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HUMAN RIGHTS COUNCIL
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Working Group on the Right to Development
High Level Task Force on
the implementation of the right to development
Sixth session
Geneva, 14-22 January 2010
Item 4 (a) of the provisional agenda

**IMPLEMENTATION OF THE RECOMMENDATIONS OF THE
WORKING GROUP ON THE RIGHT TO DEVELOPMENT, ENDORSED
BY THE HUMAN RIGHTS COUNCIL IN RESOLUTION 12/23**

**MILLENNIUM DEVELOPMENT GOAL 8, TARGET E, ON ACCESS TO
ESSENTIAL MEDICINES**

**Technical mission to the World Health Organization, the Intergovernmental
Working Group on Public Health, Innovation and Intellectual Property,
the Special Programme on Research and Training in Tropical Diseases and
the Global Fund to Fight AIDS, Tuberculosis and Malaria**

Geneva, 19 and 24 June, and 16 July 2009

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I. PURPOSE AND BACKGROUND

1. The high-level task force on the implementation of the right to development was established by the Commission on Human Rights in its resolution 2004/7, within the framework of the intergovernmental open-ended Working Group on the Right to Development, in order to assist it in fulfilling its mandate as reflected in paragraph 10 (a) of Commission resolution 1998/7.
2. The Human Rights Council, in its resolution 9/3, and the General Assembly, in its resolution 63/178, endorsed the workplan for the task force for the period 2008-2010, as recommended by the Working Group in its report on its ninth session¹.
3. The Council, in its resolution 12/23, endorsed the recommendations of the Working Group adopted by consensus at its tenth session and which, *inter alia*, requested the task force to "...draw on its dialogue with the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property, the Global Fund to Fight HIV/AIDS, Tuberculosis and Malaria and the Special Programme for Research and Training in Tropical Diseases"² in further refining the list of right to development criteria and preparing the corresponding operational sub-criteria.
4. Consequently, the task force undertook a technical mission comprised of meetings in Geneva (see Annex for the programme of mission) with the concerned officials at the World Health Organization (WHO), the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG), the Special Programme for Research and Training in Tropical Diseases (TDR) and the Global Fund to Fight AIDS, Tuberculosis and Malaria (TGF).

II. SUMMARY OF DISCUSSIONS

A. Department of Ethics, Trade, Health and Human Rights Law, World Health Organization (WHO)

5. The chair of the task force expressed his satisfaction that IGWG and TDR, both functioning under the WHO, and TGF had all been highly cooperative and engaged in genuine dialogue on the application of the right to development criteria to their respective areas of work. The positive relationship seemed relevant to WHO's promotion of health as a human right and to the resolution the United Nations General Assembly had recently adopted on Global Health and Foreign Policy,³ which stressed that achieving the health-related MDGs is essential to socio-economic development and recognized the cross-cutting nature of issues of foreign policy and global health. Another example of the increasing importance of human rights for the work of WHO was the negotiation leading to the Global Strategy and Plan of Action (GSPA), facilitated by the IGWG Secretariat, and the difficulty of including explicit reference to human rights; although draft principles 17 and 18 incorporating human rights had been deleted, the reference to human rights in the Preamble to the WHO Constitution was included in principle 16.
6. The task force stressed the importance it placed on the relationship between the GSPA and the realization of the right to development in the context of MDG 8. Although governments are unfamiliar with this right in the WHO setting, it may be useful to use the universal acceptance of

¹ See A/HRC/9/17, para. 43.

² See A/HRC/12/28, para. 46 (b).

³ A/RES/63/33

this right and the special importance it has for developing countries to encourage more attention to the human rights issues, including the right to health, by the IGWG. This potential use of the right to development to reinforce the human rights content of the GSPA is consistent with the importance of human rights in WHO policy as reflected, for instance, in the World Health Assembly Resolution on 'Reducing Health Inequities through Action on the Social Determinants of Health'⁴. WHO also noted that the WHA Resolution on 'Primary Health Care, including Health System Strengthening' was closely linked to the right to health, and solidarity, equity and participation are core elements in this document.⁵ It is significant in this regard that the MDG Gap Task Force Report 2008 uses human rights language in relation to access to medicines. The Human Rights Based Approach to Development, in spite of efforts under Action 2, still needs to gain wider acceptance among the agencies of the UN system. The discussion then turned to primary health care as another entry point for the right to development in light of the relation between primary health and basic survival needs, on the one hand, and minimum core obligations under the right to health, including access to essential medicines, on the other.

