

Mandate of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Ref.: AL OTH 20/2023
(Please use this reference in your reply)

14 March 2023

Excellency,

We have the honour to address you in our capacity as Working Group on the issue of human rights and transnational corporations and other business enterprises, pursuant to Human Rights Council resolution 44/15.

In this connection, we would like to bring to the attention of Your Excellency information we have received concerning the statement by the European Commission (COM (2021) 222 final, Brussels, 4.5.2021) to refuse the request of the United Kingdom of Great Britain and Northern Ireland to accede to the cross-border legal cooperation international treaty called the ‘Lugano Convention’, where the consequences of such refusal would allegedly have a negative impact on the right to effective judicial remedy of victims of UK business-related human rights abuses committed outside the UK.

According to the information received, the Lugano Convention (as well as the Brussels I Regulation Recast under the European Union) overcomes the *forum non conveniens* doctrine, as that doctrine limits the possibility of victims bringing a legal action in relation to corporate activities outside the state in which they are domiciled. The Lugano Convention overcomes this doctrine by establishing mandatory jurisdiction over businesses where they are domiciled for activities occurring outside the state in which they are domiciled, thus regulating the free movement of court judgments in civil cases between the Member States of the EU, on one hand, and the three EFTA states (Switzerland, Norway, and Iceland), on the other. These regulations ensure that parties’ contractual choice of jurisdiction is enforced and that judgments from member states’ courts are enforceable across the EU. This mandatory jurisdiction has been used by UK courts on many occasions to ensure that victims of corporate activities have been able to bring a claim in the UK against a UK domiciled company for human rights impacts outside the UK. It has been claimed that no other existing and applicable international judicial cooperation treaty (outside the European Union), including those concluded under the Hague Conference on Private International Law, includes this same rule.

While we do not wish to prejudge the accuracy of this situation, we express our concern that the refusal by the European Commission, and accordingly the European Union, to the accession of the United Kingdom to the Lugano Convention may limit the legal accountability of UK-domiciled business’ behaviour outside the UK.

We would like to draw to your attention that, under the United Nations Guiding Principles on Business and Human Rights, unanimously endorsed in 2011

Her Excellency
Ursula von der Leyen
President of the European Commission

by the Human Rights Council in its resolution A/HRC/RES/17/31 (UN Guiding Principles), States have a duty to protect against actual and potential adverse impacts caused by business operations on human rights and the environment.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandate provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned developments.
2. Please indicate the ways in which the decision of the European Commission and, as a consequence, the European Union, to refuse the UK's accession to the Lugano Convention remains in conformity with the European Union's support for the UN Guiding Principles and its efforts to develop a corporate human rights and environmental due diligence regime with proposed improvements to judicial remedy for victims harmed by businesses.
3. Please provide information on the process to consider the UK's bid to re-join the Lugano Convention after the European Commission's statement on 4 May 2021, and subsequent communication to the Swiss Federal Council, as depositary of the Lugano Convention, on 28 June 2021, which indicated that the European Commission is not prepared to grant consent for the UK's accession to the Lugano Convention. Please clarify whether the European Commission is the competent authority for such matters, and whether the UK's bid to re-join the Lugano Convention will be decided by the Council of Ministers and approved by the European Parliament.
4. Please clarify the processes within the European Union which have been undertaken to reach the decision not to refuse the UK's request to accede to the Lugano Convention, and other relevant processes.
5. Please provide information about the European legal bases, internal EU policies or other motivations, for which the accession to the Lugano Convention is limited to the EU-EFTA/EEA context and cannot be opened up for third states in the interest of victims of business-related human rights abuses committed abroad.
6. Please provide information on how you consider that the specific provisions of the Hague Conventions (i.e. the 1973 Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, the 2005 Hague Convention on Choice of Court Agreements, and the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters) will be able to provide the same protection as the Lugano

Convention and Brussels I Regulation Recast against the behaviour of UK-based businesses operating in other jurisdictions which has adverse human rights and environmental impacts.

We would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from Your Excellency will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please note that a letter expressing similar concerns has been sent to the Government of the United Kingdom of Great Britain and Northern Ireland.

Please accept, Excellency, the assurances of our highest consideration.

Pichamon Yeophantong
Chair-Rapporteur of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we would like to highlight the UN Guiding Principles on Business and Human Rights (A/HRC/17/31), which were unanimously endorsed by the Human Rights Council in June 2011 and are relevant to the impact of business activities on human rights. These Guiding Principles are grounded in recognition of:

a. “States’ existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

b. The role of business enterprises as specialized organs or society performing specialized functions, required to comply with all applicable laws and to respect human rights;

c. The need for rights and obligations to be matched to appropriate and effective remedies when breached.”

According to the Guiding Principles, States have a duty to protect against human rights abuses within their territory and/or jurisdiction by third parties, including business enterprises. States may be considered to have breached their international human law obligations where they fail to take appropriate steps to prevent, investigate and redress human rights violations committed by private actors. While States generally have discretion in deciding upon these steps, they should consider the full range of permissible preventative and remedial measures.

Furthermore, we would like to note that as set forth in the United Nations Guiding Principles on Business and Human Rights, all business enterprises have a responsibility to respect human rights, which requires them to avoid infringing on the human rights of others to address adverse human rights impacts with which they are involved. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations and does not diminish those obligations. Furthermore, it exists over and above compliance with national laws and regulations protecting human rights.

The principles 11 to 24 and principles 29 to 31 provide guidance to business enterprises on how to meet their responsibility to respect human rights and to provide for remedies when they have caused or contributed to adverse impacts. Moreover, the commentary of the principle 11 states that “business enterprises should not undermine States’ abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes”. The commentary of Guiding Principle 13 notes that business enterprises may be involved with adverse human rights impacts either through their own activities or as a result of their business relationships with other parties. (...) Business enterprise’s “activities” are understood to include both actions and omissions; and its “business relationships” are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services”.

The Guiding Principles have identified two main components to the business responsibility to respect human rights, which require that “business enterprises: (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur; [and] (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts” (Guiding Principle 13).

Principles 17-21 lays down the four-step human rights due diligence process that all business enterprises should take to identify, prevent, mitigate and account for how they address their adverse human rights impacts. Principle 22 further provides that when “business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes”.

Furthermore, business enterprises should remedy any actual adverse impact that they cause or to which they contribute. Remedies can take a variety of forms and may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome (commentary to Guiding Principle 25).