Synopsis from the Conference The EU's Business? Ensuring Remedy for Corporate Human Rights Abuses

European Parliament, 12 November 2014

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In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles on Business and Human Rights (UN Guiding Principles). These principles recognize three pillars: the State's duty to protect human rights; the corporate responsibility to respect human rights; and the need for greater access to effective judicial and non-judicial remedy for victims. Following the adoption of the UN Guiding Principles, the European Union (EU) and its Member States officially stated their support to the full implementation of the UN Guiding Principles. However, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, a recent study published by the European Coalition for Corporate Justice, CORE Coalition, and ICAR, has shown that the existence of legal, procedural, and institutional barriers still prevents foreign victims of business-related human rights abuses from gaining access to an effective remedy in the EU.

In 2014, the EU Access to Justice Project organised a series of conferences in Paris, London, Berlin, and Brussels to launch a discussion on solutions to improve access to justice in the EU. The final conference took place in the European Parliament and brought together more than 100 stakeholders from a diverse range of sectors including academia, legal profession, business, civil society, and policy makers. The event, hosted by **MEP Richard Howitt**, was a collaboration between **Frank Bold**, a purpose driven law firm, and the **European Coalition for Corporate Justice.**

Speakers included: **Stéphane Brabant**, Partner at Herbert Smith Freehills Paris LLP, **Jérôme Chaplier**, Coordinator of the European Coalition for Corporate Justice, **Sandra Cossart**, Head of the 'Globalisation & Human Rights' Program at Sherpa, **Marilyn Croser**, Director of CORE Coalition, **Marie-Annick Darmaillac**, Deputy Company Secretary of the Bolloré Group, **Karine De Crescenzo**, Public Affairs Manager at UFC-Que Choisir, **Filip Gregor**, Head of the Responsible Companies Section at Frank Bold, **Jonas Grimheden**, Head of Sector Access to Justice at the EU Agency for

Fundamental Rights, **Richard Howitt**, MEP for S&D, **Ludwig Krämer**, Lawyer at ClientEarth, **René Lefeber**, Chair of the Drafting Group on Human Rights and Business at the Council of Europe, **Fulgence Massawe**, Lawyer at the Legal and Human Rights Centre, **Richard Meeran**, Partner at Leigh Day, **Elvina Morkytė**, Lawyer at the European Commission, **Christopher Schuller**, Legal Adviser at the German Institute for Human Rights, **Olivier de Schutter**, Law Professor at the Université Catholique de Louvain, **Yvonne Veith**, Lawyer at the European Center for Constitutional and Human Rights, and **Diana Wallis**, President of the European Law Institute.

The main obstacles to access a judicial remedy in EU Member States for human rights abuses committed by foreign subsidiaries of European enterprises are:

— **Access to national courts in the EU when non-EU subsidiaries of EU domiciled companies are involved in the tort:** under the Brussels I Regulation, domestic courts in the EU must hear a tort claim only when the corporate defendant is domiciled in the EU.

— **Applicable law:** under the Rome II Regulation, domestic courts must apply the law of the country where the damage occurred, i.e. the law of the host country. If a number of exceptions exist, their application remains uncertain.

— **Company law:** the strict application of the limited liability of companies and the separate legal personality principles, combined with barriers to access to evidence, impedes the search for corporate liability when abuses occur.

— **Access to evidence:** apart from the UK, most EU Member States do not have effective pre-trial disclosure rules in place. This situation makes it virtually impossible for victims to have access to the enterprise's documents and substantiate their claims, in particular regarding the involvement of the parent company domiciled in the EU.

— **Litigation costs & legal aid:** litigation costs are extremely high in transnational litigation against multinational enterprises. The current EU legal framework on legal aid does not allow foreign victims of EU enterprises' human rights abuses to have access to legal aid.

— **Lack of collective redress mechanisms:** the fear of US-style group action has impeded the development of collective redress mechanisms in the EU. This situation prevents groups of victims from gaining access to a judicial remedy in most Member States.

Participants in the event heard that:

— In Africa, there has been a rush of multinational enterprises in recent years. If this rush has been accompanied by positive developments, some of these enterprises, however, have been directly or indirectly involved in human rights abuses.

— Access to judicial remedy in host countries is impeded by multinational enterprises' influence on governments, lack of resources in the judicial sector, and corruption. The combination of these factors also drives the rise of inequality in host countries rich in natural resources.

— International human rights law has strengthened the rights of victims of corporate abuses. Recent case-law and instruments have acknowledged that States are required to protect individuals from human rights violations by private actors not only in their territory but also outside their borders when they exercise some forms of control. States should also ensure access to remedies in the event of a violation.

— Soft-law instruments were never designed to hold to account enterprises in cases of gross human rights abuses.

— Civil litigation appears to be an ideal vehicle for corporate accountability, as it seeks to provide victims with a remedy, deter from further violations, and is less intrusive than direct forms of extraterritorial regulation. The Brussels I Regulation already enables courts in the EU to hear and adjudicate civil claims brought by victims of such violations against companies domiciled in the EU.

