

Joint submission to the Drafting Group on Human Rights and Business (CDDH-CORP) of the Council of Europe by Amnesty International, ICJ, FIDH and ECCJ

Amnesty International, the International Federation for Human Rights (FIDH), the International Commission of Jurists (ICJ) and the European Coalition for Corporate Justice (ECCJ) appreciate the opportunity to provide additional comments and suggestions in relation to the proposed issues for a non-binding instrument of the Council of Europe on human rights and business, as set out in the "Indicative detailed list of issues for further debate" appended to the report of the Drafting Group on Human Rights and Business (CDDH-CORP).¹ This submission is in response to the invitation to submit proposals and suggestions of issues for further consideration with a view to a revision of the list before consideration by the CDDH.²

The present submission focuses mainly on access to justice (item B of the list of issues) and aims at providing additional information and suggestions on and explanations to the issues already included in that list. It addresses the issue of extraterritoriality in the context of these issues, rather than as a separate matter. It does not contain a detailed elaboration of each of the issues, which should be provided if and when members of CDDH-CORP are asked to submit substantive comments on the issues.

The undersigned organizations support a Council of Europe non-binding instrument focused on access to justice and closely related issues. Such an instrument should essentially deal with State-based judicial mechanisms given the Council of Europe's long-standing expertise in this field and since other instruments have already provided important guidance on company-based grievance mechanisms.³

Item B: Obstacles to access to justice and remedies for victims of business-related human rights abuses

The issue of access to justice is a key element of the right to an effective remedy for persons whose human rights have been violated or abused. The right to an effective remedy lies at the very heart of international human rights law. Although judicial and quasi-judicial remedies are central to access to justice, they have been long neglected. Accessing justice presents particular problems for victims of business-related human rights abuses, especially when trying to bring claims before the courts of the home state of a parent or controlling company for human rights abuses arising in the context of its operations in another state (the host state).

Recent reports by Amnesty International and ICAR, CORE and ECCJ, and earlier reports by the ICJ and FIDH, discuss in detail the obstacles to access to justice and suggest measures to overcome them.⁴ The reports evidence

¹ CDDH-CORP (2014) R2.

² CDDH-CORP (2014) R2, para. 14.

³ See the UN Guiding Principles on Business and Human Rights: Implementing the United Nations Protect, Respect and Remedy Framework, A/HRC/17/31 (21 March 2011).

⁴ See Amnesty International, 'Injustice Incorporated: Corporate Abuses and the Human Right to Remedy' (March 2014), available at:

the impact of these obstacles on the protection of human rights. The scale of these obstacles also evidences the need for the changes outlined in this submission.

Standards developed under Article 6(1) of the European Convention on Human Rights and Fundamental Freedoms are particularly relevant in that they comprise not only the conduct of court proceedings once they are instituted but also the right to institute those proceedings in the first place.

a) Access to judicial mechanisms

Jurisdiction (including forum non conveniens)

Many cases involving corporate human rights abuses fail at a preliminary stage because home state courts are unwilling or unable to exercise jurisdiction over claims concerning extraterritorial abuses.

The organizations support the consideration of the content and principles embedded in the current Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and the corresponding Lugano Convention. The non-binding instrument could provide recommendations to Council of Europe member states in relation to the exercise by their national courts of jurisdiction in claims concerning extraterritorial business-related human rights abuses. Brussels I and Lugano recognize “domicile” as the prevailing criterion for establishing jurisdiction, and this is a criterion that is also widely recognized in the world.⁵

In this context, CDDH-CORP should consider the non-binding instrument recommending to member states that the doctrine of *forum non conveniens* not be generally used in cases concerning extraterritorial business-related human rights abuses. In relation to jurisdiction, it would also be useful to consider “forum of necessity” as an acceptable basis for jurisdiction in cases where no other alternative forum is available or the limitations on an

www.amnesty.org/en/library/info/POL30/001/2014/en; ICAR, CORE and ECCJ, 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' (December 2013), available at: accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf ; 'Corporate Complicity & Legal Accountability, Report of the ICJ Expert Legal Panel on Corporate Complicity', Vol. 3 Civil remedies, 2008, p. 45, available at: <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2009/07/Corporate-complicity-legal-accountability-vol3-publication-2009-eng.pdf>; FIDH, “Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms”, updated in March 2012, available at: www.fidh.org/en/globalisation-human-rights/business-and-human-rights/Updated-version-Corporate-8258

⁵ International Litigation for Human Rights Violations, Final Report, International Law Association, p. 6. With respect to companies, “Domicile” refers variously to the place of incorporation, statutory seat/registered office or main administration or the place where a corporation is established or carries out business. See also Principle 25, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and commentary, available at: <http://www.icj.org/protecting-human-rights-beyond-borders/>.

alternative forum are such that there is a real risk that a denial of justice would occur.

