



Joint Hearing

Committee on International Trade

Subcommittee on Human Rights

Business and human rights in EU External Policies: due diligence, non-financial reporting and access to remedies

Wednesday, 3 May 2017

Check against delivering

CARLOS LOPEZ' (INTERNATIONAL COMMISSION OF JURISTS) STATEMENT: THE INTERGOVERNMENTAL PROCESS IN THE U.N. TOWARDS AN INTERNATIONAL TREATY ON BUSINESS AND HUMAN RIGHTS

Honourable Members of the European Parliament, ladies and gentlemen,

It is a great honour for me to speak in this hearing and I want to thank, on behalf of the International Commission of Jurists, the Parliament for giving me this opportunity.

To start, it is important to explain what the International Commission of Jurists is and which are our objectives to allow you to understand where we come from and where we are going. The ICJ is an international NGO led by 60 eminent jurists from all regions of the world that promotes the rule of law and works for the legal protection of human rights. Founded in 1952 in the midst of the cold war, we have spent six decades in the defence of human rights, an independent judiciary and the respect for the work of the legal profession. From the times where the rule of law was in danger in Eastern Europe and Apartheid South Africa to Myanmar, Nepal, Guatemala and Zimbabwe today. The ICJ has from the beginning been at the forefront in developing the international human rights treaties and standards that form part of the contemporary human rights corpus.

From the trajectory of the ICJ since its foundation, it will not be a surprise for you to hear that the ICJ is supporting the objective of an international legally binding instrument in the field of business and human rights. We are committed to developing an effective international legal framework on human rights and also to its implementation, and support

the work of international human rights bodies and tribunals that are instrumental for the protection of human rights.

The decision of the UN Human Rights Council to start a process to develop a treaty on business and human rights offers the possibility of advancing the cause of human rights respect in the context of global business operations. Businesses, especially transnational corporations, have the power and capacity to affect the enjoyment of human rights as much as States and other actors. Yet the activities of business corporations have not properly been addressed in international human rights instruments, and international governance in this area has lagged behind.

A global treaty in this area is an aspiration that many civil society organisations around the world have nurtured for many years. It offers the possibility of developing standards at the multilateral global level that have the force of law and are backed by international supervisory machinery. We are convinced that this will make a positive contribution to human rights, just as other human rights treaties have enhanced the respect for human rights in various parts of the world. The ICJ believes that is in the interest of all actors with the common objective of protecting human rights to promote this treaty. The EU and EU Member States should be in the forefront of this effort. Regrettably, they are not.

There are some objections and questions about this prospective treaty, and many people would like to understand how it adds value to existing standards and complements other processes. A common concern from some EU countries is that a treaty could conflict with or undermine the UNGP. The ICJ and most civil society organizations and States supporting the treaty process agree with these European States that the UNGP are highly valuable and treaties should complement, and not undercut them. But, so far, the opponents of the treaty process have been unable to articulate one single argument to sustain the proposition that the treaty would necessarily be in conflict with the UNGPs. We have not heard any elaboration on ways in which they might be conflictual, simply because that would be a speculative exercise in the absence of a text resulting from a negotiating process.

This treaty does not need to be in conflict with the UN GP. Quite the contrary, we believe the treaty will advance the objectives of the UNGP and the protection of human rights in the context of business operations more generally. The EU's and EU Member States' active participation can contribute to diminishing the risk of conflict and to ensuring complementarity.

There is also concern about the mandated scope of this new treaty, which seems to be restricted to the activities of transnational corporations. There is certainly some lack of clarity and uncertainty here. The ICJ's position is that all business enterprises should be under the purview of the new treaty, but the specific challenges posed by the operations of transnational corporations should also be given targeted consideration. Here again, active

and constructive engagement instead of passivity and abstention can better contribute to clarify the scope of the proposed treaty.

In terms of contents, surely the international treaty should set out obligations for States and responsibilities for businesses. But its main value added or contribution should be in the area of access to remedy and access to justice, where the most pressing needs are and where the UN GPs are clearly insufficient.

