AMNESTY INTERNATIONAL

European Institutions Office

Submission for the expert conference "Business & Human Rights – Principles to Practice" Copenhagen 7-8 May 2012

Amnesty International welcomes the opportunity to provide input to the Danish EU presidency conference "Business & Human Rights – Principles to Practice". We encourage the Danish EU presidency to consider the following views and recommendations in the Statement and Report of the conference.

I. The role of the EU and Member States in implementing human rights standards

Governments' duty to protect human rights entails the obligation to protect these rights against abuses by third parties including companies.[1]

In its renewed CSR strategy of October 2011, the European Commission has committed itself to develop a priority plan for the implementation of the UN Guiding Principles on Business and Human Rights which reflect human rights standards for, among others, the duty to protect. Equally, the Commission encourages EU Member States to ensure implementation of these standards. The EU and the Member States should take a pro-active role to do so as a component of broader efforts to advance compliance with human rights standards.

As a first step the EU and its Member States should map those areas of commercial, corporate, administrative, criminal and any other areas of law for which the UN Guiding Principles and other human right standards bear relevance in order to carry out a systematic review and reform of the existing legal framework for human rights protection in the context of business activity.

[1] Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, Principle 3, 2011, "State Parties should take steps to prevent human rights contraventions abroad by corporations which have their main seat under their jurisdiction" – Committee on Economic, Social and Cultural Rights, "Statement on the obligations of State Parties regarding the corporate sector and economic, social and cultural rights" (UN Doc. E/C.12/2011/1). This is also reflected in Art. 21 TEU which defines the EU's objectives for its external policies and actions, among them the consolidation of human rights.

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Further the EU and the Member States should prioritize to:

a) Enforce more effectively existing laws holding corporate actors to account

Within the scope of State regulation, there is an urgent need to address the legal enforcement gap that exists when it comes to holding companies to account for illegal conduct under existing laws. Even where laws exist, corporate actors are not being held to account for committing acts that lead to human rights abuses abroad. One illustration is provided by the findings of the UN Special Rapporteur on the human rights implications of environmentally sound management and disposal of hazardous substances and wastes with respect to the movement of toxic waste from the EU to Cote D'Ivoire.[2]

The EU and Member States should ensure that existing laws that hold companies accountable for illegal acts that lead to human rights abuses are properly enforced. The EU should further explore gaps in accountability that exist between the different domestic legal regimes of the Member States in relation to corporations, either guiding Member States in bridging these gaps or harmonizing the different regimes to ensure that consistent human rights protection is guaranteed. Harmonization should not lead to the lowest common denominator but the highest possible protection according to International Law.

Furthermore, when a breach of EU law occurs, appropriate steps to ensure compliance should be taken and where necessary sanctions enforced.

b) Ensure greater regulation of corporate actors, particularly with respect to operations conducted abroad

The EU and its Member States must enact specific measures to regulate companies in order to ensure they respect human rights within their territory as well as when operating abroad. Effective regulatory measures put in place by the EU and Member States can take a number of forms. One important measure is to legally require businesses to respect human rights and to undertake human rights **due diligence** throughout their global operations in order to mitigate human rights risks and prevent adverse human rights impacts. Others include the mandatory disclosure of information relating to potential or actual negative human rights impacts arising through mineral supply chains.

c) Improve access to justice for victims of corporate abuse, particularly with respect to judicial and state based mechanisms in home States

Corporate entities are currently able to operate across State borders with ease, while State borders simultaneously present institutional, political, practical and legal barriers to corporate

[2] Addendum to report of the Special Rapporteur on the adverse effects of the movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights, 3 Sep 2009 (UN Doc. A/HRC/12/26/Add.2).

accountability and redress for victims of corporate human rights abuses.

Under International Human Rights Law, people whose rights are violated are entitled to an effective remedy. The EU and its Member States must ensure victims of corporate human rights abuses can exercise their right to remedy effectively and should do so by focusing on improving and facilitating access to state-based judicial and non-judicial remedies.

II. The role of the State and other stakeholders with respect to due diligence

The EU and the Member States **should legally require** their businesses to respect human rights and to undertake human rights due diligence throughout their global operations.

Due diligence is an ongoing process involving active and positive measures to identify, prevent and address actual or potential risks that corporate activities and operations may pose to human rights. Adequate due diligence includes adopting a policy commitment to respect human rights, having adequate human rights policies integrated, implemented and monitored throughout the company, assessing potential impacts of the company's activities on human rights and developing action plans to prevent and address human rights abuses. Consultation with affected individuals and communities is required, as well as transparency in the process and the disclosure of relevant information.

