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ISSUES

In this chapter we discuss two substantive issues that the Human Rights Council (the Council) needs to take up. There are other substantive issues that the Council needs to address but these are two illustrative issues that have been selected on the basis of our own organisational priorities. They are also issues that have been raised but not adequately dealt with during the last years of the Commission.

SEXUAL ORIENTATION AND GENDER IDENTITY

Across the world, people continue to face widespread and severe forms of discrimination based on their sexual orientation and/or gender identity¹. These range from violations of the right to life, including executions and hate-induced violence, to being tortured, ill-treated, and detained solely on the basis of feeling and acting contrary to social norms and expectations. More than half the countries in the world still criminalise sexual relations between persons of the same sex. Lesbian, gay, bisexual, and transgender (LGBT) people also face discrimination in the areas of housing, employment, education, right to freedom of association, right to family life, and other key civil and political, and economic, social and cultural rights. **Repressive and discriminatory national laws, policies and practices have led to homophobia, hate crimes and prejudice, and a climate of impunity for human rights violations based on sexual orientation and gender identity.**

United Nations human rights mechanisms, both treaty bodies and the Commission on Human Rights' (the Commission) special procedures are increasingly trying to address these violations. Various treaty bodies have

¹ 'Sexual orientation' refers to the way in which a person's sexual and emotional desires are directed. The common categories of sexual orientation are heterosexual, gay, lesbian and bisexual. 'Gender identity' refers to a person's deeply felt, internal sense of belonging to a particular gender, which need not be the gender they were assigned at birth. These are profoundly rooted, fundamental aspects of the human personality and of human dignity. See Human Rights Watch (HRW), *Sexual Orientation and Gender Identity: Human Rights Concerns for the 61st Session of the U.N. Commission on Human Rights*, available at: <http://hrw.org/english/docs/2005/03/10/global10303.htm>. See also International Commission of Jurists (ICJ), *International human rights references to human rights violations on the grounds of sexual orientation and gender identity*, (ICJ, March-April 2005), p. 4.

confirmed that sexual orientation is a prohibited ground of discrimination under the non-discrimination clauses contained in human rights treaties². A number of special procedure mandates are also monitoring and highlighting violations experienced by LGBT people³. The work of the Special Rapporteur on extra-judicial, summary or arbitrary executions has led to the Commission adopting a resolution calling on States to protect the right to life of all persons and investigate promptly and thoroughly all killings committed for any discriminatory reason, including sexual orientation, and another resolution asking States to ensure that the death penalty is not imposed for sexual relations between consenting adults⁴. However, **there is still no comprehensive international instrument addressing all aspects of human rights violations on the grounds of sexual orientation and gender identity**. At the 59th session of the Commission in 2003, Brazil tabled the first comprehensive resolution on human rights and sexual orientation (but not including gender identity). After a series of strategic maneuvers by opponents of the resolution, including a no-action motion and more than 50 amendments to complicate and frustrate the debate, Brazil decided to defer the resolution until the following session. At the 60th and 61st sessions of the Commission, Brazil did not pursue its resolution and no other State was prepared to take it up. LGBT groups and other human rights NGOs were extremely visible and active during this period in lobbying the Commission to take this issue forward. At the 61st session, more than 30 States from four of the five UN geographical regions made a joint statement calling for the Commission to address these issues⁵.

It is up to the Council now to take action on this neglected and important area of human rights violations and to adopt a comprehensive approach addressing all aspects of human rights in relation to sexual orientation and gender identity, including mainstreaming these issues into its work through more systematic monitoring and discussion. This approach, whether implemented through a resolution or some other type of decision, would support the struggles of LGBT activists all around the world and the work of UN human rights mechanisms.

2 See for instance General Comments 14 and 15 adopted by the Committee on Economic, Social and Cultural Rights.

3 These include, among others, special rapporteurs on health, torture, violence against women, and adequate housing. See ICJ, *International human rights references to human rights violations on the grounds of sexual orientation and gender identity*, (n. 1 above).

4 Para 6, Commission on Human Rights *Resolution 2002/36* and para 4 (f), Commission on Human Rights *Resolution 2004/67*.

