



# General Assembly

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## Human Rights Council

### Fortieth session

25 February–22 March 2019

Agenda item 5

### Human rights bodies and mechanisms

#### **Note verbale dated 21 March 2019 from the Permanent Delegation of the European Union to the United Nations Office at Geneva addressed to the President of the Human Rights Council**

The Permanent Delegation of the European Union to the United Nations and other international organizations in Geneva presents its compliments to the President of the Human Rights Council, and has the honour to request the President of the Council to have the attached document\* published as a document of the fortieth session of the Human Rights Council.

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\* Reproduced as received, in the language of submission only.



## **Annex to the note verbale dated 21 March 2019 from the Permanent Delegation of the European Union to the United Nations Office at Geneva addressed to the President of the Human Rights Council**

### **Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights 4th session (15–19 October 2018): Intervention by the European Union under Item 5 “Adoption of the report”**

Mr. Chairperson Rapporteur,

We would like to thank you for the handling of this session and allowing for diverging views to be expressed. We would like to thank the Secretariat for the handling of this session and the elaboration of the draft report.

Four years have passed since the adoption of resolution 26/9 which triggered division in the Human Rights Council establishing this Intergovernmental Working Group. We would have liked to see genuine steps by the main sponsors to address the concerns expressed by us and others with a view to overcoming divisions. Otherwise, there is a risk that several States stick to their position not to participate and that others take a similar position. There is ultimately a risk that many States will not adopt the draft text if and when it is produced by this process. Equally, there is a risk of disillusionment among civil society, trade unions and even business who see the merit of further legal developments at the international level to level the playing field to better prevent abuses, and ensure access by victims to remedy when abuses occur.

We believe in effective multilateralism and we continue to expect that the flaws of this process be fixed or that a new process be initiated for progress on this important, yet complex, issue of our time. We owe it to victims and to the next generations.

The 4th session of the Intergovernmental Working Group is about to end. One year has passed since the end of the 3rd session when the Intergovernmental Working Group requested the Chairperson-Rapporteur to “undertake informal consultations with States and other relevant stakeholders on the way forward” [A/HRC/37/67], which entailed a need to find agreement on process. At the first and only consultation convened on 17 July 2018 to discuss the process, the European Union and States from different regions made concrete proposals, including to revert to the Human Rights Council, to find common ground and build a foundation for an inclusive, fruitful, substantive and constructive discussion – see attachment I for the full text of the EU intervention of 17 July 2018; attachment II contains the Joint Statement on Intergovernmental Working Groups delivered on 19 September 2018 during the 39th session of the Human Rights Council. These proposals and the proposals from others were unfortunately dismissed; instead, two days later, the Permanent Mission of Ecuador published the draft treaty and indicated it would proceed to the 4th session without a resolution. We reiterated our suggestions before the 39th session of the Human Rights Council, but to not avail.

Once it became clear that there would be no resolution before the 4th session, we conveyed the expectation that discussion on the future of the process be held before the start of the 4th session with all States and stakeholders to ensure predictability and minimize the risk of disagreement when Conclusions and recommendations are negotiated at the end of the session. There was no such space for discussion before the session, or indeed during the current session. The draft Conclusions and recommendations were made available only on the last day of this session, 19 October at around noon. Their content clearly confirmed that, in our view, there was no attempt by the Chairperson-Rapporteur to respond positively to the proposals to revert to the Human Rights Council with a view of rethinking the best way forward.

We decided therefore not to engage in the consultations on the Recommendations of the Chair-Rapporteur and Conclusions of the working group called on 19 October at a late hour in the session, and disassociate ourselves from their adoption. We therefore request that our position be accurately reflected in the report under the section “Adoption of the report”: “the European Union disassociates from the Recommendations of the Chair-Rapporteur and the Conclusions of the working group and considers that it is not bound by the directions set out”.

We see that the draft report presented to us does not always accurately reflect all views and positions and we welcome the fact that there will be a two-week period to make comments. We also welcome that an Annex will be developed with the attributions of positions expressed throughout the session, including in the opening and closing of this session.

We do not wish to block the adoption of the report, but we rather send yet another signal that it is about time to build common ground. We are committed to continue working within the EU on options for further legal development likely to effectively allow progress in the prevention of abuses by business-related activities, and ensure access to victims to remedy when abuses occur.