Legal responsibility

There is a need to enhance the accountability of corporate actors for crimes that are or lead to human rights abuses. The regulatory gaps in criminal laws applicable to companies (particularly when operating abroad) are a significant obstacle to access to justice.

As a first point, it is important to bear in mind that many elements of criminal law remain largely within the competency of each individual state and states have, sometimes, diverse approaches to the criminal liability of legal entities. However, there is a clear trend towards the enactment of criminal or administrative liability for legal entities (including business enterprises) that commit crimes that are or lead to human rights abuses. The non-binding instrument could recommend a more consistent approach across the Council of Europe "space", with a view to member states adopting laws and policies that would enable authorities to bring companies to account and afford a measure of relief to victims.

Applicable law

The law applicable to a civil claim can be a significant issue in accessing justice. Situations often arise where applying the law of the state where the damage or harm occurred may prevent the claim being heard or restrict its scope or the compensation payable.

The organizations suggest that under this heading consideration is paid to possible recommendations concerning the applicable law or choice of law in the context of civil litigation. It is generally the law of the place where the damage occurred (in EU law) or where the act or omission causing the harm took place (in the law of certain other countries) that applies. CDDH-CORP may consider whether and to what extent the need to secure an effective remedy for victims of human rights abuses should play a role in deciding the law applicable to the case. The non-binding instrument could formulate relevant recommendations to member states with a view to enabling national courts to decide on the law applicable to a case in a way that is consistent with the right to remedy and their international human rights law obligations. For example, under international law standards, the State duty to protect against corporate human rights abuses (both within their territories and extraterritorially) also applies when a business or its parent or controlling company has its centre of activity, is registered or domiciled or has its main place of business or substantial business activities in that state.⁶

⁶ See Principle 25, Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights and commentary, available at: <http://www.icj.org/protecting-human-rights-beyond-borders/>

Difficulties for victims to obtain legal aid / financial obstacles; Rules of evidence in civil law cases (equality of arms)

Victims of human rights abuses face significant obstacles in accessing justice due to financial costs, the difficulties of finding legal representation and the difficulties of obtaining from companies information relevant to their claim.

The organizations consider that the need to ensure equality of arms as a key component of the right to access to justice is not only linked to the rules of evidence. We recommend that the above sub-headings are combined under the heading "equality of arms", under which the applicable rules of evidence (for example, ensuring that plaintiffs can access information relevant to their cases), availability of legal aid and other elements vital to ensuring equality of arms could be considered.

CDDH-CORP could consider formulating recommendations to member states to facilitate victims' access to legal aid in administrative, civil and criminal judicial systems, regardless of where the harm occurred.⁷

International judicial cooperation

To achieve the right to effective remedy, it is vital that home and host states seek the assistance of each other. This is particularly essential in criminal cases, when finding and interviewing witnesses and gathering evidence, and in civil cases, in ensuring elements of effective remedy that the home state cannot provide and which require action from the host state.

We recommend that a new sub-heading, as above, be included in the list. Investigation and adjudication of transnational cases requires cooperation among authorities of different jurisdictions. Areas for cooperation include investigation, exchange of information and data, judicial cooperation in collection of evidence and in the recognition and enforcement of sentences.

Complex structure of business (parent company legal responsibility)

Several reports, including those already mentioned above, have highlighted that complex corporate structures and separate legal personality pose significant obstacles to accountability and access to justice. To overcome these obstacles, it has been recommended that it be made easier to hold parent companies legally responsible for human rights abuses arising in their global operations.⁸ Courts in member states, such as the UK, have already recognised that in certain circumstances parent companies can have a duty of care to those affected by their subsidiaries' operations.⁹ However,

⁷ See, for example, the UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, A/C.3/67/L.6 (3 October 2012).

⁸ See pages 199-211 of *Injustice Incorporated* and pages 76-88 of *The Third Pillar*.

⁹ See, for example, *Chandler v Cape plc* [2012] EWCA Civ 525 (CA); *Guerrero and others v Monterrico Metals plc and Rio Blanco Copper SA* [2009] EWHC 2475 (QB); *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL); *Connelly v RTZ plc* [1998] AC 854; *Ngcobo v Thor Chemicals Holdings Ltd & others* [1995] TLR 579.

establishing that a business enterprise is liable for adverse human rights impacts caused by its group's operations is a costly and time consuming exercise usually undertaken in the context of litigation. In addition, it remains unclear as to what a plaintiff would need to establish to persuade the court that a duty of care exists.

