Side-Event: Legally Binding Instrument on Business and Human Rights: European perspectives

28th session of the Human Rights Council,
Thursday 19 March, 2015 12.00 – 14.00, Palais des Nations (Room XXVII)

FINAL REPORT

Background Information

In June 2014, the Human Rights Council (HRC) adopted the Resolution 26/9 that established an open-ended intergovernmental working group (IGWG) whose mandate is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations (TNCs) and other business enterprises and their impact. According to Res. 26/9, "the first two sessions of the open-ended IGWG shall be dedicated to conduct constructive deliberations on the content, scope, nature, and form of the future international instrument".

The first session of the IGWG is due to take place in July this year. It is therefore crucial to intensify dialogue and discussions with different actors and from different angles to ensure the development of a robust binding instrument, and to move the process forward through an inclusive, participatory, constructive and informed approach. The role of the EU member states will be important and their perspectives need to be explored.

CIDSE, Franciscans International (FI), FIAN International, FIDH, Friends of the Earth Europe, and the International Commission of Jurists, as members of the Treaty Alliance, convened this side-event to the 28th session of the Human Rights Council (HRC) to create a space to discuss the EU agenda in the area of business and Human Rights, identify current challenges and developments, and explore opportunities arising from the Treaty process.

On the occasion of the 28th session of the HRC, a delegation of Members of the European Parliament (MEPs) of the Sub-Committee on Human Rights came to Geneva to participate in and contribute to activities of the HRC. This represented a good opportunity to bring together key European actors (including MEPs), civil society organizations, legal experts, policy makers and diplomats, to engage in a constructive dialogue around the Treaty Initiative from the European perspective.

*The key points of discussion were based on f*raming the debate around the initiative of a Treaty on Business and Human Rights from an EU perspective; identifying areas needing further concrete action in the current status quo of the EU Business and Human Rights agenda; assessing from a legal perspective possible responses to the existing main challenges in relation to access to justice for victims of human rights abuses within and outside EU countries; and understanding the role and position of the EU and of European countries vis-à-vis the Treaty process.

The Panel was composed of:

- Mgr. Silvano Tomasi, Holy See, Permanent Representative
- Mr. Richard Meeran, Leigh Day, Partner
- Ms. Elena Valenciano, Chair of the Sub-Committee on Human Rights of the European Parliament
- Mr. Jerome Bellion-Jourdan, Delegation of the European Union to the UN and other international organizations in Geneva
- Ms. Anne Van Schaik, Friends of the Earth Europe and member of the Treaty Alliance

The discussion was moderated by Dr. Carlos Lopez, International Commission of Jurists, Senior Legal Adviser.

The following participants made interventions from the floor:

- Representative from Ecuador
- Representative from the Netherlands
- Representative from Switzerland
- Mr. Nicolas Agostini, FIDH Representative
- Ms. Francesca Restifo, Franciscans International International Advocacy Director
- Michael Ineichen, ISHR Representative
- Representative from Women's International League for Peace and Freedom (WILPF)

PRESENTATIONS BY PANELLISTS

***Carlos Lopez**, International Commission of Jurists, Senior Legal Adviser* welcomed the panellists and the audience present at the event, on behalf of the organizers of the side event, all participants in the global platform Treaty Alliance. He explained that the main objective of the side event was to offer a space for constructive exchange of views and dialogue, in the context of the preparatory work for the first session of the IGWG in July 2015. He recalled that in June 2014, the HRC established an IGWG to elaborate a legally binding instrument on Business and Human Rights, whose first session will take place July 6-10, 2015.

Dr. Lopez also explained the title of the event highlighting the fact that the aim of the organizers of the event was to focus on various "European" perspectives, while in practice the strong focus is on EU Member States only. He acknowledged the fact that Europe is bigger than the EU, and States such as Switzerland, Norway and several Eastern European countries should also be given a voice.

