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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 eighth session

Chairperson-Rapporteur: Mr. El-Hadji Guissé

* Pursuant to General Assembly resolution 60/251 of 15 March 2006 entitled “Human Rights Council”, all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights, including the Sub-Commission, were assumed, as of 19 June 2006, by the Human Rights Council. Consequently, the symbol series E/CN.4/Sub.2/_, under which the Sub-Commission reported to the former Commission on Human Rights, has been replaced by the series A/HRC/Sub.1/_ as of 19 June 2006.

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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 eighth session on 8 and 10 August 2006.

The Sub-Commission nominated the following experts as members of the working group: El-Hadji Guissé (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).

The discussion of the working group focused on how to ensure the implementation of the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, adopted by the Sub-Commission in 2003. Under item 2 of the agenda, two experts presented working papers on the issue of bilateral and multilateral economic agreements and their impact on human rights of the beneficiaries and on the issue of the role of the State in the guarantee of human rights with reference to the activities of transnational corporations and other business entities. Members of the working group and other experts commented on the working papers, as did representatives of some non-governmental organizations. Pursuant to item 6 of the agenda, the working group discussed its input and recommendations concerning implementation by the Sub-Commission of Human Rights Council decision 2006/106.

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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 eighth session of the working group.
2. The Sub-Commission nominated the following experts as members of the working group: El-Hadji Guissé (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 eight session, on 8 and 10 August 2006.
4. Mr. Guissé 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: Soli Jehangir Sorabjee, Yozo Yokota, N.U.O Wadibia-Anyanwu, and Halima Warzazi.
6. Representatives of the following non-governmental organizations (NGOs) also participated in the meetings of the working group: Europe-Third World Centre (CETIM), Pax Romana, and Tupac Amaru (speaking also on behalf of World Council for Peace).
7. At the suggestion of the chairperson, a new item 6 was added to the agenda of the working group. Pursuant to Sub-Commission resolution 2005/6 of 8 August 2005 concerning the agenda for the eighth session of the working group, the following agenda was adopted:
 1. Adoption of agenda;
 2. Review of developments related to the responsibilities of business with regard to human rights;
 3. Consideration of possible situations where business may facilitate or generate human rights violations in different kinds of societies;
 4. Consideration of possible ways and means of protecting individuals or groups from harm caused by business activities;
 5. Identification of appropriate responses in case of specific violations of human rights; and
 6. Implementation of Human Rights Council decision 2006/102.

8. The working group had before it the following background documents: The interim report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (E/CN.4/2006/97) and Commission on Human Rights resolution 2005/69 of 20 April 2005 on human rights and transnational corporations and other business enterprises. Two working papers prepared by members of the working group pursuant to Sub-Commission resolution 2005/6 were distributed as conference room papers: A working paper entitled “Bilateral and multilateral economic agreements and their impact on human rights of the beneficiaries”, submitted by Chin-Sung Chung and Florizelle O’Connor (A/HRC/Sub.1/58/CRP.8); and a working paper entitled “The role of the State in the guarantee of human rights with reference to the activities of transnational corporations and other business entities”, submitted by Gáspár Bíró (A/HRC/Sub.1/58/CRP.12).

I. GENERAL DISCUSSION

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

9. The Chairperson reminded the working group that the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/2003/12/Rev.2) (hereafter referred to as “the draft Norms”) had been adopted unanimously by the Sub-Commission, but that the expectations of the Sub-Commission as to their implementation had not been fully met. He asked the working group to consider as a matter of priority the level of implementation of the draft Norms and to decide a framework for their effective implementation. He also welcomed support and assistance from NGOs on the issue of implementation. He stated that voluntary codes of conduct had proven insufficient to ensure the protection of the human rights of individuals and communities affected by the activities of transnational corporations. He stressed that the draft Norms in his view were binding international standards, which had been developed in full consultation with States and NGOs. It was a matter of priority to get the Human Rights Council to adopt the draft Norms, and he suggested that a review mechanism be established to evaluate their implementation and enforcement by States. He supported a proposal made in a statement distributed by CETIM calling for the establishment of such a follow-up mechanism, which would report to the Human Rights Council. He also endorsed the CETIM proposal for further study of the relationship between transnational corporations and their suppliers and other business partners and its impact on human rights. He suggested that all bodies within the system of transnational corporations should have responsibilities with regard to human rights. He furthermore supported the CETIM proposal that the topics which were the subjects of working papers for this year’s session of the working group should remain on the agenda of the Sub-Commission.