5 Statement made by New Zealand on behalf of 32 States under Item 17, promotion and protection of human rights.

HUMAN RIGHTS AND BUSINESS

The need to address the issue of human rights and business has been raised by NGOs and others for many years. In a globalised world, businesses have increasing power both within their own countries and, as transnational corporations (TNCs), across many countries through their increased operations and economic growth. There are significant questions about the positive and negative elements of the relationship between business and human rights. Positively, business can promote the enjoyment of human rights especially economic, social and cultural rights. However, **issues of concern range from corporate involvement in severe human rights violations to ensuring compliance with human rights and labour rights in corporations' treatment of workers, management of supply chains, manufacturing, purchasing and sub-contracting methods, and other aspects of their operations.** In some situations these concerns are worsened by the reduced capacity of the State to regulate large TNCs. Various initiatives have been adopted to address these issues. These include: voluntary codes of conduct adopted by companies; labelling schemes; development of industry-wide or sector-specific codes of conduct or standards; international voluntary principles such as the Organisation for Economic Cooperation and Development's (OECD) *Guidelines for Multinational Enterprises* and the UN's Global Compact⁶; attempts to develop extra-territorial legislation to hold domestic companies responsible for human rights violations in other countries; and identification of core labour standards by the International Labour Organization (ILO).

While these initiatives are positive developments, they do not take away the need for a more comprehensive international human rights framework for regulation of companies to make them comply with human rights standards and ensure accountability for human rights violations. This is exacerbated by confusion about the international norms and standards that are applicable to companies. These international human rights standards were originally developed to regulate the conduct of States, and only to a limited extent of non-State actors. A significant step forward was taken in 2003 when the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) adopted the UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms) at its 55th session. The Norms were developed to compile in one document all the international human rights standards that are applicable to businesses. The Norms also include a 'commentary', which provides useful, authoritative guidance on the meaning of specific terms, the scope of particular provisions, and the legal basis for different obligations⁷.

6 The UN Global Compact is a voluntary initiative involving the UN, companies, and NGOs to advance ten principles in the areas of human rights, labour, environment, and anti-corruption, identified by the Global Compact. For more information see www.unglobalcompact.org.

7 Amnesty International, *The UN Human Rights Norms for Business: Towards Legal Accountability*, (Amnesty International, 2004), p. 6. See also N. Rosemann, - footnote carries over to the next page -

The Norms are controversial, however, with many States and business representatives challenging the claim that they are based on existing international law. The Commission has also stated that the Norms, as a draft proposal, have no legal standing and that the Sub-Commission “should not perform any monitoring function in this regard”⁸.

In 2005, the Commission created the mandate of a special procedure, the Special Representative of the Secretary-General on human rights and transnational corporations (the Special Representative), for a two-year period⁹. The Special Representative has been mandated to identify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights. The Special Representative does not have a mandate to monitor human rights violations by TNCs. He has submitted an interim report in which he has described his initial activities. He has analysed the Norms and raised various concerns about them including that “if the Norms merely restate established international legal principles then they cannot also directly bind business because, with the possible exception of certain war crimes and crimes against humanity, there are no generally accepted international legal principles that do so”¹⁰. Amnesty International has responded to this report highlighting many positive aspects in it but stating its concern that the approach of “principled pragmatism” referred to in the report “may lead to underestimating the need for binding legal principles and guidelines as well as the state of applicable international law”¹¹.

The Council will need to follow up on these issues and ensure that it clarifies the application of existing standards. It should, where needed, create other international standards to address corporate responsibility and accountability for human rights, and set up a system for more comprehensive monitoring of businesses so that human rights are not left to voluntary self-regulation alone.

The UN Norms on Corporate Human Rights Responsibilities, (FES, Occasional Papers No. 20, 2005).

8 Commission on Human Rights *Decision 2004/116*.

9 Commission on Human Rights *Resolution 2005/69*.

10 P. 15, E/CN.4/2006/97.

11 See <http://web.amnesty.org/library/index/engior500022006>.