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ECONOMIC, SOCIAL AND CULTURAL RIGHTS

**Report of the sessional working group on the working methods and
activities of transnational corporations on its seventh session**

Chairperson-Rapporteur: Ms Halima Warzazi

Summary

In 1998, the Sub-Commission on the Promotion and Protection of Human Rights established, for a period of three years, a sessional working group to examine the working methods and activities of transnational corporations. The Sub-Commission renewed the mandate in 2001 and again in 2004, each for a period of three years. The working group held two public meetings for its seventh session on 27 and 29 July 2005.

The Sub-Commission nominated the following experts as members of the working group: Halima Warzazi (Africa), Miguel Alfonso Martínez (Latin America and the Caribbean), Gudmundur Alfredsson (Western Europe and other States), Gáspár Bíró (Central and Eastern Europe), and Chin Sung Chung (Asia). Warzazi acted as Chairperson-Rapporteur in the absence of Guissé who had been Chairperson-Rapporteur of the previous sessions of the group.

The working group concentrated its discussions on several themes focusing on the future of the working group. While some participants suggested that it would be more appropriate to move consideration of the question to the general discussion under item 4 of the Sub-Commission, other participants noted that the working group's mandate had been extended in 2004 for a further three years and that it was therefore realistic to focus on the future work of the group. However, participants emphasized the need to ensure that the working group respected

the directives of the Commission and did not duplicate the work of the recently appointed Special Representative of the Secretary-General on human rights and business.

General discussion focused in particular on issues such as: the implementation of the Norms approved by the Sub-Commission in 2003; the protection of individuals from harm caused in the context of business activities; the gathering of best practices for promoting and protecting human rights by business; the role of States in protecting human rights; the effects of trade agreements on the enjoyment of human rights; the effects of trade and investment dispute mechanisms on the enjoyment of human rights; the drafting of model legislation in the area of human rights and business; a compilation of available information on human rights impact assessments; human rights education of business management; and the identification of appropriate remedies in the case of violations of human rights due to business activities.

Members of the working group, Sub-Commission experts and representatives of non-governmental organizations made specific proposals for working papers and for a revised agenda.

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Introduction

1. In its resolution 1998/8, the Sub-Commission on the Promotion and Protection of Human Rights established, for a period of three years, a sessional working group to examine the working methods and activities of transnational corporations. In its resolution 2001/3, the Sub-Commission decided to extend, for a three-year period, the mandate of the working group so that it could fulfil its mandate. In its resolution 2004/16, the Sub-Commission decided to extend, for a further three-year period, the mandate of the working group. The present report summarizes the discussion at the seventh session of the working group.

2. The Sub-Commission nominated the following experts as members of the working group: Halima Warzazi (Africa), Miguel Alfonso Martínez (Latin America and the Caribbean), Gudmundur Alfredsson (Western Europe and other States), Gáspár Bíró (Central and Eastern Europe) and Chin Sung Chung (Asia).

3. The working group held two public meetings during its seventh session, on 27 and 29 July 2005.

4. Ms. Warzazi was elected Chairperson-Rapporteur.

5. The following members or alternates of the Sub-Commission who were not members of the working group also attended the meetings: Marc Bossuyt, Emmanuel Decaux, Florizille O'Connor, David Rivkin, Ibrahim Salama and Yozo Yokota.

6. Representatives of the following non-governmental organizations (NGOs) also participated in the meetings of the working group: Association of American Jurists, Europe-Third World Centre, Foundation for Aboriginal and Islander Research and Action, Franciscans International, Indigenous World Association, Minnesota Advocates for Human Rights, and Pax Romana.

7. At the suggestion of the chairperson, a new item 3 was added to the agenda which the working group had adopted in 1999 for the duration of its mandate. The agenda adopted for the seventh session was therefore the following:

1. Election of officers.
2. Adoption of the agenda.
3. Consideration of the report of the High Commissioner (E/CN.4/2005/91).
4. Activities of transnational corporations.
5. Present standards and standard-setting activities.
6. Conclusions and recommendations.
7. Recommendations for the future work of the working group on the effects of the activities of transnational corporations on human rights, including the right to development and the right to a healthy environment.