10. Mr. Alfonso Martínez asked the working group to consider the implications of the interim report of the Special Representative of the Secretary-General for the tasks faced by the working group. He expressed concern that the findings of the report reflected a lack of coherence between the different United Nations human rights mechanisms mandated to consider the role of transnational corporations. The risks of incoherence between different human rights mechanisms were increased during transitional periods such as the one the United Nations human rights system was currently undergoing. He highlighted the difference between a collegial, independent body such as the working group and a single-person special procedure when considering such complex issues as the impact of transnational corporations on human rights. He expressed surprise at the resources which have been made available to the Special

Representative of the Secretary-General by sources outside the United Nations, in comparison to the resources available to the working group, and asked whether that could be seen as a move towards privatization of the United Nations.

11. On the issue of the draft Norms, Mr. Alfonso Martínez asked the working group to consider the best way to ensure that national legislation adequately reflects these international standards. Without imposing legislation on any given State, it should be considered whether implementation could be best achieved through legislation, national courts or tribunals, or international conventions. He encouraged the working group to work towards ensuring that the ongoing reform of the United Nations human rights system would lead to progress, and not to regression, for the protection of human rights.

12. Mr. Bíró noted in relation to the draft Norms that it was not yet clear how the Human Rights Council would proceed. The interim report of the Special Representative of the Secretary-General had not been very positive as to the practical application of the draft Norms, whereas other commentators had been more positive in their assessment of this issue.

13. Mr. Sorabjee referred to the role of the judiciary in enforcing fundamental rights contained in national constitutions. Such fundamental rights might be enforced against non-State actors performing State functions because of the very nature of these functions.

14. Mr. Yokota noted that the draft Norms might not have much chance of being adopted by the Human Rights Council. The main objections seemed to be that transnational corporations did not want to be restricted or have their activities monitored, though self-monitoring as an alternative had not been working. He referred to the United Nations Global Compact as innovative, though it had no mechanisms for monitoring or for putting strong pressure on participants. He also made reference to the ongoing process in the International Organization for Standardization to develop a social responsibility guidance document. He suggested that the working group and other human rights mechanisms should become actively involved in developing the human rights part of the standard.

15. Mr. Alfredsson said that many of the issues before the working group represented real human rights concerns and were deserving of attention. However, he called the debate about monitoring of compliance with the draft Norms inappropriate in view of the fact that they had not been adopted by the Human Rights Council. Noting that the session of the working group was poorly attended by Governments, international governmental organizations, NGOs and transnational corporations, and in view of the ongoing reform of the human rights machinery and the work of the Special Representative of the Secretary-General, Mr. Alfredsson reiterated the call he had made during previous sessions for the working group to be brought to a close and that, if at all, the subject of transnational corporations be placed in the agenda of the plenary forum of any future expert advice mechanism.

16. In a reply to Mr. Alfredsson, Mr. Alfonso Martínez blamed the lack of attendance during the session to uncertainty about the session as a result of the ongoing reform efforts and on a negative campaign against the Sub-Commission by the media and others. He agreed that the issue of transnational corporations should not be abandoned by any future expert advice mechanism to the Human Rights Council, and that the issue could be discussed by the plenary of such a body.

17. Ms. Wadibi-Anyanwu stated that it is essential that the issue of transnational corporations and human rights continue to be considered by the working group.

