



Open Public Consultation on Substantive Elements to be Included in Guidance on National Action Plans to Implement the Guiding Principles on Business and Human Rights

Submission Specific to Substantive Elements Relating to Access to Judicial Remedy

The International Corporate Accountability Roundtable (ICAR), the Corporate Responsibility Coalition (CORE), and the European Coalition for Corporate Justice (ECCJ) are each coalitions of non-profit organizations that create, promote, and defend legal frameworks to ensure corporations respect human rights in their global operations.

In 2013, ICAR, CORE, and ECCJ developed the report, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. Authored by leading experts on the issue of access to judicial remedies (Professor Gwynne Skinner, Professor Robert McCorquodale, Professor Olivier De Schutter, and Andie Lambe), the report identifies and analyzes the barriers to remedy in the United States, Canada, and Europe and then sets out detailed recommendations for the actions States should take to address the barriers to judicial remedy. The report is based on desk research, as well as on numerous consultations with key practitioners and experts in the relevant States.

We welcome the efforts of the UN Working Group on Business and Human Rights in developing draft guidance on the substantive elements to be included in National Action Plans (NAPs) for implementation of the UN Guiding Principles on Business and Human Rights (UNGPs). Based on the research conclusions in *The Third Pillar* and on the joint report by ICAR and the Danish Institute for Human Rights (DIHR) regarding the process governments should undergo to develop NAPs on business and human rights,¹ we offer this submission that focuses on the Working Group's guidance under heading 9, Access to Remedy, to be read jointly with the broader submission of ICAR and DIHR.

We emphasize that, in the development of NAPs, States must first conduct National Baseline Assessments (NBAs) and then commit in their NAP to close identified gaps through legislative or other regulatory means. On review of the draft list of substantive elements to be included in guidance on NAPs, we take note that, in general, the substantive elements are framed as elements for States to "assess." As such, we recommend that the UNWG's draft list be re-framed as content for consideration during the NBA process, rather than a list against which the content of NAPs will be assessed.

If the UNWG determines that it will not re-frame these elements and will pursue the development of guidance on the substantive elements to be included in NAPs, we offer the comments below to indicate

¹ THE DANISH INST. FOR HUMAN RIGHTS & INT'L CORPORATE ACCOUNTABILITY ROUNDTABLE, NATIONAL ACTION PLANS ON BUSINESS AND HUMAN RIGHTS: A TOOLKIT FOR THE DEVELOPMENT, IMPLEMENTATION, AND REVIEW OF STATE COMMITMENTS TO BUSINESS AND HUMAN RIGHTS FRAMEWORKS (June 2014) *available at* <http://accountabilityroundtable.org/about/publications/#nap>.

where language must be altered to ensure affirmative, forward-looking language indicative of *action*, as well as additional key areas that are universally worthy of States' focus. We further emphasize that the specific content of NAPs must respond to each State's own context; as such, the UNWG's guidance on the topic should not be presented as a checklist, but as a non-exhaustive list of considerations.

9.2.2. Examine how legal liability for legal persons such as corporations is established under national law.

The Working Group rightly directs States to examine how criminal and civil liability is attributed under their domestic law and to clarify whether extraterritorial jurisdiction exists under domestic criminal and civil legislation. These are indeed key issues that States must consider in developing NAPs. States must also, however, plan to take steps to address gaps identified via this examination and clarification process.

Specific recommendations of how States should address such gaps include the following:

- *States should identify where criminal law does not hold businesses accountable for their involvement in human rights violations and plan to address these gaps with the implementation of new laws and policies.*

Many jurisdictions recognize corporate criminal liability, either as a general concept or in relation to specific offenses.² Despite the potential for corporate criminal liability, successful prosecutions for human rights abuses in domestic courts remain very rare.³ Given the complexity and opacity of corporate structures, proving these elements presents challenges. In jurisdictions without corporate criminal liability, prosecution typically rests on civil liability or criminal liability of corporate officers. The latter often requires proof of the specific officer's sanctioning or inaction in response to actual or constructive knowledge of the offense, or direct involvement.⁴ However, the threat of company indictment, significant fines, or even dissolution arguably provides more "effective legal and moral sanctioning of wrongful corporate activity" than the threat of an individual officer's imprisonment.⁵ States should identify and address gaps in their law that prevent accountability when corporations are involved in human rights violations.

