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PROMOTION AND PROTECTION OF ALL HUMAN RIGHTS, CIVIL, POLITICAL, ECONOMIC, SOCIAL AND CULTURAL RIGHTS, INCLUDING THE RIGHT TO DEVELOPMENT

**Written statement* submitted by International Cooperation for Development and
Solidarity (CIDSE), a non-governmental organization in general consultative status**

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

[23 May 2008]

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

Human rights and transnational corporations and other business enterprises

CIDSE has been following the work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises¹ with great interest. In February 2008, CIDSE prepared a submission to the Special Representative containing a set of recommendations to help reduce the risk of human rights violations and improve access to justice² and now welcomes the opportunity to submit a written statement to the Human Rights Council on this topic. The written statement summarises CIDSE's submission to the Special Representative, sets out CIDSE's position on the advance report and advances the rationale for a follow on mandate.

Part I: A summary of CIDSE's submission

CIDSE's submission emphasized that neither corporate social responsibility initiatives, nor reliance on host government regulation alone, are able to guarantee that business respects the human rights of local populations. There is still a lack of national and international safeguards to prevent business enterprises from becoming complicit in or tacitly benefiting from human rights violations and a need for more effective enforcement. CIDSE provided a mixture of short, medium and long term recommendations to help address these issues, including:

- 1) Greater use of extraterritorial legislation by home governments; a legal requirement on company directors to take action to minimise the negative environmental and social impacts of the company and transparency requirements;
- 2) An international advisory centre to provide independent legal advice in contract negotiation with companies;
- 3) An independent international ombudsperson, with a mandate to investigate complaints of alleged human rights violations by companies;
- 4) Further efforts to promote Free, Prior and Informed Consent;
- 5) Ultimately the creation of a binding international human rights framework applying to companies no matter where they are located.

Part II: Comment on the Special Representative's report: implications for CIDSE's mid term recommendations

CIDSE welcomes the Special Representative's report and is encouraged that aspects of the analysis have significant overlap with the analysis of CIDSE and our partners. The identification of a 'governance gap'³ is valid and the recognition that some governments

¹ henceforth referred to as the Special Representative

² available at <http://www.cidse.org/docs/200805091004486422.pdf>

³ Paragraph 3

lack the ‘institutional capacity’ or the will to regulate multinational companies⁴ is in line with a central tenet of our submission. Clarification that companies have a ‘duty to respect’ human rights that operates independently of the state duty to protect⁵ is welcome, and the point that company operations impact upon the whole spectrum of human rights is in keeping with the lived experience of many communities from the South.

CIDSE supports the need for an ‘effective grievance mechanism’. The recommendation that ‘states should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory...(and) address obstacles to access to justice...for foreign plaintiffs’⁶ is key. It would help not only affected communities but responsible businesses whose reputations may be damaged by the actions of their less responsible counter-parts and deserves further examination by the Special Representative and effective operationalisation by states.

The notion of a global ombudsperson to ‘investigate, punish and redress abuses’—a key CIDSE recommendation—needs to be developed further. As the analysis of the Special Representative notes, the current mechanism for access to remedies is ‘incomplete and flawed’ and ‘must be improved in its parts and as a whole’⁷. Thus whilst a mixture of judicial and non judicial mechanisms by a variety of actors is helpful, some kind of international body will be required for access to remedy to be both effective and comprehensive. We would also be keen for future work to include an explicit focus on access to justice, as well as access to remedy, to ensure fair and just outcomes for victims of human rights violations and to help deter future human rights abuses.

The report and its tripartite framework is a useful first step towards bridging the ‘governance gaps’ in operation – but much more work needs to be done if these gaps are to be comprehensively closed. In some instances, as the Special Representative has himself emphasised, the tentative recommendations put forward need more work if they are to be operationalised effectively – and this should be a key feature in any subsequent mandate.

In other instances, more work needs to be done not only on the policy detail, but on generating the level of ambition necessary if the UN Human Rights Council and its members are to protect the most vulnerable members of the international community effectively. In certain places throughout the report, sound policy analysis is not always traced through to its logical policy conclusion. We recognise the political realities behind this, yet also see that more work needs to be done if the UN Human Rights Council is to fulfil the role of intellectual leadership that the Special Representative outlines in the beginning of the report. This point is well illustrated by looking at two of the recommendations outlined in CIDSE’s submission.

i) Extraterritorial legislation enacted by home country governments

⁴ Paragraph 14

⁵ Pt 55

⁶ Pt 91

⁷ P87

The Special Representative's analysis suggests that developing countries face many problems when trying to regulate corporations, that 'other governments' (including home governments) have a role in closing the 'governance gap' and helping such countries 'strengthen the enforcement of human rights standards'⁸ – and that one of the constraints to home country governments taking action is a poor understanding of whether extraterritorial legislation is permissible⁹. However, despite noting that UN Treaty bodies have encouraged home States to take extraterritorial action, he stops short of recommending this step.