During the moderation of the Panel, Dr. Lopez mentioned a recent publication by The Economist Intelligence Unit that reports on big business uptake of the Guiding Principles on Business and Human Rights, but challenges the assumption that the Business Sector is totally against global regulation of its activities. This study finds that corporate acceptance of responsibility to respect human rights is widespread, although only a small percentage has actually taken concrete steps.[1]

***Mgr. Silvano Tomasi**, Holy See Permanent Representative,* in his introductory remarks underlined the need for a legally binding instrument on Business and Human Rights and stressed the fact that the globalization process saw a dramatic increase in the role that non-state actors play at the international level. Traditional international law has failed to articulate the obligations of corporations by exclusively addressing the conduct of States. International law views corporations as possessing certain human rights, but it generally does not recognize corporations as bearers of legal obligations under international criminal law. In this sense, the latest developments in the HRC are a clear sign that the international community is engaged with this task.

Mgr. Tomasi also pointed out that weak and poor States suffer the consequences of an asymmetry in the international system where business companies' rights are backed up by hard laws and strong enforcement mechanisms while their obligations

[1] The full report can be downloaded at http://www.economistinsights.com/business-strategy/analysis/road-principles-practice

are backed up only by soft laws like voluntary guidelines. A second challenge concerns the unique ability of international corporations to partially evade territorial-based national legislation. Their mobility in terms of respective country of incorporation, management, production, and financial flows, allows them to navigate national legislations, take advantage of regulatory arbitration and choose the jurisdictions that may offer the best return in terms of profit. Hence, further regulatory mechanisms are required.

Questions remain open as to whether a potential Treaty would be limited to transnational companies (TNCs) or would also address national companies. In this regard, Mgr. Tomasi highlighted that there are specific good reasons why international law should devote specific attention to TNCs. Experience shows that TNCs are often involved in arbitrations against particular governments where bilateral or multilateral investment treaties are signed. Such bodies, in fact, are best able to exploit the weaknesses of the current international legal system to avoid accountability for abuses of fundamental rights in weak governance zones. The international system actually creates the very conditions in which such entities become viable and hence bears a responsibility to ensure effective regulation in this regard. As such, in certain respects, there is a principled case for why states should seek to find a treaty-based solution to the problems caused by the very structure of international system.

Mgr. Tomasi also mentioned the development of regulatory standards and mechanisms at the European level, such as the proposal of the Parliamentary Assembly of the Council of Europe (COE) to examine the feasibility of a complementary legally binding instrument. HRC activities to draft a legally binding instrument are consistent with COE activities.

Mgr. Tomasi concluded his introductory remarks by reminding the audience that human rights are universal, and so should also be the responsibility of corporations. A binding instrument would help address this concept

Ms. Elena Valenciano, *Chair of the European Parliament Sub-Committee on Human Rights,* explained that issues around Business and Human Rights have been much debated in the Annual Report on human rights in the world, which was approved by the European Parliament. She stressed that support for the IGWG appeared not to be possible before the adoption of Res. 26/9 in June last year, but now more information aids the process. The European Union still has enormous interest in this process. The European Parliament will observe the development of the negotiations but will not take direct part in them. Discussions in relation to the form of the Treaty

have not yet taken place in the European Parliament. The first two sessions of the IGWG will be extremely interesting in clarifying this debate.

Ms. Valenciano stressed that the actors involved in the Treaty process share a common objective. Therefore, all actors should aim to converge towards a common path to achieve their common objectives. In order to be successful, the negotiation process should be global, flexible and inclusive. The risk is that the process results in further polarization. Concrete actions in conformity with the Guiding Principles and National Action Plans should be developed. The international instrument should reflect the common will demonstrated by the consensus on the Guiding Principles, while implementing the National Action Plans.

Ms Valenciano added that in principle, the Treaty should deal with TNCs only, but that this decision could be revised and a flexible approach should be embraced. It is extremely difficult for Parliaments to accept that a legally binding instrument should be limited to TNCs. She pointed out that national companies also hire a large numbers of workers who also deserve protection. Moreover, from the victims' standpoint it does not make a difference whether the company is national or transnational.

