

Corporations and Human Rights

Comments by the International Commission of Jurists on the Draft Feasibility Study on Corporate Social Responsibility in the Field of Human Rights

November 2012

The International Commission of Jurists welcomes the opportunity to provide comments on the Draft Feasibility Study on Corporate Social Responsibility in the Field of Human Rights (CDDH(2012) 017), prepared by the Secretariat of the Council of Europe for consideration by the Council of Europe Steering Committee for Human Rights. The Secretariat was requested by the Steering Committee on Human Rights to prepare a draft study exploring “the feasibility and added value of the various options for Council of Europe involvement” in this field, and also to consider other avenues of action (para. 4).

The ICJ would like to express its appreciation for the expert and comprehensive consideration of options carried out in the draft study. In particular, the ICJ welcomes the focus on vulnerable groups such as children as well as the consideration of the various existing instruments and standards in this area. The ICJ agrees with the general thrust of the draft study regarding the potential for a standard-setting exercise within the Council of Europe. Following the regrettable decision by the Committee of Ministers that a new convention or additional protocol to the European Convention on Human Rights was not the most appropriate solution, options for a declaratory (“soft-law”) instrument should be seriously analysed and considered for action.

A new Council of Europe declaratory instrument in the area of business human rights responsibilities

The ICJ is convinced that Council of Europe standard-setting in the field of corporate human rights responsibilities has the potential to add value to the set of existing standards and policy guidelines in this field. It shares the view expressed in the study that “any new soft-law instrument by the Council of Europe should not lead to the duplication or replication of the UN Guiding Principles on Business and Human Rights” (para 13). Such an instrument should provide clearer and more concrete standards and guidance in areas that have not received enough attention so far.

The legal framework for any human rights standard-setting exercise within the Council of Europe is provided by the European Convention on Human Rights and Fundamental Freedoms, its Optional Protocols, the European Social Charter and Revised Social Charter and other Council of Europe Conventions and other instruments in the field of Human Rights. Most of these instruments have been adopted through an inter-governmental process and enjoy the benefit of monitoring and enforcement and supervisory machinery. These instruments and the practice of Council of Europe institutions reflect the common values and principles that bind together European countries, where attachment to the rule of law and the protection of human rights is of central importance. The ICJ shares the view that: "... the procedural and substantive standards of protection developed in the jurisprudence of the ECtHR could serve as a basis for the European Union and its Member States to further clarify and *develop normative standards on business and human rights*."¹(emphasis added). Any new exercise should, of course take into consideration existing international instruments in the field of business and human rights, especially the Guiding Principles and Framework "Protect, Respect and Remedy" developed by Prof John Ruggie.

Issues for standard setting

The draft feasibility study undertakes a comprehensive consideration of the various issues and possible avenues of action that have been suggested in this field. Several of those options may be equally feasible and desirable and should not be seen as alternatives. The Council of Europe may decide to follow certain courses of action while undertaking work to further refine and/or develop standards and guidance. Among other things, the ICJ welcomes the consideration of social rights and employment issues, and the question of extraterritorial jurisdiction for possible standard-setting.² Some of the most serious allegations of abuse committed by European transnational corporations have occurred in third countries and in regard to social rights such as labour and health.

However, the issue that is most in need of urgent attention is access to justice and other effective remedies. The ICJ concurs with the recommendation contained in the draft study:

"32. Any possible drafting, working or expert group on corporate social responsibility could prepare non-binding instruments on access to justice and adequate remedies, containing guiding principles on how to address existing obstacles to access to justice and to establish effective remedies for victims of corporate-related human rights abuses, including the exercise of jurisdiction in cases with extraterritorial effects."

¹ 37 D. Augenstein, University of Edinburgh, "Study of the Legal Framework on Human Rights and the Environment applicable for European Enterprises Operating Outside of the European Union", page 10, cited in para 27 of the feasibility study

² Draft study para. 26, and para 34: "A non-binding instrument by the Council of Europe on human rights and business could therefore seek to develop similar standards and guidance with regard to the extraterritorial conduct of transnational companies with their headquarters based in Council of Europe member states, without necessarily creating any new obligations which would go beyond state's obligations under the European Convention on Human Rights."

As noted in the study, ordinary obstacles experienced by people in accessing courts or during judicial proceedings relating to process, costs, proof and others become overbearing, and often insurmountable, for claimants who belong to local peasant or indigenous communities in developing countries affected by activities of European transnational corporations. In many instances, the effect of these obstacles amounts to a clear denial of justice in contradiction to the guarantees provided not only under the European Convention (arts 6 and 13), but also the International Covenant on Civil and Political Rights (Arts 2 and 14) and other universal and regional instruments.

The ICJ has developed a significant programme of work in the area of access to justice for victims of corporate human rights abuse. In particular, it regularly studies national legislation and justice mechanisms in countries across all regions, to identify obstacles to redress and provide recommendation for action to address those obstacles.

Among the problems that are frequently encountered are the weakness in the administration of justice, including in respect of the independence and impartiality in the judiciary; the lack of accessible courts and tribunals in areas where problems and abuse most frequently occur; inadequate laws that regulate legal standing and legal representation; high costs for litigants deriving not only from court fees and legal representation, but from a prevalence of corruption in the systems; and foremost among all, the lack of implementation and enforcement of judicial decisions. When justice avenues are closed in the countries where the victims live, there should always be the possibility of a European forum that is open and available for victims of abuse that involves European corporations.

The ICJ's work in this field has shown that access to justice for victims of corporate abuse of human rights is the aspect of corporations and human rights which is most urgently in need of attention. The jurisprudence of the European Court of Human Rights and the standards developed by the Council of Europe can provide a good basis for further refinement and development of standards, guidance and recommendations for Council of Europe Member States in this field. The ICJ therefore urges the Steering Committee on Human Rights to support the development of Council of Europe standards on access to justice for victims of corporate human rights abuse.

The ICJ looks forward to remaining engaged in the Council of Europe's work on this question and is willing to provide information and expertise to assist in any future standard-setting on corporations and human rights.