Similarly, the report acknowledges that 'governments can support and strengthen market pressures on companies to respect rights' and that a lack of regulation is not necessarily in the interests of business¹⁰ – but again stops short of turning this into a concrete recommendation for listing requirements on national stock exchanges. Our Honduran partner, Caritas Tegucigalpa, has pointed out that often home country governments take a very pro-active role with the Honduran government in promoting trade activities by their transnational corporations, yet when it comes to promoting human rights, the home country will often shy away, saying that this is the role of the host government. Caritas feels that a more direct message from John Ruggie to the home countries of transnational corporations to encourage them to take a more active stance on the promotion of human rights would be welcome.

ii) An International Advisory Centre to assist developing countries in negotiations

The Special Representative has correctly identified that bilateral investment treaties can have a freezing affect on domestic legislation, making it more difficult for countries to the make legislative changes necessary to ensure the human rights of their populations – and this situation is felt most acutely in developing countries, where 'regulatory development may be most needed'¹¹.

He identifies the problem and recognises the need for a solution¹² - but falls short of calling for specific measures such as an international advisory centre, recommended in the CIDSE submission. Our partner, Caritas Tegucigalpa, has often highlighted the need for specialised training and technical assistance for the Honduran government in the regulation of mining activities, and is disappointed that the report does not make a specific recommendation to address this issue. We look forward with anticipation to potential solutions outlined in more depth in any subsequent mandate adopted.

Part III) Comment on the Special Representative's report: implications for CIDSE's long term recommendations

⁸ Pt 45

⁹ Pt 14

¹⁰ Pt 22

¹¹ Pt 36

¹² Pt 38

CIDSE notes with appreciation the Special Representative's point that frameworks and legal clarity often act to the benefit, not to the detriment, of business. We believe that ultimately the best way to clarify the legal responsibilities of companies is to agree a binding, international human rights framework that applies to companies directly. Whilst this is a time consuming process, as the influence of corporate actors continues to grow worldwide, the need for a binding international human rights instrument will only increase. However, CIDSE is cognisant of the Special Representative's concerns and for this reason advocates for work on a range of solutions with varying time frames.

We appreciate that this mixed approach does contain an element of risk, but there are also risks involved in concentrating exclusively on one time-scale to the detriment of the other. With these practical considerations in mind, CIDSE also wishes to outline two theoretical considerations which support the idea of an overarching human rights framework.

First, although companies' responsibilities do not 'simply mirror the duties of States'¹³, they still have human rights obligations. The state bears the prime responsibility for human rights, but the Universal Declaration of Human Rights in its preamble calls on "all individuals" and on "all organs of society" to uphold and promote those rights. When rights are violated, the negative consequences are the same, irrespective of whether rights have been infringed upon by a public or a private actor. The starting point is not 'which actor has infringed upon human rights' but that all humans have equal and inalienable rights and are entitled to enjoy these rights fully.

Second, the Special Representative argues that more 'coherent and concerted approaches are required' if the competitive dynamic of states is to be overcome and the governance gaps successfully reduced¹⁴. The very existence of governance gaps at an international level suggests that an international governance solution is ultimately required – and the danger is that alternative solutions below the international level risk being piecemeal and patchwork in nature, obscuring rather than narrowing the governance gaps and confusing all actors and stakeholders in the process. They may be part of the solution but it is difficult, following the Special Representative's analysis, to see how they can constitute an effective solution in their entirety.

CIDSE agrees that it is essential that the mandate results in specific short to medium term recommendations that the holder would develop as an integral part of his work. However we believe that further development of the "protect, respect and remedy" framework should not rule out the adoption of global standards in the longer term.

Part IV) A comment on the mandate

CIDSE is strongly in favour of a resolution authorising a follow on mandate, which would allow the post holder to further develop the ideas and recommendations contained within the report. Any credible mandate must contain the following elements:

¹³ Pt 53

¹⁴ Pt 17

- to examine specific instances of human rights violations in order to inform the operationalisation of the recommendations
- to engage with key stakeholders and specifically with southern based civil society, faith based organisations and academics at key stages in the process, including when finalising the recommendations
- to issue further recommendations to help reduce the risk of human rights violations, including by developing further the notion of an ombudsperson and bringing forward proposals in this regard
- an adequate budget and capacity to allow the mandate holder to examine cases of abuse in countries where they have happened and to engage with a broader range of southern organisations in locations accessible to them.

This would ensure that Southern communities, organisations and networks participate in the discussion in their own right – whilst giving a clear mandate for engagement with other key stakeholders as well, thus helping to facilitate consensus and move the debate along. It would strengthen the work of elaborating and building on the report's recommendations by ensuring that measures were fit for purpose and of practical benefit to those suffering from human rights abuses.

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