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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Joint written statement* submitted by 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.

[11 February 2005]

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

THE NEED FOR INTERNATIONAL PROCEDURES TO APPLY TO TRANSNATIONAL CORPORATIONS THE RULES WITH REGARD TO HUMAN RIGHTS CURRENTLY IN FORCE

1. Despite the fact that the Draft "Norms"[1] for transnational corporations and other business enterprises approved by the Sub-Commission on the Promotion and Protection of Human Rights[2] is far from being a panacea on the subject of control and legal framework of transnational corporations. The latter had a sharp reaction against on a document of some 40 pages[3], signed by the International Chamber of Commerce (ICC) and the International Organisation of Employers (IOE), which gather big enterprises, amongst which the biggest transnational corporations in the world. In that document, they state that the Sub-Commission's Draft undermine human rights and the rights and rightful interests of private enterprises, and that only states, not private actors, are the ones who bear obligations with regard to human rights. They exhort to the UN Commission on Human Rights to shelve the draft approved by the Sub-Commission.

Private persons, both individual and corporate, are also obliged to respect human rights

2. The document issued by ICC-IOE aims to reject the principle, perfectly established in international law and in most of national laws, that individuals, not only states, must respect human rights and can incur in violations of such rights.

3. The ICC-IOE document states that the Draft approved by the Sub-Commission favours the delegation of state's responsibilities with regard to human rights to business enterprises. It states also that the Draft is an attempt to "privatise human rights". Business enterprises do not lack cynicism to talk of "privatisation of human rights" when, in order not to accept to be submitted to prevailing legal norms and to a public control of their activities, they hide behind their "voluntary codes" and "private controls" that are, in fact, self-controls.

4. The ICC-IOE document, which is in really opposed to the Draft, takes advantage with certain ability of certain errors of the Draft, errors that the AAJ and the CETIM pointed out both orally and in written during its making by the Working Group of the Sub-Commission. Indeed, the Draft, after saying that even though… "*States have the primary responsibility to secure the fulfilment of, respect and protect human rights...*" adds that "*TNCs and other business enterprises have also the responsibility to promote and secure the fulfilment...*" The AAJ and the CETIM pointed out this error to the Sub-Commission's Working Group and proposed to remove the sentence *"... have the responsibility to promote and secure the fulfilment"...* in order for it

[1] See AAJ- CETIM "Proposed amendments for the Draft Norms on responsibilities of transnational corporations and other business enterprises with regard to human rights", 28 pages, Geneva July 2003. We proposed to change the title into "Directives and Recommendations..." and we added: "it is not a matter of proposing norms, because they already exist, but to propose ways to apply the existing norms..." and possibly create specific norms that take into account particular features of transnational corporations.

[2] See E/CN.4/Sub.2/2003/12/Rev.2.

[3] International Chamber of Commerce, International Organisation of Employers, *Joint views of the IOE and ICC on the draft* "Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights". www.iccbo.org

to read: *"must respect and contribute to ensure respect of, protect and promote human rights*"…[4].

Undoubtedly, the state has a non-delegable obligation on human rights' validity in the sphere of its jurisdiction and must impede their violation by the state itself and/or their officers as well as by private persons. Should the state not comply with such obligation, it will incur international responsibility.

5. But the ICC-IOE document takes advantage of this error in the Draft to affirm that obligations with regard to human rights are only borne by states, not by private persons. It adds that, in any case, private persons can bear civil and criminal responsibilities only in the framework of internal legislation. Therefore, according the ICC-OIE document, human rights can be violated only by states and their officers, not by private persons.

6. However, social reality shows that human rights can be violated not only by the state, but also by private persons. The common denominator that identifies those who have capacity to harm in a way or another their equals, by violating their human rights, is possession and exercise of any form of power, be it political, economic, military, religious, cultural or a compound of some of them.

7. The recognition of individuals' obligations with regard to human rights and their responsibility derived from violating them is set in article 29 of the Universal Declaration of Human Rights[5] and it was strengthen by legal doctrine, numerous international conventions on the subject of protection of environment, reports made by some thematic rapporteurs and the jurisprudence[6]. Such responsibility of individuals is set from the Statute of Nuremberg to the Statute of the International Criminal Court[7].

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[4] See AAJ- CETIM "Proposed amendments for the Draft Norms on responsibilities of transnational corporations and other business enterprises with regard to human rights", 28 pages, Geneva July 2003.

