IV. Conclusion

Transnational corporations are legal persons of private law and, as any other natural or legal person, should respect the law, which, by the way, comprehends all international norms in force concerning human rights: civil, political, economic, social, cultural and environmental.

But their gift of ubiquity, that is, their capacity to be present in several parts of the world and nowhere at the same time, allows them to avoid national jurisdictions. And, even more important, their immense power, the aid of some of the major world powers and the complicity of many governments from peripheral countries, has make it possible for them to weave a planetary network of norms that are contrary to national and international public law in force, in the shape of bilateral agreements on protection of foreign investments (some 2.000 currently in force), regional agreements such as NAFTA and the planned FTAA, without forgetting the World Trade Organisation (WTO).

Not including legal persons nor economic and environmental crimes under the competence of the International Penal Court has put TNCs out of this international jurisdiction.

Instead, they count, inside the World Bank system, on a discretional tribunal at their service: the International Centre for Settlement of Investment Disputes (CIRDI-ICSID) whose president is not other but the World Bank President and whose norms of reference do not include the ones concerning human rights or environmental law. The ICSID, with the lack of objectivity and impartiality inherent to the World Bank, settles controversies between transnational corporations and states (136 states are part of the ICSID) that accept to undergo its arbitration.

So, many states, that are, at least in theory, the political expression of sovereignty and of the interests of the whole nation in front of the international community, accept to discuss their disputes on an equal footing with private companies in front of a pseudo arbitral tribunal whose partiality in favour of the private interest is not called into question.

When some states do not give in to the "liberal" demands of transnational capital embodied in transnational corporations, pressures from international financial bodies (IMF and World Bank), from the WTO and their Agreements on trade of services (GATS), on measures concerning investments relating to trade (TRIM), concerning issues of intellectual property related to trade (ADPIC – TRIPS), etc. increase.

For states that, despite all this pressure do not give in to the global strategy of transnational corporations, there are still more forceful resorts to be used by the superpower and its allies' intelligence services, "special forces" or armed forces: attacks and sabotages, coup d'Êtat, and aggression wars.

These are, in real terms, the problems caused at present by transnational corporations.

Trying to find ways of giving answer to these problems in the framework of the United Nations is a huge challenge. But it has to be faced because it is the whole of the current system of international law founded on the sovereign equality of all states and in the full validity of human rights what is at stake now.

The AAJ and the CETIM suggest the Commission on Human Rights to constitute an open Working Group, as the Sub-commission itself has proposed in its resolution 2003/16, in order to improve the Draft, to solve the omissions that have been pointed out in the previous paragraphs and to study follow-up measures for the issue, of an extraordinary importance, of problems caused by transnational corporations' activities, in order to grant an effective enjoyment of human rights: civil, political, economic, social and cultural.