7. Also discussed was the necessary link between access to essential medicines and the right to development and recent developments in related fields, including the work of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, whose first report deals primarily with the right to health, access to medicines and intellectual property rights, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), TRIPS+ and TRIPS flexibilities.⁶ He has endorsed the work of his predecessor on the 'Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines'⁷. In light of the task force's mandate under MDG target 8E, reference was also made to the work of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, and his recent report 'Business and Human Rights: Towards Operationalizing the 'Protect, Respect and Remedy' Framework'.⁸

8. It was clear from the discussion that, with regard to the GSPA, there was no longer an opportunity to influence the process, which is complete. The concern of the task force about coherence in integrating a human rights framework into the policies and programs of WHO was shared and the implementation of the GSPA seemed a good opportunity to link human rights to public health, innovation and intellectual property, which involves WHO, WTO and WIPO. Since public health should have the highest priority, it was felt that WHO should take the lead in coordination in this sphere of cross-cutting issues. A recommendation from the Working Group on the Right to Development at its forthcoming meeting to urge the WHO Secretariat to play a greater role in resisting TRIPS+ and facilitating TRIPS flexibilities, in accordance with the Doha Declaration on the TRIPS Agreement and Public Health, would be consistent with government commitments to the right to development. Specifically, government policies consistent with TRIPS flexibilities and conducive to access to medicines in developing countries would conform to article 2(3) of the Declaration on the Right to Development, according to which governments have the 'right and the duty to formulate appropriate national development policies' but the policies they can adapt must be to those 'that aim at the constant improvement of the well-being of the entire

⁴ WHA 62.14.

⁵ WHA 62.12.

⁶ A/HRC/11/12.

⁷ A/HRC/7/11, annex.

⁸ A/HRC/11/13.

population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.’

B. Intergovernmental Working Group on Public Health, Innovation and Intellectual Property

9. The task force recalled the dialogue launched by its technical mission in November 2008⁹, where certain synergies and potential for congruence of the right to development and the Global Plan of Action of IGWG had been identified. The mission was followed by an independent consultant study¹⁰, containing a mapping exercise of IGWG policies and programs, focusing on the GSPA. The task force drew attention to the salient elements of Annex II of the consultant report ‘Revising the Plan of Action According to Right to Development Criteria’.

10. Recalling its meeting with the Department of Ethics, Trade, Health and Human Rights Law (see section A above.), the task force noted the overlap among the initiatives of the above-mentioned independent experts of the Human Rights Council, IGWG, and the Working Group on the Right to Development and its task force, as well as OHCHR’s efforts to relate the right to development to MDG target 8E (access to essential medicines). Because that target is supposed to be pursued ‘in cooperation with pharmaceutical companies’ and the IGWG Secretariat had been receptive to prospective collaboration in this area, all agreed that it would be useful to plan a workshop to explore how these processes could be mutually reinforcing, with the active involvement of all stakeholders, notably pharmaceutical companies. Such a workshop could examine prospects for patent pools, technology transfer and pricing, using the GSPA as a tool to operationalize and mainstream the right to development. The human rights content of the GSPA could be examined in relation to the Human Rights Guidelines for Pharmaceutical Companies in relation to Access to Medicines and more generally the right to health.

11. Turning to the concerns of the consultant in her report for more disaggregation within countries, in relation to the right to development criterion of establishing priorities that are responsive to the needs of the most vulnerable and marginalized segments of the population, IGWG pointed out that ‘concerned communities’ are included in the GSPA, which to some extent addresses this issue, but perhaps not to the extent recommended in the report. IGWG works closely with many stakeholders including concerned communities, and the list of stakeholders is not exhaustive. The IGWG Secretariat pointed out that the GSPA could not be amended; however, there is leeway with regard to interpretation and implementation to introduce the right to development principles into the operation of the GSPA. All actions need to be read in the light of the Principles and Elements of the GSPA. The ideas in the consultant’s report may therefore be considered and to the extent possible accommodated within the GSPA.