[5] The ICC-IOE document states that obligations for individuals deriving from article 29 of the Universal Declaration are not legal obligations but ethical duties. The compulsory legal character (*jus cogens*) of the Universal Declaration of Human Rights is not put into question by anyone, except for big transnational corporations.

[6] In November 1999 a penal lawsuit was filed before the Court of the South District of New York against *Union Carbide* and its President Warren Anderson, within the framework of the *Aliens Tort Claims Act*, for acting with clear culpable negligence impregnated with racial discrimination when installing in India an industry with security norms clearly inferior to the existing ones in the United States and for being foreseeable the disaster that led to the death of thousands of people (Sajida Bano et al v. Union Carbide Corporation).

In 1997 a suit of law against *UNOCAL* and *Total* started for human rights violations during the construction of the oil pipeline in Yagana, Myanmar. In this lawsuit, Judge Richard Páez said that transnational corporations and their leaders can be held responsible for violations to international human rights law in foreign countries and that North American courts had jurisdictional capacity to judge such violations.

A recent case is the criminal complaint against *Shell* and its Director Anderson, filed before a court of New York by relatives of Ken Saro-Wiwa, who accused the transnational corporation of having helped the Nigerian regime of Sani Abacha to produce proofs in a sham trial that led the Ogoni leader and his companions to gallows. In February 2002, Judge Kimba Wood, of New York, in charge of the lawsuit, refused Shell's defences and decided to proceed with the trial against the enterprise and against Anderson, for taking part in crimes against humanity, torture, summary executions, arbitrary detention and other violations of international law. Judge Wood said that the facts, as presented by complainants, could be considered crimes against humanity, according to the definition contained in the Treaty of Rome of 1998 that approved the Statute of the International Criminal Court.

[7] Andrew Clapham, in a documented work (*The Question of Jurisdiction Under International Criminal Law Over Legal Persons : Lessons from the Rome Conference on an International Criminal Court* , en *Liability of Multinational Corporations Under International Law*, M. Kamminga and S. Zia-Zarifi, publishers, Kluwer Law

8. Transnational corporations, with their enormous power, violate repeatedly all human rights; by promoting coup-d'états and civil wars, giving support to bloody dictatorships, violating the right to health, labour and environmental rights, etc.

9. In this year of the 60th anniversary of the liberation of the nazi concentration camps, it is necessary to recall that some of the transnational corporations that took part in the holocaust and made profits out of it, nowadays take part actively in international spheres, try to influence decisions of several United Nations bodies, give financial support to foundations and give patronage although still they do not grant indemnities to the people that worked for them as slaves during the nazi regime.

Human rights are indivisible and cannot be dissociated, and their common denominator is dignity inherent to human condition

10. The ICC-IOE document completes its ground line of argument against the Sub-Commission's Draft by holding that human rights are an specific and limited category of rights to which economic and social rights, amongst other, do no belong.

11. Such an exclusion of economic and social rights is unacceptable. Human rights are indivisible and cannot be dissociated, like the human being itself, and their common denominator is dignity inherent to human condition. This reference to human being's dignity is in the first paragraph of the Preamble of the Universal Declaration of Human Rights. The Declaration embraces not only civil and political rights but economic, social and cultural rights as well, for instance in article 23.3 that states: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity...".

12. This is how it was understood by the UN General Assembly, when thinking of working out a sole International Covenant that embraced civil and political rights and economic, social and cultural rights. During the fifth period of sessions in 1950, it adopted a resolution that read: "the enjoyment of civil and political freedoms, as well as of economic, social and cultural rights are interdependent" because "in the case a human being is deprived of economic, social and cultural rights it does not represent the human being that the Universal Declaration considers as the ideal of a free man". (Doc. A.2929, point 21, chap. I).