² Jennifer Zerk, *Corporate Liability for Human Rights Abuse: Towards a Fairer and More Effective System of Domestic Law Remedies* (Report prepared for the Office of the UN High Commissioner for Human Rights), available at <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf> at 32.

³ Jan Wouters and Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 THE GEO. WASH. INT'L L. REV. 939, 969, available at <http://docs.law.gwu.edu/stdg/gwilr/PDFs/40-4/40-4-3-Wouters.pdf>.

⁴ See *Criminal Liability of Companies: Peru*, Lex Mundi, available at http://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf, at 7.

⁵ Elidiana Shkira, *Criminal Liability of Corporations*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2290878 at 7, 8.

- *States should assess to what extent they investigate and prosecute companies for involvement in human rights violations and ensure that where there are legitimate allegations of corporate involvement in human rights violations, these allegations are thoroughly addressed.*

Even in jurisdictions where criminal prosecutions of businesses are possible, investigations and prosecutions are rarely conducted of illegal corporate acts that are or are linked to human rights violations. States should ensure that prosecutors have a clear mandate to pursue such cases, make sufficient resources available for them to do so, and ensure that any decision by public prosecutors not to take action is amenable to judicial review at the request of the victims.

- *States should ensure that victims have access to compensation when businesses or their officers are found guilty of human rights abuses.*

Given the multitude of barriers victims face in pursuing civil remedies, victims of business-related human rights violations should have access to compensation where a prosecution has resulted in a conviction. States could ensure that remediation is available through the criminal system (and should examine to what extent such remediation has been provided, if any successful prosecutions of business involvement in human rights violations have been completed), or ensure that victims have the opportunity to bring a civil claim based on a conviction of a business or corporate officer has been convicted of an offense linked to a human rights violation.

- *States should ensure that controlling entities within business enterprises have a legal duty with regard to all parts of the enterprise for human rights impacts.*

The twin principles of separate legal personality and limited liability, combined with other hurdles, are at the heart of the barriers victims face in accessing judicial remedies. The duty of the business enterprise to exercise due diligence with regard to all aspects of the group to ensure the business enterprise does not directly or indirectly cause or contribute to human rights impacts, should be clearly affirmed. States should therefore make it clear that a business can be found civilly liable for human rights impacts where it has not complied with a legal duty to carry out due diligence to prevent such impacts from occurring.

- *Home States should ensure that victims of business' human rights violations have the ability to bring a case in the home State, even where the violation occurred abroad.*

National legal systems take a variety of approaches to whether a claim may be brought against a business in its home State for harm that occurred abroad. Given the large hurdles many victims face in bringing claims in the host State, the ability of home State courts to consider claims for extraterritorial human rights violations in some cases provides the only avenue toward remedy. States should examine whether their law allows claims to proceed for harm that occurs outside the home State and should plan to eliminate any barriers to doing so.

- *States should ensure that there is no limitation period for claims alleging genocide, war crimes, and crimes against humanity; States should ensure that an adequate statute of limitations applies for torts that occur abroad.*

Time limitations on civil claims are commonplace, but they pose specific barriers to human rights claims, given the difficulties in investigating and gathering evidence for such claims. Some statutes of limitations are so short as to prevent victims from being able to present their claims at all. Similarly, international law proscribes statutes of limitations for the crimes of genocide, war crimes, and crimes against humanity.⁶ States should examine their criminal and civil statutes of limitation and ensure that legitimate claims are not barred by short limitations periods.