8. Adoption of the report of the working group to the Sub-Commission.

8. The working group had before it the following background documents: 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); Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (the Commentary) (E/CN.4/Sub.2/2004/38/Rev.2); report of the High Commissioner to the Commission on Human Rights on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/2005/91).

I. GENERAL DISCUSSION

Comments by the members of the working group and Sub-Commission experts

9. The Chairperson proposed that the Secretariat should explain some of the developments since the Sub-Commission had approved the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights. A member of the Secretariat noted that the Commission on Human Rights had adopted a decision and a resolution on the issue since the adoption of the Norms. In its decision 2004/116, the Commission requested the High Commissioner to undertake a study of existing initiatives and standards on human rights and business and to identify any outstanding issues for consideration by the Commission. During 2004, the Office of the High Commissioner for Human Rights undertook an extensive consultation process which was compiled and issued as a report of High Commissioner. In its resolution 2005/69, the Commission requested the Secretary-General to appoint a special representative for an initial period of two years on the issue of human rights and transnational corporations whose mandate was specified in the resolution.

10. The Chairperson encouraged the working group, other experts of the Sub-Commission and representatives of NGOs to present their views on the report of the High Commissioner and to suggest specific areas of possible focus for the future work of the working group. In particular, the Chairperson suggested that the working group could consider the criticisms of the Norms that had been raised by business and recorded in the report.

11. Ms. Chung stressed the importance of the working group's to gathering information on this issue and made three proposals for future work. First, Ms Chung noted that corporations could foster economic well-being at certain times while at other times they could have negative impacts on the enjoyment of human rights. In the latter case, the working group could consider what mechanisms existed to protect human rights. Second, the working group could consider what mechanisms existed to repair damage caused when, in violation of the norms, corporations engaged in or benefited from war crimes. Third, the working group could consider situations where authoritarian States facilitated or accelerated human rights violations committed by corporations.

12. Mr. Decaux, suggested that the working group could facilitate the mandate of the Special Representative of the Secretary-General by focusing on gathering best practices of States and transnational corporations. Mr. Decaux also noted that the Special Representative could have an important role in simplifying the panorama of existing initiatives and standards, and suggested that the Norms also had an important role in this regard by explaining what was expected of

corporations in the area of human rights. In this context, Mr. Decaux noted that large human rights organizations as well as businesses were using the Norms and the Sub-Commission's work was now less contentious than it had been two years ago. He highlighted the need to encourage corporations to consider the question of human rights more seriously and suggested ways of making human rights more attractive to business. In particular, he noted that corporations were attracted by legal clarity and security and clarifying the responsibilities of business with regard to human rights was a way of achieving this. Further, clarifying business responsibility for human rights and promoting good corporate conduct could avoid consumer boycotts and improve the image of businesses for their shareholders.

13. Mr. Alfredsson stated that he had identified several concrete objections to the Norms at the sixth session of the working group. He regretted that neither the working group nor the report of the High Commissioner had provided answers to his questions. He noted the Commission's resolutions and the fact that the working group had no documents before it, and suggested that the working group should terminate its mandate.

14. Mr. Alfonso Martínez noted that the working group could not alter the Norms as they had been approved by the Sub-Commission; however, the working group could consider ways of putting them into practice. He noted that there was a basic responsibility to protect against human rights violations, no matter who committed them. National law often derived from the international standards in treaties or recommendations, and the working group could therefore consider how the Norms could be implemented nationally.

15. Mr. Biró referred to the report of the High Commissioner and noted that there were relatively few internationally legally binding initiatives and standards existing on this issue. He noted that States had the obligation to protect against human rights violations in their territory; however, he also noted that it was unclear whether states had an obligation to cooperate internationally when a company based in one country violated human rights in another country. That issue merited future consideration by the working group. Such consideration could also complement the second element of the mandate of the Special Representative.