Ms. Valenciano pointed out that promoters of the legally binding instrument are also aware that such an instrument would offer only a partial response to the challenge. She insisted that although the Guiding Principles are not legally binding, they should still be used to achieve further improvement of the situation. The Guiding Principles, she argued, are not in opposition to the Treaty process. This is why both instruments can coexist.

Furthermore, she congratulated States who have adopted National Action Plans and asked those who have not, to do so. She concluded her intervention by expressing her full commitment to the task that lies ahead. She acknowledged that this is a long and vast process and also mentioned that she would try to make it as democratic and extensive as possible. The European Parliament Human Rights Sub Committee will play an active role to make sure that the EU takes its responsibility. The European Parliament will work to support this idea and move it forward, and place the EU at the head of human rights protection regarding business.

Mr. Jerome Bellion-Jourdan, *Delegation of the European Union to the UN and other international organizations in Geneva*, praised in his introduction the work of civil society and human rights defenders in the area of Business and Human Rights. His intervention focussed on the reasons why the EU supports the Guiding Principles;

on the European approach in the field of Business and Human Rights, and on the parameters that would allow the European Union to reassess its current position of non-participation in the IGWG negotiation process in July 2015.

Mr Bellion-Jourdan explained that the EU supports to the Guiding Principles because they are a very powerful instrument as they were adopted by the HRC by consensus. Though the Guiding Principles are not a legally binding instrument, they include references to the existing obligations of States in this area of work. Secondly, the Guiding Principles triggered policy changes at the EU level with a smart mix of voluntary policy measures and binding regulation. Amongst the concrete actions that have been taken by the EU one should mention the work that the European Commission is undertaking in relation to corporate responsibility notably the guiding material for enterprises, outlining the responsibility of business to respect human rights in three key business sectors (employment and recruitment agencies, ICT companies, and oil and gas companies). A separate guide was elaborated to help SMEs translate human rights in their operations. National Action Plans are also being developed. The legal framework is being adapted with, for instance, new Directives on non-financial information disclosure and on Public Procurement.

Mr. Bellion-Jourdan emphasized that the EU is developing these new policies bearing in mind that this is a global challenge which requires new responses. The EU is encouraging companies to implement the UN Guiding Principles worldwide in their operations. The EU is also increasingly cooperating with partners from across region. A recent example is the EU/African Union seminar in Addis Abeba in September 2014 "Fostering the implementation of the UN Guiding Principles through regional cooperation", a joint commitment reiterated by the EU Special Representative for Human Rights and the Commissioner for Political Affairs of the African Union Commission in December 2014 in the margin of the third Forum on Business and Human Rights in Geneva.

The real question – said Mr Bellion-Jourdan – is whether the legally binding instrument is the proper solution to address the problem. He said that the UN Guiding Principles do not exclude further legal developments in this area but Resolution 26/9 created a division at the HRC and led to the unnecessary polarisation of the debate. The process itself was not the most effective way to make progress.

As a way to unblock the situation, the European Union developed a number of parameters and hopes those parameters will be met so that it can reassess its current position of non-participation in the Intergovernmental Working Group:
• Appointment of a third party as a Chair to facilitate the process;

• Undertaking that the focus of the Intergovernmental Working Group will not be limited to transnational corporations;
• Commitment by all to continue implementing the United Nations Guiding Principles;
• Guarantees that the relevant expertise will be brought in, and all segments of civil society and business will be properly consulted.
The European Union hopes that these parameters can be widely accepted by States across regions as well as by civil society organizations.

Jerome Bellion-Jourdan recalled the European Union's support to the Human Rights Council resolution 26/22 on "Human Rights and transnational corporations and other business enterprises", which was presented in June 2014 by Argentina, Ghana, Norway and Russian Federation. This resolution was adopted by consensus and provides for important directions of work.