Through their regulation, EU and Member States should clarify what is required for carrying out adequate human rights due diligence. They should make clear that human rights due diligence is not about managing risks to the company's commercial interest, but to avoid external harm to individuals and communities, and that the main purpose and function of these processes is to prevent human rights abuses. The EU and Member States should actively monitor human rights due diligence processes; require the disclosure of corporate human rights policies and processes so as to facilitate transparency and accountability. Sanctions and other corrective measures should be imposed if companies fail to take adequate steps to identify, prevent, minimize and address adverse impacts on human rights.

An immediate and important step towards mandatory due diligence for all companies would be for the EU to extend the **disclosure of non-financial information** by companies and require that companies disclose information about how they identify, prevent, minimize and address adverse impacts on human rights.

Another important step would be that state-owned-enterprises and businesses receiving any **form of public support** conduct human rights due diligence. States must ensure that they are not

complicit in human rights abuses by corporations and should therefore not support business operations that are causing or are likely to cause human rights abuses. As a minimum, the EU and Members States should make sure they do not provide support if adequate human rights due diligence policies and practices are not in place. The recently introduced **reporting requirements of Member States** to the Commission on the compliance of their export credit agencies (ECAs) with human rights[3] should be meaningful and include sufficient detail to reflect how ECAs ensure that benefiting companies conduct due diligence processes and their impact on business operations and human rights.

III. How can the State, Business and other non-state actors provide satisfactory access to remedy?

The right to remedy entails both procedural and substantive entitlements. Under international human rights law individuals and communities who allege that a human right abuse has been committed against them have a right to have their rights determined by an independent, impartial and competent authority established by law. If human rights abuses are found, individuals or communities have a right to substantive reparation (such as compensation, rehabilitation, restitution, changes in law, guarantees of non-repetition, etc). Remedial mechanisms must have the capacity to afford and enforce remedy; they must be affordable and accessible and guarantee equality of the parties both in access and throughout procedures.

To ensure that the human right to an effective remedy is effectively realized in cases of corporate abuse, the main focus of the EU and Member States must be on access to state-based judicial and non-judicial remedies. State-based non-judicial remedies play an important complementary role in establishing accountability and access to remedy. The EU and its Member States should devote greater attention and resources to strengthening competent State-based administrative and other non-judicial bodies capable of providing effective remedy for rights abuses. These can be supplemented, but not replaced by corporate-level grievance mechanisms. In particular, the EU and Member States should seek to improve the ability of foreign rights-holders to access remedies in the home States where corporate actors are domiciled or headquartered.

People whose human rights are affected by corporate activities often face significant hurdles when trying to access an effective remedy. The problem is particularly acute for rights-holders who suffer abuses caused or contributed to by businesses incorporated abroad and attempt to seek justice in the companies' home States. The focus of Amnesty International's research has

[3] Regulation No 1233/2011 of the European Parliament and to of the Council of 16 November 2011 on the application of certain guidelines in the field of officially supported export credits, Official Journal, L 326/45.

been on four major obstacles to remedies which it recommends that the EU and Member States consider: 1) challenges presented by the complexity of corporate structures and how these are often used to evade accountability (e.g. the separate legal personality of different entities within a corporate group); 2) barriers to access to information for victims; 3) imbalances in power and influence between corporate actors and victims and the overall impact that this has on justice; and 4) legal procedural hurdles that can be used to defeat extraterritorial claims, such as the principle of *forum non conveniens.*

Further, the Edinburgh Study highlighted significant procedural obstacles in accessing redress in the European legal system such as obstacles resulting from time limitations, legal aid and due process, non-availability of public interest litigation and mass tort claims, and provisions on evidence.[4]

With the objective to ensure the full enjoyment of the right to remedy by victims of corporate human rights abuses, the EU should identify the existing obstacles to remedy within the EU, including difficulties in accessing EU courts, and remove or alleviate these obstacles and where necessary, give guidance to Member States on how to address these obstacles.

As a first step, the EU should introduce **minimum grounds for jurisdiction** for human rights abuses resulting from business operations abroad, including their subsidiaries. such as *forum necessitatis* and where there is a strong link to the country in which the court resides. The EU should use the recast of the Brussels I regulation to enhance jurisdiction in cases of alleged human rights abuses without eliminating or reducing existing grounds for jurisdiction of Member States[5].

In the context of the forthcoming review of the *Rome II* regulation, the EU should further ensure that when Member State courts decide on the **applicable law**, they refuse the application of foreign laws where such application would lead to manifest breaches of human rights.

The EU should furthermore strengthen mechanisms for collective redress as an important tool for access to justice and ensure their applicability in cases of alleged human rights abuses resulting from business operations abroad.

The EU should also give guidance to Member States on the establishment of new, or strengthening of existing state-based non-judicial grievance systems such as National Human Rights Bodies, Ombudspersons and other administrative or quasi-judicial bodies, in order to provide further avenues for redress to victims of human rights abuses by corporations.

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[4] *Study of the Legal Framework on Human Rights and the Environment applicable to European Enterprises Operating outside the European Union,* submitted by the Edinburgh University, 2010, para 238.