16. Mr. Yokota noted that there were many issues for the working group to discuss and so did not agree that the group's mandate should end. He stressed that the transnational nature of modern business made it difficult for any one State to regulate business properly. Further, many businesses were so strong financially that their budgets overshadowed those of many smaller countries, which inhibited some countries from regulating companies operating in their territories. Mr. Yokota also referred to the lack of understanding of human rights among business management and suggested that human rights education was an important action to develop. Trade unions, the media and civil society were more aware of human rights; however, it was still relatively rare that these groups addressed companies in the context of human rights. Mr. Yokota also suggested that the working group could work together with the Global Compact to help make it stronger by specifying in detail what was expected of business in relation to human rights. This could help those companies that were willing to improve their performance in relation to human rights but were unaware of what they should do. Mr. Yokota also noted that the court system was a strong deterrent for companies as they were eager to avoid the damage to their reputation as a result of losing court cases related to human rights. Finally, Mr. Yokota referred to the work of the World Bank on human rights, in particular in relation to indigenous peoples, as well as the decisions of the Dispute Settlement Mechanism of the World Trade

Organization and their impact on human rights. He proposed that the working group could consider these issues as part of its ongoing work.

17. Mr. Decaux noted in this context, that the decisions of international investment tribunals also affected human rights, such as the right to water, yet the tribunals did not adequately take those issues into account. There could be value in deepening discussion in this area.

18. Mr. Salama believed that the working group was addressing an important subject, but that at the same time it was mishandling it at a technical, political, as well as procedural level. At the technical level, the working group was attempting to implement the Norms too soon and it would be better to let them rest for some time. Politically, the working group should be careful not to work against the directives of the Commission which had stated in 2004 that the Sub-Commission should not monitor the Norms. Procedurally, the Sub-Commission had complained about a lack of time to complete its work; consequently, terminating the mandate of the working group would make room for discussion on other topics. The question could be taken up as a sub-item of the agenda and the working group could be re-established, if needed, in the future. Mr. Salama highlighted recommendations contained in the report of the High Commissioner, in particular the need to develop human rights impact assessments, noting that this was also an area of work of the Commission's Working Group on the Right to Development. He suggested that the working group or the Sub-Commission could recommend that States should adopt national legislation compelling businesses to undertake human rights impact assessments of their activities.

19. Mr. Alfonso Martínez and Ms. Chung spoke in favour of continuing the mandate of the working group. Ms. Chung noted that the working group had discussed its future mandate extensively at its sixth session and suggested that it was not useful to continue discussing it this year. She highlighted the need for the working group to have a working paper before it at its next session and suggested that, in addition to the ideas already raised, the working paper also focus on appropriate remedies for violations, or gender issues in relation to business activities.

20. Mr. Rivkin suggested that instead of deciding on the future of the working group now, the group could be dissolved and then reformed at an appropriate time in the future.

21. Mr. Alfonso Martínez stated that terminating the working group at this point would be sending the wrong message.

22. Ms. O'Connor suggested that the working group could work together with the International Labour Office, which had started a human rights education programme. In that way, the working group would not continue its work in isolation. In relation to human rights impact assessments, Ms. O'Connor stated that she was not aware that instruments had been identified for undertaking such assessments so she was not sure how the working group could itself undertake an assessment. Any information on that issue gleaned over recent years could be useful background information for the working group.

Comments made by non-governmental organizations

23. The representative of Europe-Third World Centre referred to the events since the last session of the working group including the report of the High Commissioner which devoted

significant space to the Norms and suggested that there was growing interest in the development of a universal statement on human rights and business. However, in establishing the mandate of Special Representative of the Secretary-General, the Commission had ignored the previous work of the Sub-Commission. Consequently, it was important that the working group continue its deliberations and, while unable to monitor the Norms, the working group could make proposals for the monitoring of the Norms. The working group could also analyse the compatibility between human rights and bilateral, regional and multilateral trade agreements, as investment tribunals did not take into account the human rights obligations of parties when resolving investment disputes.

