

Report

Conference on Legal Accountability of Business for Human Rights Impacts

14 – 15 March 2015, Château de Bossey, Switzerland

On 14th and 15th March 2015, the Friedrich-Ebert-Stiftung (FES), the Danish Institute for Human Rights (DIHR) and the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights (ICC) held a conference for National Human Rights Institutions (NHRIs) on “Legal accountability of business for human rights impacts”. The aim of the meeting was to discuss the current and future use of the UN Guiding Principles (UNGPs) on Business and Human Rights and the new initiative towards the elaboration of a binding international instrument to ensure greater legal accountability of business for human rights impacts.

In June 2014, on the initiative of Ecuador and South Africa, the UN Human Rights Council adopted resolution 26/9 establishing an inter-governmental working group (IGWG) mandated to elaborate an international legally binding instrument to regulate the activities of transnational corporations¹. Having the first meeting of the IGWG in July 2015 in mind, NHRI representatives from different regions²

as well as experts on relevant subjects participated in the conference to consider the aims of a possible future legal instrument, the role that NHRIs with their unique mandate and experience could play in the process as well as opportunities of using existing human rights mechanisms at the national, regional and international level to more effectively prevent and remedy business-related human rights

¹ Resolution adopted by the UN Human Rights Council, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights A/HRC/RES/26/9

² These included: Commission Nationale des Droits de l’Homme et des Libertés de Cameroon; Netherlands Institute for Human Rights; National Human Rights Commission of Mongolia, Uganda Human

Rights Commission; Malawi Human Rights Commission; Office of the Human Rights Defender of Poland; Kenya National Commission on Human Rights; Australian Human Rights Commission; Scottish Human Rights Commission; South African Human Rights Commission; the National Human Rights Commission of Thailand; New Zealand Human Rights Commission; Conseil National des Droits de l’Homme du Maroc; and the National Human Rights Commission of Mongolia.

abuses. Representatives from Ecuador, the European Union, the International Organisation of Employers, the International Trade Union Confederation and the Treaty Alliance also participated in the conference to share their perspectives on a possible treaty.

Since 2011, the UN Guiding Principles on Business and Human Rights, formulated by the UN Special Representative for Business and Human Rights John Ruggie and endorsed unanimously by the Human Rights Council, have served as guidelines for States, businesses and other stakeholders to address the issue of adverse human rights impacts caused by business activities. While the UNGPs have not created any new human rights obligations, they have been helpful in clarifying the respective obligations of States and responsibilities of business.

The soft-law approach has triggered numerous positive policy changes and was therefore appreciated by the participants of the conference to constitute a cornerstone in the process of enhancing respect for human rights by business. While welcoming efforts of developing National Action plans on business and human rights, the group nevertheless believed the process of implementation of UNGPs was happening too slowly. It was noted that the UNGPs were only a soft law document, even if building on and reiterating legally binding obligations drawn from the international bill of Human Rights, and lacking dedicated monitoring mechanisms. The UNGPs *as such* could therefore have limited direct efficacy as regards holding companies legally accountable, and access to legal remedies – even if they had potential to influence positive legal developments indirectly. A view was expressed that norms that were subject to formal negotiation amongst States, as well as participation and consultation of stakeholders would convince

States and companies to implement them more readily.

As a conclusion, the participants expressed the need to explore the value of a complementary binding instrument to see if this might address the challenge of business-related human rights abuses more effectively in the future. They insisted that the development of a new instrument should in no way be undermining current efforts of implementation of the UNGPs.

Obstacles in access to effective remedies

The speakers reported numerous legal and practical obstacles that exist for victims of human rights abuses related to economic activities to access an effective remedy. Obstacles to access to justice in home states of multinationals included: separate corporate legal entities; difficulties in accessing documents; inequality of arms between the defendant company and the affected stakeholders; the costs of litigation, in particular where there is no possibility for group claims. The lack of judicial cooperation amongst countries was also raised as a major obstacle in trans-boundary cases. Suggestions for overcoming barriers to access to justice were made in particular around facilitating disclosure of documents and group claims, and reversal of the burden of proof. The group noted the need to clarify under which circumstances States should exercise extra-territorial jurisdiction over companies domiciled within their territory for their involvement in human rights abuses in third countries. Approaches taken in environmental law or anti-corruption could be further analysed in this context.

National Implementation and role of NHRIs

Participants discussed the value of developing National Action Plans on Business and Human Rights and highlighted the need to increase

the capacity of NHRIs to monitor the development and implementation of such NAPs. Participants deplored that access to remedy had been given too little attention in the implementation of the UNGPs at national level. It was suggested that NHRIs should also report their observations through the Universal Periodic Review (UPR) of the United Nations Human Rights Council (UNHRC). NHRIs also play an essential role as a remedy mechanism through their complaints-handling functions.

The treaty process and views of NHRIs

Important to all attendees was the further implementation of the UN Guiding Principles and their persistence to frame the future approaches. The attendees generated suggestions on the configuration of a possible legally binding instrument.

On the process:

- To ensure a broad recognition of any future treaty, its negotiation process should allow for comprehensive participation and consultation, including the voices of affected people and NHRIs as national experts. Through their involvement, NHRIs could helpfully share national experiences and challenges and could help bridge the gap between the national and international levels.

On the content and scope of a future treaty:

- The experiences of NHRIs' with business-related human rights impacts demonstrate the need not only to include multinational companies but to cover all business activities within the scope of a treaty.
- Most participants agreed that the instrument should not be limited to only "gross" human rights abuses, in particular as most business related violations

they deal with in their daily activities relate to economic, social and cultural rights.

Expectations towards the elaboration of a binding instrument on business and human rights:

- In general terms, it should serve as a reference tool that could empower stakeholders in their argumentation.
- Some participants thought that a treaty with an enforcement mechanism could help close the gaps of legal accountability and could incentivise states to further regulate where needed.

Limitations of a treaty:

- First, cross-border investigation would probably not be easy to facilitate;
- Second, victims that are today afraid of the implications of a testimony against a company, would probably not enjoy better protection under a binding instrument.
- Participants noted that the accountability gap was linked to the lack of implementation by States of their obligations under existing treaties and questioned how a new instrument could help overcome this problem.
- The risk that a future treaty may not be ratified by many States was identified as a major risk
- Finally, the possibility that a negotiated instrument may actually take a very restrictive approach and close down some of possibilities of bringing legal cases against companies at the national level was discussed.

The conference on business and human rights ended with an internal discussion amongst NHRIs about their future work on the subject. NHRIs discussed in particular the need to enhance collaboration between home and host States' NHRIs in specific cases involving multinational corporations. The attendees formulated therefore the intention to strengthen cooperation on diverse levels: bilaterally, regionally and as a global network with the ICC. Such a cooperation could turn the rather limited influence of one NHRI into the strong voice of a combined network. The NHRI representatives expressed their ambitions to engage in the process of elaborating the treaty. Therefore it is planned to contribute to the formulation of a joint ICC statement which should be submitted ahead of the first session of the IGWG, detailing the view of NHRIs on the key elements to ensure a successful process.

The views expressed in this publication are not necessarily the ones of the Friedrich-Ebert-Stiftung.

Friedrich-Ebert-Stiftung. Geneva Office
6bis, Chemin du Point-du-Jour, 1202 Geneva,
Switzerland