

INTERNATIONAL ROUND TABLE – Brussels, 12 & 13 December 2017

SPEAKER'S CONTRIBUTION

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Developments in the normative and legal protection of defenders

International

- At the **international political level**, mirroring what is happening in many States on the ground, the normative framework is under attack.
- While the most recent UN resolution on HRDs was adopted at the GA by consensus in November, this masks fractures. There were attempts throughout negotiations to restrict the definition of HRDs and China disassociated itself from a paragraph which referred to the work of HRDs as 'legitimate'.
- More positively, the resolution was co-sponsored by States from all regions, including a number of West African States that have not been traditional co-sponsors but have taken national initiatives towards the protection of HRDs, including Cote d'Ivoire, Burkina Faso and Mali.
- Less positively at the political level, we are seeing for the first time efforts to include notions such as 'non-interference in domestic affairs' and the 'supremacy of national law' – notions which are incompatible with the principle of the universality of human rights and are often used to restrict the work of HRDs – in a binding treaty, namely the proposed treaty on business and HRDs being developed by Ecuador and South Africa. This has implications for HRDs, particularly those working in areas of land and environment rights and in the field of business and human rights.

- At the **international legal level**, there are a number of positive normative developments, with international human rights bodies continuing to develop and strengthen jurisprudence and standards on the protection of defenders.
- Last year, CESCR became the first treaty body to adopt a specific statement on defenders, establishing that attacks against defenders of ESC rights may amount to violations of the ESC rights which they defend, in addition to constituting violations of the rights to freedom of expression, association, assembly and liberty and security of person.
- And earlier this year, in a case concerning HRDs in Cambodia, the WGAD found for the first time that States have a legal duty to prevent, protect against and remedy discrimination against human rights defenders, in the same way as they must address discrimination on grounds such as race or gender. This is an important legal development because, whereas relatively few national jurisdictions have adopted specific HRD protection laws, many more have adopted laws prohibiting discrimination on the grounds of 'political or other opinion' or 'other status' in line with Arts 2(1) and 26 of the ICCPR. This

means that discrimination against HRDs, and a failure on the part of States to prohibit and protect against such discrimination, may be justiciable under domestic law.

- As we approach 20th anniversary of the Declaration, it is to be hoped that other TBs and Special Procedures apply and further develop the approaches of CESCR and the WGAD.

National

- A conducive **national legal framework** is a necessary, although by no means sufficient, element of a safe and enabling environment for the work of human rights defenders. This requires both the absence of laws and policies which restrict or criminalise the work of defenders, together with the enactment and effective implementation of laws and policies which support and protect them.
- At the national level, there are a number of jurisdictions which have taken or are taking steps to incorporate the Declaration into binding national law through the enactment of specific human rights defender laws and the establishment of specialised HRD protection mechanisms. In some cases these legislative efforts are drawing on the Model National Law on HRDs developed and endorsed by a panel of HRDs and legal experts in 2016.
- Accordingly, in recent years, Cote d'Ivoire and Burkina Faso in West Africa, as well as Honduras in Latin America, have adopted such laws, while laws are under development in Sierra Leone and Mali. While it is too early to make any assessment as to the efficacy of the Burkinabe law, in Cote d'Ivoire there is an empirical association between the enactment of Loi 388 in 2014 and a decline in threats and attacks against defenders in the years since.
- The rise in attacks and the prevalence of impunity in Mexico and Honduras, by contrast, both of which have specific HRD protection laws, shows manifestly that laws are not enough. To be effective, such laws must be developed and implemented in close consultation with civil society. They must also be complemented with adequate resources and high-level political will and support.
- In addition to issues regarding implementation, there is a disturbing trend in some jurisdictions, most notably the Democratic Republic of Congo, to develop laws that are purported to be for the protection of defenders but in fact contain provisions – such as requiring that HRDs be registered and submit reports – which have the purpose, or would have the effect of restricting defenders' independence and work. In that jurisdiction, the Model Law is providing both national and international civil society with a useful tool against which to assess proposals for conformity with the Declaration.
- While the Model Law is 'a model', not 'the model' there are a number of elements which are essential for any national law. At a minimum these include ensuring that the law:
 1. adopts an inclusive functional and not vocational definition of defenders;
 2. comprehensively enshrines the rights set out in the Declaration and other relevant international human rights treaties without reservation or selectivity; and
 3. does not introduce conditions or seek to impose or imply 'responsibilities' on defenders that may impair those rights.
- Any national law should also clearly articulate the obligations of both State and non-State actors (including business enterprises), and contain provisions for the enforcement of these obligations and penalties and remedies for their contravention.

Diplomatic

- Finally, and to end on a positive note, a growing number of States are adopting policies or **guidelines for their diplomatic representations** on the protection of HRDs abroad.
- The most recent of these, adopted by Canada, links a Canadian company's record on respecting and protecting HRDs with the provision of trade, export credit and other supports the company may be provided.
- Meanwhile, Finland has taken the positive and welcome step of commissioning an independent evaluation of their support for HRDs, including with respect to the implementation and impact of the Finnish diplomatic guidelines. A summary has been published in English and provides valuable learnings and guidance for like-minded States.