To partially fill that perceived gap, the EU, the Council of Europe and OHCHR have undertaken important initiatives. The Committee of Ministers of the Council of Europe adopted in 2016 a Recommendation on Business and Human Rights whose main contribution is a set of detailed recommendations on access to justice. These include recommendations to enhance the regimes of civil and criminal responsibility of business enterprises.

The Council of Europe also recommends States to extend the jurisdiction of their courts to deal with civil complaints arising out from operations of subsidiaries of European companies abroad when those claims are connected to claims against the European company; to cases where no other forum guaranteeing fair trial is reasonably available, and to limit the grounds under which the court would refrain to exercise its jurisdictions (for instance the *Forum non conveniens* doctrine). The Council of Europe also recommends a series of measures to facilitate civil complaints by groups and to provide legal aid and other measures to ensure there is effective procedural fairness between weak complainants and powerful corporate defendants.

Recommendations in the same direction have been issued by the Office of the High Commissioner on Human Rights in its final report on Accountability and Remedy, and most recently by the European Agency of Fundamental Rights. All of these recommendations may be put in practice by European or another group of States alone, but this will not achieve the objective of tackling business human rights abuse wherever it occurs. We need State action across all continents, and to achieve that we need a global multilateral treaty assorted with supervisory machinery.

The Council of Europe recommendations and others show there is wide consensus on these measures, which EU representatives and those of Member States can advocate for in the debates at the UN instead of remaining silent and passive as until today.

Although access to remedy and justice is for us the main focus of this treaty, we also think it should address duties and responsibilities of businesses. One measure to be considered is an obligation for States party to the treaty to adopt mandatory obligations for business to adopt internal policies on human rights due diligence. In this regard, the recent passing of a law on the *devoir de vigilance* in France shows that the adoption of such measures is possible at the same time that it shows its limitations. Similar measures are being considered in The Netherlands in relation to the prevention of child labour in the supply

chains of Dutch enterprises. Here too, European governments have much to offer in the debates within the UN.

The prospective treaty should also create a legal framework for enhanced and effective international cooperation among States, in particular in the form of mutual legal assistance for investigation and prosecution of cross-border cases. All global treaties such as in the fields of corruption and money laundering contain extensive provisions on international cooperation. This treaty on business and human rights should not be less.

Besides the content of the obligations a treaty in this field should also establish the appropriate monitoring or supervisory machinery at the UN level. The creation of a monitoring and reporting system within the UN has been one of the main contributions of the various human rights treaties, and it is also a factor of effectiveness and success.

The ICJ, my organization, has elaborated a set of proposals for the possible content of this treaty.¹ I invite you all to consult that publication of which I have put some copies in the back of the room. All recommended measures are feasible because they are all based on existing practice, much of it existing within European countries. The EU external relations service could do much more to engage proactively in the process on the basis of this practice.

I would like to finish this short presentation by addressing the business sector. The ICJ has always maintained that this treaty making process should be open to all those who have a stake in it. Even if the process is intergovernmental in nature, business enterprises should find ways to express their views and be listened to. The ICJ and other human rights organisations call on business enterprises to take more interest in the process and seek ways to participate. The ICJ encourages you and offers to facilitate your participation.

This treaty could be a crucial instrument for European businesses to advocate for common global rules of respect for human rights that are stronger and enforceable *vis a vis* companies from all regions. This will help level the playing field for the companies that have a genuine interest in human rights protection by creating a common standard. For Governments, it is an important instrument to advance the objective of a level playing field for businesses in the global marketplace. This is not only important and a condition of success for European businesses who currently have to compete with businesses that do not have to observe the same rules in other parts of the world, but is also a condition for the sustainability of economic globalisation and its potential to deliver for the human rights for all.

Many thanks Mr Chair.

¹ <https://www.icj.org/the-icj-releases-its-proposals-for-the-content-of-a-treaty-on-business-and-human-rights/>