Comments made by non-governmental organizations

18. The representative of CETIM deplored the fact that the conditions under which the session of the Sub-Commission had been organized with restrictions on the full participation of all. He asserted that it was necessary to continue the mandate of the working group, not least in view of the inadequate response by the Commission on Human Rights to the draft Norms. He urged members of the working group to consider how to revive the draft Norms. He also recommended that the working group consider developing a follow-up mechanism to support the implementation of the draft Norms. He furthermore recommended that a study be undertaken to explore the complex relations between transnational corporations and their suppliers and other business partners, to clarify the responsibilities of transnational corporations in this regard.

19. The representative of Pax Romana shared the concern expressed about incoherence between different human rights mechanisms on the issue of transnational corporations. He recommended that the working group advise the Human Rights Council that there should be dialogue between the different mechanisms. Much work remains to be done on the draft Norms and in relation to their implementation. He called on the working group to convince the Human Rights Council to adopt the draft Norms and gave examples of how the draft Norms had been used to change the behaviour of companies for the benefit of human rights.

20. The representative of Tupac Amaru, speaking also on behalf of World Council for Peace, remained convinced of the need for binding standards such as the draft Norms to regulate the behaviour of transnational corporations. Systematic violations of human rights had increased considerably worldwide, particularly in developing countries. The draft Norms, whether binding or not, had not resolved the problem of human rights violations of transnational corporations. They had continued to destroy strategic resources of indigenous peoples, and States, particularly developing countries, had neither the resources nor the power to act. He called for further research into how transnational corporations in many cases are more powerful than States. He also insisted that States remain responsible for providing essential services such as water and electricity. He expressed concern about the two human rights mechanisms of the United Nations dealing with the issue of transnational corporations. He proposed that a mandatory code of conduct be drafted, taking the views of NGOs into consideration during the process. He recommended that the working group consider elaborating a definition of what constitutes a transnational corporation, and called for the establishment of an international tribunal to consider complaints against transnational corporations.

II. DISCUSSION OF WORKING PAPERS

Working paper on bilateral and multilateral economic agreements and their impact on human rights of the beneficiaries

21. Ms. Chung outlined the main findings and recommendations of the working paper she prepared with Ms. O'Connor on the issue of bilateral and multilateral economic agreements and their impact on human rights of the beneficiaries. The paper asserted that transnational corporations had served as the main actors for the promotion of free trade. Along with the

various multilateral, regional and subregional economic agreements, many countries were now entering into bilateral trade agreements. There were growing concerns over the involvement of transnational corporations in trade agreements. Because of the eagerness of poorer States to attract foreign investment, the negotiations processes were often unequal. The main problem there was a lack of democratic and transparent procedures and legal difficulties inherent in extraterritorial application of national standards. Direct and indirect impacts upon human rights of international economic agreements ranged from encroachment on the right to work and livelihood, on medical treatment and health, on the preservation of traditional knowledge, and on women's human rights. Various mechanisms could be used to promote the human rights responsibilities of States and transnational corporations. These included: invoking States' responsibilities arising from international human rights conventions; the development of human rights impact assessments of any bilateral or multilateral trade agreement; the active application of General Exception clauses of World Trade Organization (WTO) agreements and the Generalized System of Preferences in trade negotiations; incorporating human rights responsibilities of transnational corporations into international economic agreements; and applying the "Calvo Doctrine" to restore the territorial competence of national tribunals in disputes arising from trade agreements. The working paper also suggested a range of additional measures to be considered by the Sub-Commission, including asking the WTO to adopt the draft Norms; drafting model free trade agreements with principles and guidelines including non-discrimination, transparency, accountability and participation; and establishing a separate mechanism within the United Nations human rights machinery to address free trade agreements and transnational corporations.

22. Mr. Sorabjee suggested that the best way to prevent human rights violations by transnational corporations would be for the host country to make respect for certain basic human rights standards a condition for granting the transnational corporation permission to invest and operate in that country.

23. Mr. Bíró drew the attention of the working group to a statement by CETIM elaborating on the implications of States competing for investments.