There are various proposals to overcome this. One proposal is to affirm the duty of business enterprises to conduct human rights due diligence with respect to the group's subsidiaries and business partners.¹⁰ There would be a presumption that an enterprise had breached this duty if the business did not have or had not followed these standards. This could be achieved by placing parent companies under an express duty of care towards those whose human rights may be or are affected by their global operations, with the standard of care needed to meet this requirement being defined by reference to international human rights due diligence standards. It could also be achieved by adopting specific national legislation to that effect.

Such changes would improve access to justice and help to overcome the obstacles by making it easier for victims of corporate human rights abuses to bring a claim directly against the relevant parent company in its home State courts and providing a legal basis for such a claim.

The non-binding instrument could elaborate on this duty. It could recommend, among other things, that member states ensure that the principles in the non-binding instrument on the duty of business enterprises are complied with in national law and practice. If the non-binding instrument focused on this duty, it would have the added benefit of addressing not only access to justice issues but also other issues on the indicative list such as extraterritoriality and due diligence standards.

The issue of parent company responsibility may be seen solely as an issue of attribution of responsibility rather than also as an issue concerning access to justice. We suggest that parent company responsibility is an issue of access to justice as it falls within or is directly linked to the determination of "civil rights and obligations" by "an independent and impartial tribunal" as set out in article 6(1) of the European Convention. It is also clear that the lack of a legal basis for bringing a claim in home state courts poses a significant issue to accessing justice. In the alternative, should this issue not be considered as falling under item B of the list of issues (Access to justice and remedy), we propose that it be considered under item C (Policies and measures requiring business enterprises to respect human rights).

b) Access to non-judicial mechanisms and c) Non-state-based mechanisms

While there is a role for non-judicial mechanisms in the provision of remedy, they should not be viewed as a replacement for access to judicial mechanisms. Access to effective judicial mechanisms is vital, and in some

¹⁰ See, for example, Guiding Principles 17 to 21 of the UN Guiding Principles on Business and Human Rights.

cases required, including in respect of crimes under international law, for victims of business-related human rights abuses.

To be effective, State based non-judicial mechanisms must be able to provide remedy to victims of business-related human rights abuse. State-based mechanisms should also comply with requirements set out in international law and should be independent from government. In accordance with Guiding Principle 27 of the UN Guiding Principles on Business and Human Rights (UNGPs), gaps in the provision of remedy could be filled, where appropriate, by expanding the mandates of existing mechanisms or creating new mechanisms.

Non-state based mechanisms should meet the effectiveness criteria set out in Guiding Principle 31 of the UNGPs. Business enterprises' operational level grievance mechanisms should not include legal waivers which preclude access to other non-judicial and judicial mechanisms.

Item D. Policies and measures promoting respect for human rights (e.g. public procurement, foreign investment, activities of State-owned companies, activities in conflict areas, gender equality)

The undersigned organizations support a Council of Europe non-binding instrument that would consider the incorporation of legislative and policy measures to be taken to ensure respect for human rights by both States and business enterprises, including in trade and investment agreements. Recommendations to member States could be formulated to ensure that such agreements, and related dispute resolution mechanisms, do not hinder State parties' ability to uphold their obligations to respect, protect and fulfill human rights.

Item G. The role of stakeholders and social partners, including national human rights institutions

The organizations welcome the recognition, in the report of the meeting CDDH-CORP (2014) R2, that “[a] special focus, in order to ensure their appropriate consultation, should be placed on rights-holders such as children, minorities, indigenous peoples, persons with disabilities, human rights defenders, etc.”

Recommendations in the non-binding instrument could further elaborate on the meaning of “appropriate consultation” to ensure meaningful consultation and to secure the full and effective participation of rights-holders. Recommendations to States and companies regarding vulnerable or marginalized groups could build on previous recommendations emanating from the Council of Europe.

Furthermore, the organizations would like to emphasize the need to ensure a non-binding instrument recognizes the fundamental role played by human rights defenders in safeguarding human rights from the adverse impact corporate activities may generate. A non-binding instrument could make reference to – and envisage collaboration with – existing bodies and mechanisms within the Council of Europe, such as the Office of the Commissioner for Human Rights, and in the United Nations, such as the

Special Rapporteur on the situation of human rights defenders in contexts involving business activities. Particular attention should be paid to the protection of indigenous peoples' rights, with explicit references to the UN Declaration on the Right of Indigenous Peoples, including the right to free, prior and informed consent.