9.2.3. Examine whether practical or procedural barriers prevent legitimate cases from being brought before the courts.

The guidance currently included in the Working Group’s draft focuses broadly on legal and practical barriers, but does not specifically address barriers outside of costs; the availability of legal representation; the ability of claimants to aggregate claims; and the resources, expertise, and support prosecutors have to investigate individual and business involvement in human rights related crimes. While each of these focus areas is worthy of special attention, there are a number of key barriers that should also be explicitly included in the Working Group’s guidance. These include:

- *States should examine whether their courts apply a doctrine of forum non conveniens; States that do apply the doctrine should ensure that the doctrine ensures that victims must have an adequate available remedy before dismissing a case.*

Most, if not all, plaintiffs would prefer to file their claim in the State in which they are located or where the harm occurred; when plaintiffs bring claims in another forum, this demonstrates that a remedy cannot be easily had (or had at all) in the host forum. Statistics suggest that “ninety-nine percent of cases dismissed on *forum non conveniens* grounds in the United States, are, for one reason or another, never refiled”⁷ in the alternate forum, and victims are left without any remedy. States should ensure that when dismissal on *forum non conveniens* grounds is considered, the burden is on the defendants to establish that the foreign forum is a better and more convenient alternative for the witnesses and the parties; that the public policy of the forum State can be achieved through filing in the foreign forum; that an adequate remedy, similar to what the plaintiff could achieve in the forum State’s courts, is available and would be provided as promptly as it would be in the forum State; that the alternative State’s judiciary is stable; that the defendant would agree to personal and subject matter jurisdiction in the foreign forum; that there are no rules which would prevent the plaintiff from achieving a remedy; and that the State does not have “blocking statutes” which would prohibit the plaintiff from re-filing in the foreign forum. The State should also ensure that its courts have the ability to set conditions for dismissals on *forum non conveniens* grounds, and should ensure that cases dismissed on such grounds are dismissed without prejudice.

⁶ Barton Legum, Resolution 107A, A.B.A. Sec. Int’l L. Rep. (adopted by the House of Delegates August 2013).

⁷ See footnote 101 of 3d pillar

- *States should allow for the recoupment of lawyers' fees where not already available.*

In order for human rights cases to be more economically viable, States should enact legislation providing that the prevailing plaintiffs in civil actions be awarded lawyers' fees. Lawyers' fees give lawyers an incentive to engage in "private" enforcement of violations of international human rights law, the enforcement of which is a matter of public policy.

- *States should identify whether they have a "loser pays" system, and if they do, should ensure that exceptions exist that would allow victims to seek a "no cost ruling."*

In States that have a "loser pays" doctrine, victims are significantly inhibited from accessing judicial remedies. Businesses should anticipate the risks of litigation when operating in foreign States and should be expected to understand that litigation is a cost of doing business abroad. Therefore, victims, with legitimate, non-frivolous, claims should be able to seek a "no cost ruling."

- *States should ensure that collective redress mechanisms are in place and accessible to victims.*

Human rights violations frequently involve a large number of victims, for instance an entire village adversely affected by a development project or all workers employed on a particular industrial site. Collective violations are unlikely to be remedied adequately through individual complaints. States should ensure that class actions or other collective redress mechanisms are available, and ensure that such mechanisms are not limited by restrictive conditions.

- *States should examine whether their law provides protection from retaliatory actions, and where it does not, ensure that victims are not subject to retaliatory lawsuits.*

Some victims, NGOs, and plaintiffs' lawyers have faced claims by businesses, seemingly in retaliation for bringing a human rights case against the business. These lawsuits create a barrier for future litigation in that they may intimidate the parties. In addition, tremendous time and financial resources are needed to defend against these attacks. Some jurisdictions have anti-SLAPP statutes, allowing the party or lawyer being sued to request the court to dismiss the case promptly in order to avoid the burden and costs of litigation and to recover fees. States should ensure that they have legislation to prevent lawsuits that are meant simply to chill victims and their lawyers from bringing legitimate cases.