— However, due to persisting barriers, and despite the rising number of claims brought against multinational enterprises in EU Member States for their involvement in human rights violations in third countries, these cases are the exception, not the rule.

— Even when parent companies may owe a duty of care towards stakeholders affected by their subsidiaries' activities under the law of EU Member States, the Rome II Regulation may prevent the application of such rule, as courts are obliged to apply the law of the host country.

— Civil claims against multinational enterprises are risky, costly, and lengthy. It is often challenging for victims to find adequate legal representation.

— In other sectors governed by EU law, such as environmental law, citizens and NGOs face similar obstacles, including legal standing and litigation costs.

— Reforms in other sectors, such as consumer protection, have helped improved access to justice in some EU Member States. For example, France has recently introduced a collective redress mechanism for consumer claims, which is proving to be useful in cases where a large group was impacted by business behaviour.

— Studies by the EU Agency for Fundamental Rights show that access to justice within the EU remains problematic, and the level of awareness and understanding of judicial systems is currently low. EU citizens and victims of human rights abuses or discrimination find litigation complex and difficult to understand. Traditional reactive mechanisms are currently not sufficient to respond to complaints.

— Political will remains the biggest challenge to tackle in order to improve access to justice in the EU.

In relation to potential reforms in the EU, participants were also told that:

— Both the EU and its Member States should adopt a **pro-active approach** to provide redress in cases of human rights abuses.

— The EU has already the **basic legal framework in place** to allow the EU and its Member States to comply with international human rights law, in particular the access to remedy requirement. Practical barriers prevent victims from using this framework, but these barriers can be addressed by targeted reforms adopting a human rights-based approach to the wider topic of access to justice.

— Challenges may arise from the **division of competences between the EU and the Member States**. These challenges are particularly visible in civil procedure where issues, such as access to evidence, have been so far considered to remain under the competence of Member States. The EU should conduct a study to understand how these challenges affect the feasibility of reform at EU level. Furthermore, this study should assess how existing EU treaties and Article 47 of the Charter of Fundamental Rights of the EU may provide a basis for action to improve access to justice.

— The EU should consider the introduction of the *forum necessitatis* rule in the **Brussels I Regulation** when claims raised human-rights abuses linked to European enterprises.

— The EU should further examine obstacles created by the **Rome II Regulation**. It could be clarified that the exceptions to the rule prescribing the application of the law of the place where the occurred, which are already embedded in this regulation, should apply if the application of this law would undermine access to justice and effective remedy.

— In the context of human rights and environmental abuses, **legal standing** should be broadened. For example, NGOs should have the possibility to file claims on behalf of individuals when the individual redress does not provide for effective and fair remedy.

— The existing **directive on legal aid** may be broadened to non-EU citizens and residents to avoid discrimination against foreign victims.

— The EU should continue its efforts towards the adoption of a legislative instrument establishing **collective redress mechanisms** across the EU. The EU should critically assess the Member States' implementation of the European Commission 2013's communication on collective redress mechanisms and propose further steps towards harmonisation of minimum standards.

— At EU level, establishing a **mandatory human rights due diligence**, a key concept of the UN Guiding Principles, would provide a win-win for both victims and companies, as it would provide for legal certainty. Some EU Member States, such as France, are exploring options to translate such concept in national legislation. However, action at EU level is recommended to avoid economic disadvantage for multinational companies from Member States moving faster than other EU countries.

— **Ombudsmen** may be allowed to play a more significant role in civil proceedings. For example, a "EU Corporate Justice Ombudsman" could be created.

— The European Commission is elaborating a **Staff Working Document on EU priorities in the implementation of the UN Guiding Principles**. This document should address explicitly the access to remedy pillar of these Guiding Principles.

— Member States should elaborate **National Action Plans** for the implementation of the UN Guiding Principles with a strong accent on their third pillar, which deals with access to remedy. The EU should support the Member States in their efforts to draft NAPs. It may also consider drafting a supra-national action plan, which would provide actions at EU level.

— The EU could produce a **study looking at examples of best practices across the EU Member States**. For example, in Germany, legal aid is available to both national and foreign claimants while in the UK civil proceedings are facilitated by opt-in collective redress and pre-trial disclosure of evidence.

— **The EU could collaborate with the Council of Europe** on business and human rights issues. In 2015, the Council of Europe will finalise a non-legally binding instrument, as well as guidance on access to remedy in the business and human rights context. The EU could therefore take into account these documents for future actions.

— The EU should provide support for building the rule of law and effective access to remedy in host countries where EU-based enterprises operate. For example, the EU could provide for **capacity-building and training to lawyers and judges in host countries**.

— The EU could also support a **discussion in the legal community on the uptake of the UN Guiding Principles**, in particular by lawyers who provide advice to multinational companies.

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