We invite all to reflect on the words of former Special Representative of the Secretary General Prof. John Ruggie in his Open letter to this Intergovernmental Working Group before the start of this session: “Success – not on paper but on the ground – demands deep reflection, good will, and a constructive process that searches for consensus in the knowledge that real change requires it.”

I thank you Mr. Chairperson-Rapporteur.

## **Attachment I**

### **Meeting convened by the Permanent Mission of Ecuador to the UN and other international organisations in Geneva on the implementation of HRC resolution 26/9 – 17 July 2018**

#### **Intervention of the European Union**

The European Union thanks the Permanent Mission of Ecuador for convening this meeting. We would like to recall that the request for consultations on process was made by States from across regions, and not only by the European Union – as seems to be implied by the Note Verbale sent by the Permanent Mission of Ecuador to all Missions on 11 July 2018.

I would like first to set out the context of our intervention agreed by all Member States of the European Union. The European Union is working with partners from across regions to implement the UN Guiding Principles on Business and Human Rights, the authoritative framework in this field, and a constant reminder of the obligation to comply with existing legally binding norms. Our experience within the EU has been to develop a smart mix of regulatory and voluntary measures in this and others areas – we regularly provide updates on concrete steps in various areas, most recently in a written contribution to the UN Working Group on Business and Human Rights, in view of its 2018 report to the UN General Assembly “on emerging practice and innovations of corporate human rights due diligence across sectors”.<sup>1</sup>

Over the past years, we have indicated our readiness to engage in meaningful discussions regarding further legal developments. We are aware of the range of views expressed by States, civil society, business, trade unions, academics on the range of options for possible legally binding norms, which highlight the complexity of the issue. In this context, the EU has also embarked in internal reflections on the possibility of further legal developments at the international level.

There should be a thorough analysis of whether/how further legal developments best can contribute to address the real issues: better prevention of abuses, and access to remedy for victims when abuses occur. We are convinced of the need to pursue discussions in an appropriate format on possible further legal developments, and how these could effectively contribute to respond to the real needs.

As there was no agreement among States on the future of the process towards a legally binding instrument at the end of the 3rd session which ended on 27 October 2017, the Intergovernmental Working Group requested the Chairperson-Rapporteur to “undertake informal consultations with States and other relevant stakeholders on the way forward” [A/HRC/37/67], which entails a need to find agreement on process. We hope that today’s first meeting convened to discuss the process can help us find common ground and build a foundation for an inclusive, fruitful, substantive and constructive discussion on possible further legal developments at the international level, in the Human Rights Council or beyond, aiming at outcomes that would be broadly acceptable for all.

A number of States have argued that there is a need to revert to the Human Rights Council. Some States are not in the room today to reiterate these points, seemingly as a result of frustration that their views and expectations have been disregarded.

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<sup>1</sup> <https://www.ohchr.org/Documents/Issues/Business/WGSubmissions/2018/EU.pdf>.

We are also aware of the provisions of document (A/72/6 (Sect.24), Add. 1 dated 2 November 2017:<sup>2</sup>“While no further action is required in respect of the working group’s resources, given the perennial nature of the mandate, the Human Rights Council will need to consider the matter, including the terms of reference for the working group’s future session(s)”. We could develop further legal arguments. We could also refer to the well-established practice in other Intergovernmental Working Group in the Human Rights Council. In our view, reverting back to the Human Rights Council would allow States to agree on the appropriate format to continue the discussion towards a legally binding instrument. It would be paramount to have an inclusive process and an outcome which could be acceptable to a large number of States.

In this context, we have developed the following proposals. The first proposal would be to consider a resolution of the Human Rights Council for the continuation of the Intergovernmental Working Group which would reaffirm the mandate of elaborating a legally binding instrument. It could provide for 2 more sessions of an Intergovernmental Working Group, and a report to the Human Right Council to decide on next steps. The Intergovernmental Working Group would be expected to be chaired in line with principles set out in the UNGA Rules of Procedures and Annex I – including “impartiality”, “respect for the rights both of minorities as well as majorities”.

