United Nations A/HRC/23/NGO/12

General Assembly

Distr.: General
16 May 2013

English only

Human Rights Council
Twenty-third session
Agenda item 3
Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Written statement* submitted by the International Commission of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement, which is circulated in accordance with Economic and Social Council resolution 1996/31.

[7 May 2013]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Corporate complicity and access to justice

In June 2008, the Human Rights Council adopted the report containing the Framework "Protect, Respect and Remedy". Leading human rights organizations also supported the Framework in the hope that it would lead to the development of robust legal instruments to improve the compliance of business enterprises with human rights standards. Five years later the promise of the Framework remains unfulfilled. The adoption of the Guiding Principles in 2011 as an affirmation of principles and set of recommendations to States and business enterprises is a small though significant step, but realities on the ground show that further and bolder multilateral initiatives should be taken.

In its written comments to the first report of the Working Group on human rights and transnational corporations and other business enterprises (the Working Group) in 2012, the ICJ reiterated the three main issues proposed by civil society as priorities for the Working Group, namely: (1) to explore the further development of international standards; (2) to improve access to remedies, and in particular access to justice for victims of human rights abuses; and (3) to address the impact of business on indigenous people and other vulnerable groups. While providing information on some steps taken regarding (2) and (3), the present report of the Working Group (A/HRC/23/32) regrettably does not at all address the further development of international standards.

The Working Group's current report refers to a series of steps taken to integrate elements of the Guiding Principles within global governance frameworks, as well as other initiatives and measures. While those steps are welcome, the ICJ would highlight that they can hardly provide grounds for complacency and that the key test remains the practice on the ground of enterprises and States. The ICJ notes with concern the low level of State responses to the survey circulated by the Working Group and the fact that many responses were incomplete and/or included past and ongoing initiatives that have no explicit or direct association with the implementation of the Guiding Principles. A more serious approach to implementation must make explicit reference to the particular principle that is being implemented.

The Working Group also reports to have received approximately 40 submissions detailing situations of concern, a large number of which involve conflicts between local communities and businesses over land and resources, including instances of forced evictions and the operation of businesses within indigenous territories without the free, prior and informed consent of the indigenous people. The ICJ has received information of one such instance in 2001 where the Ugandan army forcefully evicted more than 2,000 people from their land in the Mubende district to make way for a vast coffee plantation operated by Kaweri Coffee Plantation Ltd. Kaweri Coffee is a subsidiary of the Hamburg-based Neumann Kaffee Gruppe and although a complaint was filed with Germany's OECD National Contact Point, it was quickly dismissed. In April 2013, ten years after the events, a court ruled on the case finding civil responsibility of the lawyers who advised the government and company, without addressing the responsibilities of the Ugandan and German companies.

In this context, the Working Group expresses its decision to continue to analyse these cases in order to inform its work and strategy and to formulate recommendations to stakeholders. The ICJ is concerned that such a response to these kinds of serious allegations is by itself insufficient and may amount to inaction in the face of serious abuse. It therefore welcomes the Working Group's intention to update its methods of work to consider raising "specific allegations" with relevant State authorities and companies requesting clarification or information. This is a positive development and the ICJ encourages the Working Group to actively use this option and report on such interventions to this Council.

Regarding its own programme of work, the Working Group reports that it is undertaking projects on access to remedy and on indigenous peoples. The ICJ welcomes continued attention to the key issue of access to remedy and calls on the Working Group to make public the details of its project in this area, its partners and terms of reference. The ICJ notes that the project will "produce guidance on what constitutes an 'effective remedy'" on the basis of lessons learnt and requests the Working Group to clarify the form that such guidance will take, its addressees and other elements of the project. The ICJ would emphasize that the integrity of existing international law and standards as developed by international and regional human rights courts and bodies must be respected in this work.

The issue of access to justice and remedy is of particular concern for the ICJ. Recent developments of global impact are the cause of concern and add to the urgency of the Council's action in this area. On 17 April 2013, the Supreme Court of the United States held in Kiobel v Shell Co that the Alien Tort Statute, which had been widely used to file legal suits against companies for serious abuses committed abroad, could not be applied extraterritorially, thus narrowing the options for this important avenue of redress for victims of corporate abuse.[1] Given that the Nigerian victims in this case have virtually no chance of redress in their own country, where judicial decisions are generally disregarded by political authorities and are therefore ineffective, they are left without justice in the absence of access to other jurisdictions.

The United States is a very important jurisdiction, given the number of transnational corporations based in the country and subject to its jurisdiction.. The disappointing outcome there follows another setback on 1 November 2012, when the Supreme Court of Canada declined to hear an appeal against a decision of the Quebec Court of Appeal in a case against Anvil mining (a Canadian/Australian company acting through a subsidiary in the Democratic Republic of Congo) concerning alleged complicity with crimes under international law.[2] The Quebec Court had denied jurisdiction on the grounds of forum non conveniens. Several other cases have also been rejected in Canadian courts.[3]

The case of the Lago Agrio communities in the Amazonian jungle of Ecuador is another emblematic example of the difficulties plaintiffs experience in seeking justice for corporate wrongdoing. In the original lawsuit in the United States, the plaintiffs asserted that from 1972-1992, Texaco (later acquired by Chevron) released massive quantities of highly toxic petroleum wastes into waters used for bathing, fishing, drinking and cooking, and that Texaco sprayed these wastes onto local roads. In a decision of 16 August 2002, the US Court of Appeals for the Second Circuit dismissed the case also on the basis of forum non conveniens. The plaintiffs pursued the case before Ecuadorian courts and obtained a favourable final ruling ten years later. However, given that Chevron no longer holds assets in Ecuador, the plaintiffs have now the daunting task of pursuing enforcement of the ruling in other jurisdictions where Chevron holds assets.

Such cases illustrate that the involvement of parent companies in the wrongdoing of their subsidiaries, a practice commonly labelled as complicity, remains an issue that must be adequately addressed. Victims of corporate abuse face acute challenges in seeking justice in this context due to the diverse approaches of States to the question of jurisdiction and the

[1] Kiobel v Royal Dutch Petroleum Co, Case No 10-1491, 2013 (U.S. Apr. 17, 2013).

[2] Anvil Mining Ltd. c. Association canadienne contre l'impunité, 2012 QCCA 117 (CanLII), online: Canlii.org <http://canlii.ca/t/fpr75>.

[3] One such case is that against Green Park International Inc for complicity in international crimes in the occupied Palestinian territories, also dismissed for forum non conveniens: see Bil'in (village council) et al v Green Park International Inc et al, Superior Court Province of Quebec, judgment of 18 September 2009.

rules regarding complicity. Recent negative developments may suggest a pattern that could ultimately lead to a situation of denial of justice for many people who do not have viable legal avenues to pursue.

Finally, the ICJ appreciates the growing attention lent by the Working Group to the issue of indigenous peoples. It urges a coordinated approach with, and an enhanced role for, the International Labour Organization (ILO) to prevent a potential proliferation of varied and unsynchronized standards and initiatives in this area.

Call for Action

The ICJ calls on the Working Group:

- To publicize the details of its project on access to remedies and its terms of reference, including its partners and details on the form that such guidance will take;
- To undertake the latter project through open consultations and with due regard to existing international law and standards on remedies and reparations as developed by universal and regional human rights mechanisms;
- To explore the further development of international standards;
- To actively raise specific allegations of corporate abuse with relevant State authorities and business enterprises and report on those interventions to this Council;
- To address more clearly the issue of access to justice in cases of corporate complicity; and
- To take a coordinated approach with the ILO on issues affecting indigenous peoples.