13. This reference to dignity inherent to human condition as the common denominator of all human rights can be found also in the Proclamation of Teheran of 1968 (art. 13) as well as in

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International, The Hague 2001), holds that transnational corporations could be accused by the International Criminal Court, although in Rome the French proposal supported by other countries and only one NGO, the Foundation Lelio Basso, to confer the Court jurisdiction over corporate persons did not succeed, Clapham based his argument upon preliminary considerations of Law n. 10 of December 1945 of the Allied Control Council for Germany (that gave authorization to judge associations declared as criminal by the Court itself) and what article 25 sets out (Criminal individual responsibility, subsection 3, paragraph *d* of the Statute of the International Criminal Court) which refers to whom "In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose".
In short, Clapham holds that transnational corporations could be judged before the International Criminal Court as criminal associations.
But, it might be pointed out that in Nuremberg, big German enterprises that committed war crimes were never declared as criminal associations (although some of their Directors were judged). This was the case of I.G. Farben (US Military Tribunal; Nuremberg, 14th August 1947-29th July 1949) as noted by Clapham himself.

successive instruments and declarations (preambles of ICESCR and ICCPR, Vienna Declaration and Program of Action of 1993, etc.).

14. Unlike civil and political rights, economic and social rights are progressively applicable, "to the maximum of its available resources" (art. 2 of the ICESCR). But this does not mean that ECSR are just an objective, since they involve minimum obligations of immediate fulfilment[8], as for instance, pay a just and favourable remuneration (art. 23.3 of the Universal Declaration and art 7 of PIDESC).

15. The ICC-IOE document states, criticizing article 8 of the Draft "norms", that business enterprises do not have this last obligation. For the business enterprises document, a just and favourable remuneration would be an objective, not an obligation. Furthermore, it denies, in a general way, that international labour law belongs to the category of human rights.

16. From a strict legal point of view, it can be said that human rights are those that have been admitted as such in international rules and in most of national states, many of which have incorporated international rules to its internal law.

17. These questions (if private persons are also obliged to respect human rights and which rights fall into the category of human rights) that can be seemingly theoretical have, however, practical scope.

18. If transnational corporations are excluded from the sphere of human rights[9], the legal framework left to them is common internal law, which is clearly insufficient as to ask them responsibility.

19. This is due to the fact that in rich countries, transnational corporations have a favourable legislation and, above all, with the unconditional backing of Governments, and in poor countries can impose their strategies, violating, if necessary, internal legislations and, by the way, also human rights, with the complicity of leading elites in many of those countries. It is well known that some transnational corporations are economically more powerful than many poor countries[10] and that, besides, they count on a legal arsenal to their service (bilateral treaties on free commerce and promotion and protection of investments, amongst other) and jurisdictional (arbitrary courts of the International Centre for Settlement of Investment Disputes (ISCID), member of the World Bank Group and the Dispute Settlement Body of the World Trade Organization)

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[8] General Comment n. 3 (1990) of the ICESCR Committee. It is said, among other things, that the fact that states bear an obligation of result, ("take measures… to achieving progressively... the full realization of the rights recognized") does not mean that states bear no immediate obligations in the sense of acting rapidly and efficiently to achieve the objectives declared in the Covenant (paragraphs 4, 5, 9, 10 and 11 of General Comment n.3). And, in paragraph 5, the Comment states: "…judicial remedies should be provided to make worth the rights of immediate realization in the Covenant" (arts. 3, 7.a.i, 8, 10.3, 13.2.a, 13.3, 13.4 and 15.3).

[9] The Draft approved by the Sub-Commission includes "other enterprises", which denaturalise its objective, that should be directed specifically to transnational corporations. The AAJ and the CETIM pointed out this in due time.

[10] The volume of business of the biggest transnational corporations is equivalent or superior to GDP of many countries and that of half a dozen of them is bigger than the GDP of the 100 poorest countries together (Utting, *Business Responsibility for Sustainable Development*, UNRISD; Geneva, January 2000.

20. This, together with the extreme fluency of transfrontier movements of TNCs that allows them to avoid the fulfilment of national laws and rules, makes clearly insufficient domestic legislations and demand imperatively the establishment of international procedures and mechanisms of public law that force TNCs to respect human rights and sanction them if they the violate such procedures and mechanisms. This is exactly what these enterprises do not want.

21. A public and social control at an international scale is needed to oppose the enormous power of big transnational corporations. We cannot allow again what happened in 1992, when the intense pressure made by transnational corporations made the draft Code of Conduct to these enterprises, made in the framework of the Commission on Transnational Corporations within the ECOSOC, sunk.

22. It is essential that the Commission on Human Rights does not give in to the pressure of transnational corporations and adopts in this period of sessions a resolution establishing an open-ended Working Group with the mandate to revise and improve the Draft handed by the Sub-Commission.