So far, he concluded, there has not been much advancement in meeting these parameters and he expressed his hope that by July the situation moves forward so that the EU can reassess its position regarding its participation in the negotiation process.

Mr. Richard Meeran, *Leigh Day, Partner* explained his scepticism in relation to voluntary guidelines by identifying some legal and procedural barriers that litigators face when litigating cases against big companies. Litigation in home States has faced inter-related legal, procedural and practical problems. In his presentation Mr. Meeran underlined the main obstacles that victims of human rights abuses face when attempting to bring claims against TNCs before national courts.

The first legal obstacle is the jurisdiction of national Courts. The general rule is that national Courts will have jurisdiction in the state where the company is domiciled. Although a Court might have jurisdiction to hear the case, in the past problems have emerged in relation to the *forum non conveniens* doctrine which prevented a Court from hearing the case if a better forum could be found. Prior to 2005, litigators in cases involving human rights abuses by TNCs spent years arguing which would be the most appropriate court. This is still a problem in the US, Canada and Australia. Conversely, in the European Union, as result of a decision by the European Court of Justice (ECJ), the doctrine of *forum non conveniens* has been abandoned. The ECJ ruled that if the defendant (TNC) is domiciled in a Member State (home state), there is no power to decline jurisdiction in this state. This decision by the ECJ represents significant improvement.

The second legal obstacle is the corporate veil problem. Nonetheless, in UK litigation, we focus on the direct conduct of the parent company, to circumvent the corporate veil.

The third legal obstacle is the quantification of damages. In the EU, the rule dealing with a harm suffered abroad provides that the local level of damages will apply. This is often very low in developing countries, and thus it is not a real deterrent for TNCs.

A procedural problem in relation to cases involving TNCs is the disclosure of documents to prove the connection between the parent company and its subsidiaries. When dealing with TNCs, information as to which entity was responsible for a given activity is often exclusively in the possession of the company itself. Furthermore, the level of disclosure of documents varies across countries. While in the US there are extensive disclosure procedures that enable the claimant to have access to information that can be used in litigation, in most EU countries, access to documents is extremely limited. In the UK, the general rule is the proportionate disclosure of documents. A possible solution to overcome this challenge would be the reversal of the burden of proof, meaning that there would a presumption that the parent company was in control unless it can prove otherwise.

A fifth procedural obstacle is that class actions are not available in all legal systems. For example, while class actions are possible in Canada, US, South Africa and Australia, in Germany they would not be possible.

Finally, a major obstacle when litigating cases against TNCs is the availability of funding. It is often the case that only the big law firms would be able to ligate cases involving TNCs, but these law firms usually work for the companies and not for the claimants. On the other hand, small firms do not have enough funding to litigate such cases. Given the power imbalance between claimants and defendants, some other forms of funding for litigating these cases must be identified. The magnitude of litigation costs reflects legal and practical hurdles that need to be overcome: jurisdiction; corporate veil; disclosure; class action procedures etc. In order to reduce costs - and increase access to justice - these legal and practical barriers must first be addressed.

Ms. Anne van Schaik, *Friends of the Earth Europe,* indicated that although the Netherlands adopted a National Action Plan, legal aid for accessing Courts in the Netherlands has been cut. Moreover, she emphasised that Friends of the Earth International witnessed serious challenges in relation to access to remedies for affected people in the South who step up against big companies.

The cases that Friends of the Earth has been working on involved issues related to environment and human rights, such as land grabbing and the role of European financers, climate change, fracking, extractive industries and deforestation. She pointed out that all these cases have a common feature which is that victims of human rights abuses are unprotected and left without access to justice or effective remedies. Although some measures have been taken to address this challenge (e.g OECD guidelines, Global Contact, etc.), all these initiatives are voluntary, which means that these mechanisms do not have the power to enforce their decisions.