12. With regard to language used in the consultant’s report, the Secretariat explained that the phrase ‘more extensive intellectual property protection than is required by the Agreement on Trade-Related Aspects of Intellectual Property Rights, without prejudice to the sovereign rights of Member States’ as provided in Element 5, principle 5.2(c) of the GSPA, is the accepted WHO usage, rather than ‘TRIPS +’. The discussion also referred to the concepts of global public goods and global public values, which were seen to be useful. There was agreement among all present that

⁹ See A/HRC/12/WG.2/TF/CRP.1.

¹⁰ A/HRC/12/WG.2/TF/CRP.5/Rev.1.

in cross-cutting issues of public health and intellectual property, public health should be the highest priority.

C. The Special Programme on Research and Training in Tropical Diseases

13. TDR explained that it is very interested in maintaining the dialogue with the task force, and looks forward to receiving its input and feedback, which TDR can consider in relation to its programmes. TDR, for its part, can give the task force examples of its work, which can assist the task force in completing its mandate. TDR perceives the need to strengthen health systems, and hear the voice of countries and communities. TDR noted that fundamental concepts of human rights were present in TDR's work, although it does not make explicit reference to human rights. Since the research agenda of TDR extends over several years, the ongoing dialogue can be fruitful for the future.

14. Nevertheless, TDR had some concerns regarding the report of the independent consultant¹¹, including the proposed set of criteria, which he ranked on a par with the right to development criteria. The report neglected a broader human rights agenda and was limited to intellectual property and pricing issues, to the detriment of the broader research and human rights agenda. While some of the criticism of TDR in the report was justified (for instance, to some extent on the issue of lack of transparency, which in turn is related to certain institutional constraints), others were not.

15. The task force expressed a keen interest in the input of TDR to the right to development criteria and sub-criteria, which are the priority concerns of the task force for the final phase of its work and explained that the task force planned to engage with partners in specialized work on operational, measurable sub-criteria, where the input of TDR would be greatly appreciated.

16. In the context of the report of the consultant, it was noted that TDR and TGF have distinct mandates but share a common objective to fight major diseases that afflict the poorest people of the world. The consultant's report raised two common themes. First, that both initiatives were carrying out important work in expanding access to health and furthering equitable development and that their procedures were generally participatory and empowering. Second, the current activities of the two initiatives did not engage with one of the major challenges to the right to development, namely, the need to create a more conducive macro-environment for health, notably due to the underfunding of research and development for poor peoples' diseases, and the high prices of medications. The key issue from the right to development point of view is that both are silent on these questions, including as concerns initiatives to create a more enabling environment.

17. The overriding concern noted by TDR was that it did not consider engagement with macro-environment issues to be within its mandate, and also viewed the emphasis on such an engagement to be somewhat counterproductive to its essential mandate.

18. TDR briefly presented the main points in the report of the consultant with which it could not agree. TDR had a very specific mandate, and the nature of the work done by it is quite particular, in that it is fundamentally trying to pull together stakeholders from different horizons who had not been working together before. Such an approach required a very delicate and subtle balance between the diverging interests and visions, as well as considerable tact. This in return means that

¹¹ A/HRC/12/WG.2/TF/CRP.4/Rev.1

TDR cannot be vocal on certain issues in the same way as a consultant. It was moreover stressed that advocacy was not explicitly part of the TDR mandate.

19. In connection with the issue of mainstreaming the right to development principles in the work of TDR, it was underlined that the institution was *prima facie* not against such an idea and that TDR was already applying some of those principles in its activities even though it did not necessarily use the same concepts to refer to those principles. TDR expressed its willingness to continue the dialogue with the task force, which it sees as potentially beneficial to its own work.

20. The task force understood the limitations of TDR's operational approaches. It reiterated the relevance of the points being made in the report of the consultant to the right to development.