24. The representative of Franciscans International welcomed the excellent work done by the working group in the past, noting that that organizations, such as the International Commission of Jurists and the International Federation of Human Rights Leagues had worked in a coalition to support it. However, those organizations now supported terminating the working group and moving the consideration of the issue to a sub-item of item 4 of the Sub-Commission's agenda.

25. Pax Romana also referred to recent developments in the Commission relevant to the mandate of the working group, noting that the Special Representative did not have an investigative role. The representative highlighted the fact that the perpetrators of the Bhopal disaster over 20 years ago still remained unpunished, and that this was just one example of situations where corporate crimes went unpunished and the victims had no remedy. The representative proposed several areas of future work of the working group including an examination of the moral, political and legal responsibilities of States and corporations at different levels in relation to human rights; the establishment of model national legislation based on the Norms; an analysis the role of the State to protect individuals from the negative effects of business activities; an examination of corruption in the context of business activities; and a study of opportunities for transnational litigation. Those issues could be elaborated upon in a working paper.

26. The representative of the Foundation for Aboriginal and Islander Research Action noted that there remained many issues in the area of human rights and business to be discussed and that, if the working group were not to continue, such issues might come to the attention of the Commission. The representative underlined the inadequacy of voluntary guidelines in this area, which had never been helpful to indigenous peoples. He emphasized the need to examine conflict resolution and, in this context, highlighted the principle of free, prior and informed consent as well as the protection of the spiritual traditions and interests of indigenous communities. The working group provided a forum for considering such issues. The representative also noted that the consultation process that had provided the background to the report of the High Commissioner was useful in assisting civil society to lobby Governments and to have access to government positions which were made public as a result of the consultation. Finally, it would be important for indigenous peoples to have an opportunity to be heard in the process of compiling the compendium of best practices proposed by the Commission in the mandate of the Special Representative.

27. The representative of the Indigenous World Association referred to Mr. Salama's references to the Commission's Working Group on the Right to Development, noting that States tended to dominate debate in that forum, making it difficult for civil society to have a say. The representative noted that there was no international mechanism to hear claims of human rights

violations on behalf of communities. The continuation of the working group would be important to fill this and other gaps.

28. Minnesota Advocates for Human Rights referred to positive practice in relation to the Norms. The representative stated that the Norms were very practical and that the document was currently being put into practice by many companies. Further, a group of companies was currently road-testing the Norms and some companies were including provisions requiring respect for the Norms as part of business contracts with other companies.

II. RECOMMENDATIONS FOR FUTURE WORK OF THE WORKING GROUP

Proposals by experts

29. During the course of the general discussion, Mr. Biró, Ms. Chung and Mr. Alfonso Martínez made suggestions for the future work of the working group.

30. Mr. Biró suggested that he prepare a working paper on the role of the State or States in the protection of human rights with regard to the activities of business, with particular attention to the situation where States were unwilling or unable to protect human rights. In that regard, Mr. Biró referred to the report of the High Commissioner which noted this as an area meriting further attention.

31. Ms. Chung indicated that she could prepare a working paper on situations where companies were complicit with the State in ways that could lead to violations of human rights. Ms. Chung gave examples of companies working with authoritarian regimes such as Myanmar.

32. Mr. Alfonso Martínez proposed changes to the annual agenda which would guarantee fulfilment of the working group's mandate while meeting the directives of the Commission that the Sub-Commission should not monitor the Norms, nor interfere with the mandate of the Special Representative. In that context, Mr. Alfonso Martínez proposed a four-point agenda as follows:

1. Review of developments related to the moral and legal responsibilities of business with respect to the promotion and protection of human rights.
2. Examination of the various situations where business generates or accelerates human rights violation in different kinds of societies.
3. Consideration of possible national and international mechanisms to protect individuals from harm caused by business activities.
4. Identification of appropriate remedies in the case of specific violations of human rights caused by business activities.