24. Mr. Yokota welcomed the findings of the working paper, but stated that the problem with economic agreements was that their objectives were to create greater trade and free markets where business could seek profit without interference from Governments without any consideration for international human rights standards. At the same time, the human rights machinery had no voice in the development of bilateral and multilateral free trade agreements. He agreed that an effort should be made to bridge the gap between the human rights and WTO systems.

25. Ms. Chung made suggestions on how to overcome the gap referred to by Mr. Yokota, emphasizing that human rights were higher norms of international law than international trade law and that States must respect their human rights obligations when entering into trade agreements. She suggested that States undertake a human rights impact assessment as part of the process of negotiating bilateral or multilateral trade agreements in order to ensure that such agreements would be in compliance with their human rights obligations. She also asked the human rights machinery to continue to put pressure on WTO to incorporate human rights norms in its agreements. In this context, she noted the problem of WTO not being part of the United Nations system.

26. Mr. Alfonso Martínez noted that the sources used for the working paper were generally favourable to transnational corporations. He questioned the recommendation contained in paragraph 50 of the working paper that parties to free trade agreements could apply some exceptions in multilateral economic agreements. He would have preferred a discussion in the document about the reasons put forward by States that had prompted the exceptions. He noted that some of the concepts used to justify exceptions are rather elastic, for example the notion of “public order”.

27. Ms. Chung responded by saying that the recommendation concerning exception clauses stemmed from recommendations made in the report by the Office of the United Nations High Commissioner for Human Rights on trade and human rights, which considered the issue of using exception clauses to protect human rights.

28. The Chairperson noted that the concepts used in many of the exception clauses had systematically been applied in ways which were not supportive of human rights. He also stressed that a bilateral or multilateral trade agreement was illegal if it violated international law. He said that it was necessary to constantly monitor such agreements among States.

Working paper on the role of the State in the guarantee of human rights with reference to the activities of transnational corporations and other business entities

29. During the first meeting of the working group, Mr. Bíró explained the different lines of inquiry he had explored in determining how to approach the issue of the role of the State in the guarantee of human rights with reference to the activities of transnational corporations and other business entities. He noted that the Special Representative of the Secretary-General had also been mandated to examine the issue of the role of States. Mr. Bíró was particularly interested in exploring further what constituted “unwillingness” of a State to fulfil its human rights obligations in relation to the activities of transnational corporations. That would include studying the implications for human rights of States applying management principles from the private sector to its governance and of overlap in certain countries of key government functions with private sector interests. A further aspect was the issue of privatization of basic public functions such as education, health care, etc. Following input from two non-governmental sources (CETIM and the American Association of Jurists), he had decided to focus on the sociological and political aspects of the issue.

30. At the second meeting of the working group, Mr. Bíró presented a preliminary draft of the working paper. A document from CETIM (in French) was attached to the paper, and the expert fully shared the views of CETIM as expressed in the document. He also referred to a contribution from the American Association of Jurists, which was included in the text of the working paper.

31. Mr. Sorabjee questioned the relevance of discussing the issue of unwillingness of a State to fulfil its human rights responsibilities and stressed that an enquiry into this issue should not give any acceptance to the notion that a State can be unwilling to fulfil its obligations.

32. Mr. Alfonso Martínez noted that there was general agreement that States had the final, legally binding responsibility of guaranteeing the rights of citizens and others under its jurisdiction. States could only guarantee the rights of citizens if they had full capacity to exercise full sovereignty. The paper analysed recent trends of economic globalization whereby States were expected to privatize basic services, which had a severe impact on States' abilities to fulfil their obligations in relation to economic, social and cultural rights. Globalization should not mean that sovereign States had to disappear, because only they could ensure that transnational corporations respected the laws in the countries in which they operated. Examples of countries that had insisted that national laws in relation to social security be respected challenged any suggestion that States were unable to impose conditions on transnational corporations. He expressed concern at the interim report of the Special Representative of the Secretary-General, which in his view adopted a very different approach.