Ms. Van Schaik reiterated that voluntary measures are not sufficient and binding regulations are therefore needed to regulate corporations' activities that affect human rights. This is why, when Res. 26/9 calling for a legally binding instrument on TNCs and other business enterprises was adopted, not only Friends of the Earth, but many organizations around the world celebrated, as this was the first time that at the UN, States seriously discussed corporate accountability for human rights abuses. Many groups and social movements from the South felt that for the first in a long time, the UN was taking action that would be beneficial to them.

She concluded by expressing her concern in relation to the position taken by the EU and argued that the parameters set by the EU on its participation in the negotiation process are unacceptable. She stressed that Res. 26/9 was adopted in a democratic process at the UN. Therefore, she suggested, that the EU come to the IGWG session in July to express its concerns openly, instead of setting pre-conditions. Therefore, she invited the EU and all its member States to participate in the process in a constructive way, avoiding political games and clearly stating its position on the merits during the negotiation session.

INTERVENTIONS FROM THE FLOOR

Representative of the Permanent Mission of Ecuador, shared the view expressed by Ms. Van Schaik from Friend of the Earth Europe in relation to the parameters on the EU participation in the negotiation process.

Ecuador particularly challenged the parameter in relation to the neutrality of the chair and defined it an "insult in diplomatic terms", as it implies that the co-sponsors are not capable of chairing the group. He invited the panel to consider that nobody would be neutral anyway. The IGWG, he explained, is intergovernmental in nature, which means that Governments are legitimate to take the lead in this.

Representative of the Permanent Mission of the Netherlands referred to Mr. Richard Meeran's presentation in relation to challenges in access to courts for victims of human rights abuses by corporations. He asked Mr. Meeran for some insights into measures that they were able to adopt to gain funding to litigate cases against companies.

The Representative of the Netherlands explained that issues related to Business and Human Rights are taken seriously in the Netherlands. For example, the Netherlands was one of the first countries in the world to adopt a National Action Plan. The Netherlands remains at the disposal of other countries who want to adopt an action plan for questions and to share experiences.

In relation to the Treaty initiative, the Netherlands is not against it in principle, but it has certain concerns. The treaty should build upon the Guiding Principles. He also questioned how it would apply in practice. The Guiding Principles set a very high standard and it would be a pity for this standard to be diluted by a Treaty. The risk is that Governments will stop implementing the Guiding Principles arguing that the Treaty supersedes the Guiding Principles.

Representative of the Permanent Mission of Switzerland highlighted that Switzerland is in favour of a complementarity approach. The experience of the Guiding Principles will enrich the discussion around the Treaty. He also explained that Switzerland is adopting a realistic approach as it wants to avoid ending up with a Treaty that no State would ratify.

Switzerland is always open for dialogue and will attend the session in July. On the implementation of the Guiding Principles, he informed the audience that the Swiss National Action Plan is being drafted and expected to be published in July.

The Permanent Representative concluded his intervention by stressing Switzerland's commitment to the protection of human rights defenders.

Other interventions:

FIDH, Nicolas Agostini, started by welcoming the three key words that emerged during the discussion: complementarity, victims, process.

-Complementarity: The treaty process should be seen as complementary to the implementation of the UN Guiding Principles, and should aim at strengthening norms at the international and national levels. A normative approach is needed, as the voluntary approach is not sufficient. Companies take up this approach more and more. Some companies actually ask for binding norms so that there is an international level playing field. We need to close the accountability gaps victims face and are evidenced by the work of a range of actors, including FIDH, which produced a briefing paper highlighting these gaps. As Professor Ruggie highlighted: "The Guiding Principles are a floor, not a ceiling." We need to build on them.

-Victims: The UN Guiding principles remain insufficient to guarantee effective remedies for victims. On the footnote of Resolution 26/9: There is a need to consider complex corporate structures. Excluding local businesses would be inconsistent with the definition included in the Guiding Principles and with the ultimate aim of ensuring access to effective remedies for victims. This needs to be addressed and included in the negotiations. At a minimum, subsidiaries and entities in the supply chain should be included.