Reactions to the proposals by members of the working group and Sub-Commission experts

33. In relation to Ms. Chung's suggested working paper, Mr. Salama noted that he had recently submitted a working paper on a similar topic and offered to work with Ms. Chung in the preparation of her paper, possibly by updating his first working paper. In relation to the proposed agenda, Mr. Salama warned that the working group should not go against the instructions of the Commission, in particular in relation to monitoring. As a general comment on the proposals, Mr. Salama expressed concern at the use of terms such as "unwilling or unable" in relation to States.

34. Ms. O'Connor expressed an interest in working with Ms. Chung on her paper. She also expressed interest in the area of the effects of trade agreements on the enjoyment of human rights. The Chairperson suggested that Ms. Chung could incorporate the issue of trade agreements into her working paper.

35. Mr. Alfredsson cautioned the working group, against undertaking standard-setting and monitoring functions. He also noted that the working group should avoid duplicating the mandate of the Special Representative. While out of respect for the Chair, Mr. Alfredsson said that he would work with the other experts on the future work plan of the group, he believed that the working group had no role to play on this issue.

36. Mr. Salama suggested a two-point agenda, the first being a review of developments relating to business responsibility with regard to human rights and the second being an examination of working papers. Mr. Alfredsson supported the proposal by Mr. Salama.

37. With regard to the proposals for the agenda, Mr. Alfonso Martínez, noted that the reference to "situations" in his point 2 was not a reference to monitoring. In order to clarify the matter, he suggested replacing "various" with "possible" before the word "situations". He was prepared to delete the references to "national and international" in point 3. On point 4, Mr. Alfonso Martínez stated that he could not see the problem with the reference to remedies as it was a reference to the identification of appropriate remedies in the case of specific violations, but was open to alternative wording. Mr. Alfonso Martínez did not agree that the agenda of the working group should be reduced only two points, as prepared by Mr. Salama. Indeed, an item could not be put under a working paper, but rather a working paper under an item. The topics proposed by Mr. Biró and Ms. Chung for working papers were already in the revised agenda he had proposed.

38. Mr. Salama, Mr. Alfredsson and Mr. Alfonso Martínez agreed to reformulate the revised agenda.

Reactions to the proposals by non-governmental organizations

39. The representative of the Europe-Third World Centre suggested that: (a) a compilation of the work of intergovernmental organizations could be prepared; (b) in relation to the Norms, that treaty bodies could ask States to provide information about human rights violations by business in their territories; (c) that a mechanism could be created under the Economic and Social Council for the implementation of the Norms; (d) that the working group could consider the compatibility between human rights treaties and trade agreements. Finally, the representative supported the Mr. Biró's offer to prepare a working paper.

40. The representative of the Association of American Jurists indicated that there was currently a dangerous confusion between the United Nations and business, particularly in relation to partnerships between intergovernmental organizations and the private sector. The representative also suggested that the World Summit for Sustainable Development had been overly influenced by the private sector.

41. The representative of Pax Romana noted that there were several steps that needed to be undertaken before legal accountability of business would be possible. Referring to the report of the High Commissioner, the representative suggested that the working group could consider the question of “complicity” of business in human rights violations. Similarly, the Sub-Commission had before it a number of working papers and papers of Special Rapporteurs that were relevant to the mandate of the working group which could provide information to the working group. Further, the working group could monitor the comments on the Norms and consider case law which could indicate what mechanisms would be appropriate to respond to point 3 of the revised agenda proposed by Mr. Alfonso Martínez. For example, there were already mechanisms – for example, national human rights institutions – that were challenging business practices and that could provide information to bridge the knowledge gap on this issue.

III. ADOPTION OF THE REPORT OF THE WORKING GROUP

42. The present report was adopted by the working group on 3 August 2004.