33. The Chairperson supported the statement made by Mr. Alfonso Martínez. He stressed that the draft Norms clearly stated that a State had the primary responsibility to protect the human rights of any person within its jurisdiction, and that transnational corporations had obligations and responsibilities within their sphere of interest. He brought attention to the role of transnational corporations in undermining the sovereignty of States. Corruption often ensured that the interests of transnational corporations were protected at the national level. He also referred to the privatization of essential services and resources, whereby States lost control and had their sovereignty limited along with their abilities to ensure the enjoyment of economic, social and cultural rights by their citizens. He expressed particular concern at the privatization of wars, with private armies and mercenaries undertaking military action to defend the economic interests of transnational corporations.

34. Mr. Yokota echoed the concern expressed by the Chairperson about the role of private military corporations, particularly in Africa, and said that this issue was linked to the issue of State responsibility. He asked whether human rights abuses committed by a military company contracted by a Government could be attributed to that Government. He raised the issue of the responsibility of companies producing and distributing small arms, which could be used to commit human rights violations. He also called for the working group to address exploitation of natural resources by transnational corporations, particularly resources found on land belonging to indigenous peoples. He suggested that the responsibility of home and host States should be discussed separately because of the enormous imbalance which frequently exists. He called for further analysis of the implications of the responsibilities of States engaged in business activities through State-owned enterprises. He noted that there was a trend against sovereign immunity for commercial activities of States, but that State functions are still immune from acts of other States. He also mentioned the need to define the limits of State responsibilities in cases where a Head of State went on an official visit abroad accompanied by companies seeking to expand their business.

Comments made by non-governmental organizations

35. The representative of CETIM called for further study of the subjects covered by the two working papers submitted for this session of the working group. He stated that there was a lack of political will of States to control the activities of transnational corporations, both at home or abroad.

36. The representative of Pax Romana stated that the main problem with bilateral trade agreements was the lack of transparency. He referred to the need for instruments to be developed which enabled people to question Governments as well as transnational corporations as to the content and implications of such trade agreements. Relating to the working paper on the role of States, he noted that the draft Norms were a tool for States to use in their dealings with transnational corporations.

37. The representative of Tupac Amaru referred to the considerable experience in Latin America with negative human rights impacts arising from bilateral trade agreements, which had given rise to a considerable social movement. The impact was felt in particular by indigenous peoples whose means of subsistence and intellectual ownership of their heritage was being taken away.

III. RECOMMENDATIONS FOR IMPLEMENTATION OF HUMAN RIGHTS COUNCIL DECISION 2006/102

38. **During the course of the general discussion and during discussion of item 6 of the agenda, members of the working group made suggestions relating to implementation of Human Rights Council decision 2006/102.**

39. **The Chairperson recommended that the Sub-Commission urge the Human Rights Council to adopt the draft Norms and consider the establishment of a follow-up mechanism. He also recommended that the issue of transnational corporations remain on the agenda of the Human Rights Council and on the agenda of any future expert advice mechanism to the Council.**

40. **Mr. Alfonso Martínez recommended that the document be submitted by the Sub-Commission to the Human Rights Council pursuant to Council decision 2006/106 should set out a detailed list of studies undertaken by the Sub-Commission as well as an overall summary and analysis of its mandates and activities, including those of the sessional working group on the working methods and activities of transnational corporations. He also recommended that an analysis be undertaken and transmitted to the Human Rights Council as to the implications of having collegial bodies as opposed to single-person mechanisms to consider topics which have universal implications. He furthermore recommended that the Human Rights Council be asked to adopt the draft Norms.**

41. **Mr. Alfredsson recommended that the working group be brought to a close, and that the subject of transnational corporation be placed in the agenda of the plenary forum of any future expert advice mechanism.**

42. **Ms. Chung recommended that activities within the United Nations human rights machinery in relation to transnational corporations should be coordinated by the working group in order to ensure more coherence between the different mechanisms.**

IV. ADOPTION OF THE REPORT OF THE WORKING GROUP

43. The present report was adopted by the working group on 17 August 2006.