-Process: Participatory process is needed – everyone should be around the table. Representatives of business enterprises and of NGOs (with the caveat that NGOs without ECOSOC status should not be excluded from the process and should also be able to participate in the process) can for instance be invited to participate in panel discussions. The views of those affected by corporate abuses should be central to the work of the intergovernmental group.

Mr Agostini expressed satisfaction at the fact that the EU was now talking about "parameters" instead of "conditions". He noted that some of these parameters were reasonable. All parties should show some flexibility. The process must be inclusive. There is no reason why states should not come together to discuss on issues related to Business and Human Rights, as they have managed to come together to discuss and reach agreements on addressing other transnational issues, like child

prostitution, pollution or corruption. In this regard, he insisted on the fact that the question of the chair should not be an obstacle to the IGWG, and that everyone should show some flexibility, as the ultimate aim is to have a robust instrument that is as widely ratified and implemented as possible.

Women's International League for Peace and Freedom highlighted the need for civil society organizations to be included in the intergovernmental process, in order for the outcome of the negotiations to be meaningful. She also added that a gender-based approach should be mainstreamed in the Treaty process. In relation to the conditionality formulated by the EU on the need to get the relevant expertise involved in the negotiation process, she asked the EU whether the expertise would also include a gender component.

Franciscans International*, Francesca Restifo,* stressed the point that the language of resolution 26/9 leaves enough room to engage in a participatory and inclusive dialogue to define the scope and content. Franciscans International believes that the result could only be successful if a truly transparent and constructive dialogue without prejudice and polarizations is sustained. She pointed out that according to cases Franciscans International is following with local partners in many different countries around the world, the Guiding Principles proved to be insufficient and ineffective and their good intentions did not translate into concrete change for local communities and for victims. This does not mean that we want to dismantle the Guiding Principles. She reiterated that the two processes are complementary and could be mutually reinforcing. On the one hand the treaty process will build on the way already paved by the Guiding Principles and fill their gaps. On the other hand it will give an impetus to the implementation of the Guiding Principles.

In relation to the EU parameters, she referred to the condition of inviting Business to the negotiations. She said that opening up negotiations to business clearly means giving priority to business instead of affected communities: considering the asymmetry in the power balance and in financial means, the effect will be that the victims will be silenced during the negotiations. This EU approach shows distance from real problems and unwillingness to address the challenges faced by victims.

ISHR, *Michael Ineichen,* expressed the need for non-ECOSOC organisations to be included in the negotiation process. He focussed on the need of the chair of the IGWG to have strong sensitivity to the risk that human rights defenders face when denouncing abuses involving business activities. In relation to the footnote in Res.26/9, which defines "other business enterprises" as all business enterprises that have a transnational character in their operational activities and which does not

apply to local businesses registered in terms of relevant domestic law, he said that in many cases human rights defenders are threatened by local business rather than by transnational companies.

CONCLUDING REMARKS

Anne van Schaik reassured that the Guiding Principles will not be undermined by a binding Treaty. The only people who put this argument forward are the businesses and representatives of the EU, but not the supporters of the Guiding Principles. The Guidelines and Treaty will be complementary.

Mgr. Silvano Tomasi concluded his remarks by focussing on the idea of complementarity which emerged in different observations: the Principles can be used to strengthen the Treaty. He also stressed that participation of civil society is a key issue.

Mr. Richard Meeran stressed the point that the Treaty initiative will not undermine the Guiding Principles. On the distinction between national and multinational companies, he explained that on a practical level, it is feasible to hold national companies accountable, but usually not in the developing countries**.**

Mr. Jerome Bellion-Jourdan explained that the parameters had been developed with the specific aim of unblocking the situation in June. On the chair of the IGWG, he explained that a neutral chair is not an insult to anybody, but simply underlines the fact that the chair will play a decisive role in that all views are listened to. The parameters address issues that need to be fixed before, to avoid endless discussion in the working group session.

Ms. Elena Valenciano reiterated that the European Parliament will continue to work on this issue and try to get everyone around the table.