Business and human rights treaty | Key issues start to crystallise but attention on the protection of human rights defenders remains inadequate

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(Geneva) - Governments met in Geneva from 24-28 October 2016 for the second round of a process to elaborate an international treaty to address human rights violations committed by transnational corporations and other business enterprises. From here on referred to briefly as ‘the IGWG’, this session hosted diplomats, academics, representatives of business and over 100 activists, victims and other civil society actors from around the globe.

‘By far one of the most important contributions of the NGO community was to the transparency of the process,’ said ISHR’s Sarah M Brooks.

‘These voices were critical to the debates, often complementing perspectives of panellists with their lived experiences,’ Ms Brooks said. ‘This should be fully reflected in the final report of the IGWG, and inform the discussions during the third and final session, expected to occur in 2017’.

The role of NGO coalitions, in particular the Treaty Alliance and the Global Campaign, in organising participation of grassroots and community actors in Geneva was invaluable. At the same time, organisations such the Business and Human Rights Resource Centre, SOMO, and ESCR-Net also helped bring Geneva to the grassroots, hosting live updates and detailed descriptions of the proceedings to foster vibrant discussion at home.

Debate and dialogue: voices of victims and experts heard

Though relatively late in coming, the Programme of Work and agenda allowed the IGWG to address a range of issues through its agenda, with panels featuring a range of experts including professors, Special Procedures mandate holders, human rights advocates and practitioners, and others.

In his report on land and environmental rights defenders presented to the UN general Assembly last week, the Special Rapporteur on HRDs Michel Forst stated that he ‘supports... the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, and believes that such an instrument would be timely’. The Special Rapporteur recommended, however, that the intergovernmental working group should ‘fully consider the heightened risk posed by business activities to environmental human rights defenders in negotiations’.

This concern was widely echoed by speakers, with subjects under debate including:

• Landscape of violations linked to TNCs: Through a combination of academic approaches, the work of
other UN mechanisms, and the perspectives of victims and defenders, the session identified a huge range of human rights abuses currently occurring in the context of business operations – from forced labour and land grabs, to barriers to the right to water and a healthy environment, to the specific challenges facing indigenous women and women human rights defenders.

- **Scope of the treaty**: This conversation included which human rights should be covered, which existing frameworks should be foundational to the discussion, and importantly which kinds of business enterprises should be the focus of the treaty.

- **Challenges to access to remedy**: According to many panellists and the majority of the civil society actors, the biggest challenge to remedy is the overwhelming power of transnational corporations to exert influence, demand that victims shoulder the burden of proof, threaten and harass victims and their advocates, jump between jurisdictions to avoid criminal liability, and – through trade and investment agreements in particular – manipulate domestic regulation to ensure these violations can occur with impunity.

Including many civil society contributions:

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EU is still adopting a conservative position on #BindingTreaty, but states in IGWG welcomed its willingness to participate in discussions.

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#BindingTreaty Effective participation by communities necessary in designing instrument @LRC_SouthAfrica statement: bit.ly/2dOblmy

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**Elusive consensus, ongoing gaps**

While the conversations on the nature of any future treaty remain complex, they seem to have coalesced around a few key points. In particular, most civil society speakers called for the treaty to be monitored by a robust treaty body with the capacity, as with other human rights treaties, to investigate claims by States and individuals. They called for the treaty to ensure State obligations to ensure access to information, to remove the corporate veil, and to refrain from adopting policy or legislation that allows – implicitly or explicitly – loopholes in the application of extraterritorial obligations or parent company liability.

Other issues remained live and unresolved. For example, there was a diversity of civil society opinions about using treaty bodies, or an international court, as the primary mechanism to provide international avenues for
Effective remedy.

States, for their part, pressed for further discussion of international arbitration, including investor-state dispute settlement, to be a more substantial part of the discussion. Some, such as South Africa, sought also to incorporate issues of technology transfer.

With very few exceptions, the primary obligation of States to protect and promote human rights was not fully on the table in the discussions. While some NGOs noted the importance of the treaty in filling protection gaps in law at the national level, many others – and indeed some States – focused on the need to address obligations of corporations directly through this tool, while failing to acknowledge the governance gaps, corruption and other barriers to effective access to justice that exist at the State level.

In addition to remarks many found contentious on a panel on 25 October, the representative of the US Council for International Business did speak out, warning the Working Group to exercise caution that it not ‘perpetuate the idea that the sovereign [States] sitting in the room are powerless’.

Says Ms Brooks, ‘While issues of corporate capture are real and should be brought to the table, States must be called on in any treaty to do more to ensure a safe and enabling environment for human rights defenders working in the field of business and human rights or affected by business operations and activities’.

**Strengthening protection of defenders**

The EU, participating in the IGWG substantively for the first time, emphasised the clear need for the process to build on the UN Guiding Principles on Business and Human Rights. Furthermore, and importantly in light of the EU Guidelines on Human Rights Defenders, their statement also noted the critical importance of defenders’ work to improving access to justice and effective remedy.

In that regard, ISHR reiterates the importance of defenders being central to any treaty process and to be protected in any treaty content. This includes clear calls on States’ in line with international human rights obligations to:

- **protect and support human rights defenders** who work on issues of corporate accountability, including from threats by State or non-State actors;
- **create a safe and enabling environment** in which human rights defenders can operate free from hindrance or fear;
- **ensure full, timely and transparent investigations and accountability for** threats and attacks against them, through both judicial and non-judicial mechanisms;
- **adopt and implement legislation ensuring participation of defenders and affected communities** in business-related decisions that affect them, particularly in the conduct of human rights impact assessments, the development of risk mitigation strategies and programs, the elaboration of National Action Plans, etc.

Finally, ISHR seeks to reiterate concerns about reprisals, both in the context of the IGWG process (in particular, as a mechanism of the Human Rights Council) and in the eventual supervision of a treaty. Ms Brooks emphasises: ‘No defenders, no matter who they confront, should feel that speaking out on corporate abuses and seeking protection and remedy from their governments is a dangerous act.’