D. The Global Fund to Fight AIDS, Tuberculosis and Malaria

21. In the view of TGF, the report of the consultant is rather incomplete and misleading. Since the consultant's report was submitted, TGF had launched an important initiative to examine market dynamics and has set up a Board Committee for this purpose. The Fund recognizes the increasing cost of HIV/AIDS antiretroviral treatment as a major challenge due to both the increasing number of people living with HIV/AIDS as well as the increasing cost of second line treatments. As a major financier of such drugs, and thus a factor in the market dynamics, TGF Board was in the process of discussing its responsibilities in these areas.

22. TGF reiterated that it was committed to human rights and the inclusion of human rights language in its activities. The Fund is also interested in furthering the dialogue with the task force. In that context, TGF briefly elaborated on future institutional developments in the Fund, namely the creation of the Market Dynamics Ad Hoc Committee and the Affordable Medicine Facility for Malaria. The Fund suggested that some form of involvement of the task force in the work of these structures could be envisaged as a way forward for the dialogue.

III. FOLLOW-UP ACTIONS

23. In the context of the mandate of the task force to refine its criteria and sub-criteria for the operationalization of the right to development, IGWG, TDR and TGF will be requested to provide input. All three partners have shown explicit and consistent interest in this process.

24. In furtherance of the mandate of the UN High Commissioner for Human Rights to mainstream the right to development, OHCHR will continue to follow the work of IGWG, TDR and TGF, possibly with the continued involvement of Professors Stephen Marks and Sakiko Fukuda-Parr, and prospective engagement in the TGF Market Dynamics and Commodities Ad Hoc Committee and Affordable Medicine Facility for Malaria and the endeavours of TDR to further integrate human rights in its work.

25. All concerned will explore the feasibility of convening a one-day meeting on MDG Target 8E on access to essential medicines, with the participation of key members of the Working Group on the Right to Development and its task force, OHCHR, IGWG Secretariat and other stakeholders in the Global Strategy and Plan of Action, TDR and TGF as concerns intellectual property and technology transfer, the Special Rapporteurs on the right of everyone to the enjoyment of the highest standard of physical and mental health and the Special Representative of the Secretary-

General on the issue of human rights and transnational corporations and other business enterprises as well as representatives of pharmaceutical companies. The purpose of the meeting would be to explore the synergies between these partnerships from the right to development perspective and the potential for mutually reinforcing approaches to the human rights content of the GSPA and to realizing the right to health, including access to essential medicines in developing countries.

Annex

Programme of mission

19 June 2009, Friday

12:00-13:00 - Ms. Helena Nygren-Krug, Human Rights and Health Advisor, Department of Ethics, Trade, Health and Human Rights Law, WHO. The task force mission team: Professor Stephen Marks (Chairperson, the task force) and Ms. Shyami Puvimanasinghe (OHCHR).

15:00–16:00 - Dr. Elil Renganathan, Executive Secretary, Ms. Precious Matsoso, Director, Secretariat for Public Health, Innovation and Intellectual Property, Ms. Joanne Hamilton, Department of Ethics, Trade, Health and Human Rights Law, and Mr. Vijay Trivedi, Political Advisor, Secretariat of the Framework Convention on Tobacco Control, WHO. The task force mission team: Professor Stephen Marks (Chairperson, the task force) and Ms. Shyami Puvimanasinghe (OHCHR).

24 June 2009, Wednesday

17:00-18.00 - Dr. Robert Ridley, Director, Special Program for Research and Training in Tropical Diseases (TDR), Mr. Meinrad Studer, External Relations Officer, TDR. The task force mission team: Professor Stephen Marks (Chairperson, the task force), Ms. Shyami Puvimanasinghe (OHCHR) and Mr. Ayuush Bat-Erdene (OHCHR). Dr. Arjun Sengupta (Chairperson, the Working Group on the Right to Development) also attended the meeting.

16 July 2009, Thursday

16:00 – 16:50 - Dr. Robert Ridley, Director, Special Program for Research and Training in Tropical Diseases. The task force mission team: Professor Sakiko Fukuda-Parr (Member, task force) and Mr. Materneau Chrispin (OHCHR).

17:00 – 18:00 - Mr. Ian Grubb, Senior Adviser, Office of the Executive Director, the Global Fund to Fight AIDS, Tuberculosis and Malaria. The task force mission team: Professor Sakiko Fukuda-Parr (Member, task force) and Mr. Materneau Chrispin (OHCHR).

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