We were also approached to think creatively of an alternative format in line with the mandate of elaborating a legally binding instrument. The very limited participation of States in the rounds of consultations on substance confirmed the lack of traction among States. We could therefore envisage a resolution of the Human Rights Council mandating a group of eminent legal experts to consult States and all stakeholders (including civil society, trade unions and business) with a view of producing draft options for a legally binding instrument to be presented at the Council after one year. It could build on the discussions held and documents produced during the three sessions of the Intergovernmental Working Group. Once the report of the group of eminent legal experts is presented to the Council, the Human Rights Council would then decide on the best format to continue the discussion – resuming an Intergovernmental Working Group or deciding on another format to pursue the agenda.

We hope that one of these two proposals can be considered favourably as a way to allow for meaningful progress towards a possible legally binding instrument.

As the conversation on further legal developments at the international level continues, we need to continue taking concrete steps to strengthen prevention of abuses, and ensure access to remedy for victims when abuses occur. As we stated in the 3rd session of the Intergovernmental Working Group on the elaboration of a legally binding instrument under the panel “The voices of victims”, “current discussions should not serve as an excuse to avoid providing remedy for victims waiting for justice now. The provision of effective remedy cannot wait.”<sup>3</sup>

Against this background, we are pleased that the Human Rights Council adopted at its 38th session a resolution presented by the core group on Business and Human Rights (Argentina, Ghana, Norway, Russian Federation) entitled “Business and human rights: improving accountability and access to remedy”. It allows for the continuation of the OHCHR-led Accountability and Remedy Project and further pragmatic and tangible steps in the implementation of the third pillar of the UN Guiding Principles on Business and Human Rights.

<sup>2</sup> General Assembly, Agenda Item 136, Proposed Programme Budget for the Biennium 2018–2019. Part VI. Human Rights and humanitarian affairs. Section 24. Human Rights (A/72/6 (Sect.24)). Add.1. 2 November 2017.

<sup>3</sup> <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/OralInterventions/EU-Panel.Voicesofthevictims.pdf>.

## Attachment II

### 39th Session of the Human Rights Council

#### Item 5

19 September 2018

Joint Statement on Intergovernmental Working Groups<sup>4</sup>

Mr. President,

The intergovernmental working groups and other intersessional fora established under the auspices of this Council have a critical role to play in strengthening the protections afforded by international human rights law and ensuring the implementation of existing obligations.

We take this opportunity to recall that intergovernmental working groups and other bodies set up by the Council shall, like the Council itself, and unless decided otherwise by the Council, apply the rules of procedure established for the Main Committees of the General Assembly. By disregarding these rules of procedure we can undermine the very outcomes of the work these intergovernmental groups were tasked to achieve in the first place.

Accordingly, each working group is required to elect a Chairperson, by secret ballot, for a fixed term, and on the basis of experience, personal competence, and equitable geographical distribution. If a Chair is unable to perform his or her functions, a successor must be elected by the membership, using the same criteria. Once elected, the Chair remains, in the exercise of his or her functions, under the authority of the working group. The Chair discharges their functions as an individual, not as a representative of their delegations, and in the best interests of the membership as a whole.

The competence and impartiality of chairpersons, their respect for the applicable rules of procedure, and their efforts to ensure that the views of all Member States are heard and reflected are essential to ensure that working groups can produce high-quality outcomes able to engender the broadest possible support. While the Council may confer an open-ended mandate, it is the responsibility of each core group to return to the Council for a renewal of its program of work, to ensure that its endeavours and resources reflect, and are accountable to, the democratic will of the members of this Council.

We also stress the importance of ensuring that time and resources are used in the most efficient manner that agendas and papers are circulated in good time and that reports from these working groups fairly reflect the balance of views.

Taking into account that most chairpersons discharge these functions admirably, we recall the need for a strict application of this set of rules and standards by all, to help secure a conducive environment for the constructive engagement of all stakeholders with due respect to rules of procedure set up by the General Assembly and established practice.

Thank you, Mr. President.

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<sup>4</sup> Delivered by Austria, also on behalf of Albania, Armenia, Australia, Canada, the European Union, Georgia, Ghana, Iceland, Japan, Montenegro, New Zealand, Norway, the Republic of Korea, the Russian Federation, Singapore, Turkey and Ukraine.