

PROPOSALS MADE BY THE *GRUPO DE ESTUDIO SOBRE EL DERECHO INTERNACIONAL PRIVADO Y LOS DERECHOS HUMANOS* FOR THE UN WORKING GROUP ON HUMAN RIGHTS AND TRANSNATIONAL CORPORATIONS AND OTHER BUSINESS ENTERPRISES IN ADVANCE OF ITS FIRST SESSION (16-20 January 2012)

1.- Work towards the creation and adoption of legal and judicial mechanisms, specially in the countries of origin of Transnational Corporations (hereinafter referred to as *TNCs*) –home states- and in those where *TNCs* operate –host states-. Such mechanisms should allow for proper adjudication of human rights (hereinafter referred to as *HRs*) violations. These mechanisms may include but should not be limited to universal or and/or extra-territorial jurisdiction mechanisms in criminal and non-criminal matters in cases of violations of international *ius cogens* norms by *TNCs*, their employees or their officials.

Judicial mechanisms are the mechanisms of first resort for victims because, in many cases, they are the only ones available or the ones whose availability is greater. Therefore, they should be improved in all countries and an effort should be made to ensure that they are adapted to the needs of *HRs* litigation. Jurisdiction is sometimes the first and most cumbersome hurdle that claimants have to overcome when they believe that, for reasons such as corruption or otherwise inadequate judicial mechanisms, they commence proceedings in another country with which the parties or the cause of action may not have strong jurisdictional links. Some of the other difficulties that traditional judicial mechanisms pose to this kind of transnational litigation are: the lack of adequate notification mechanisms; the lack of adequate mechanisms to join in a single proceedings all the claimants who believe to have been affected by the *HRs* violation; the lack of adequate compensation; the lack of adequate mechanisms to obtain evidence which is to be found abroad, as in all those cases where the claimants believe that the judicial mechanisms of the country where the violations have taken place are not suitable to their needs and they decide to file the claim elsewhere. The drafting and dissemination of model laws which put forward efficient judicial mechanisms of this kind should be fostered.

2.- Work towards the strengthening of the judiciary system in developing countries and countries where *TNCs* are most active.

A strong judiciary is key towards the enforcement of *HRs*. Without it, laws or even codes of conduct are useless. Even though *HRs* litigation seems to be focusing on how to bring proceedings to the jurisdictions where *TNCs* are incorporated –home states-, it is necessary that those cases can also be tried where the events took place, where most of the victims live and where most of the evidence is to be found.

3.- Work towards the creation and dissemination of Alternative Dispute Resolution mechanisms (ADR) such as arbitration and mediation for disputes arising out of *HRs* violations by *TNCs* and the recognition and enforcement abroad of arbitral awards or agreements reached by the parties to a dispute.

Court proceedings sometimes lack the flexibility needed for a special type of litigation such as human rights litigation. Furthermore, jurisdiction rules also

pose insurmountable difficulties which do not exist in ADR. ADR mechanisms are voluntary, it is necessary therefore to find ways in which the consent of the parties –specially the defendant TNCs- can be extracted. An effort should be made to include Arbitration or Mediation clauses in voluntary codes of conduct, in international investment and free-trade agreements, national legislation, procurement contracts, etc. Other problems that would have to be tackled are the applicable law, the procedural rules that would have to be followed for the proceedings, the recognition and enforcement of arbitration awards and settlement agreements, etc. Investment arbitration has also become a battleground where the rights of countries and TNCs are pitched against each other. Therefore, as cases such as Metalclad show, investment and free-trade treaties should be placed under close surveillance to prevent them from impinging upon countries' rights to regulate environmental matters, labour rights, HRs, etc.

4.- Work towards the adoption of corporate, criminal and civil law regimes which make TNCs, their employees and their officials not only civil or administrative but also criminally responsible for violations of international *ius cogens* norms.

Liability regimes should always have victims' redress as one of their main goals. Criminal and non-criminal liability may or may not be available depending of the country where the claim is filed and may achieve different results as far as victims are concerned. Therefore, it is necessary to achieve a situation where the victims do not have to decide where to file a claim depending on the procedural and legal advantages that jurisdiction offers them (*forum shopping*). To this end, it is necessary that jurisdictions, as a rule, offer the possibility to request civil, criminal and/or administrative liability for those responsible of the HRs violations. In this regard, it should be studied whether countries should adopt statutes allowing for the criminal liability of corporations, which is not a very common principle yet.

5.- Work to facilitate the recognition and enforcement abroad of judicial and non judicial decisions coming from developing countries and countries where TNCs are most active, in cases of violations of HRs by TNCs.

A judicial decision or an arbitral award is useless for the victims if it cannot be recognised and enforced in the place where the assets of the defendant TNC are to be found. Therefore, as it has been said before, mechanisms such as the Hague Convention or the New York Convention should be adapted and made applicable to the judicial and non-judicial mechanisms of HRs litigation.

6.- Work towards the harmonization of existing external codes of conduct and standards of behaviour for TNCs so that the latter have as much certainty as possible concerning what they can and cannot do in their business activities, as far as HRs are concerned.

A great number of initiatives of this kind have been put up and tried (the UN Code of Conduct for Transnational Corporations, the Global Compact, the UN Norms on the Responsibility of Transnational Corporations and Other Businesses, the ILO Tripartite Agreement, the OCDE Guidelines and other Codes of conduct for specific industrial sectors) and TNCs sometimes feel that

they have to comply with too many standards. Therefore, an effort should be made to unify codes of conduct (e.g. by types of industry), making them as clear and as specific as possible and discarding useless or simply academic initiatives. Information on Grievance mechanisms should also be disseminated and unified. The new UN Guiding Principles will definitely act as a harmonizing tool of existing codes of conduct but, nevertheless, codes will continue to exist in specific industries although hopefully inspired by and drafted according to the principles.

7.- Work towards the dissemination of information on existing codes of conduct and standards of behaviour among Corporations, Professional and Commercial Organisations as well as International Organisations.

The more a code of conduct is known and the more institutions endorse it, the stronger and more prestigious that code of conduct is and the easier it is to make a TNC understand its need to comply with it.

8.- Work towards the sharing of resources among international and/or national organisations and agencies, as well as NGOs whose goals are partly or totally related to the protection of HRs from violations by TNCs.

There is a great number of stakeholders working to prevent and mitigate the risks that TNCs pose to HRs and which sometimes do not work coordinately. They should work together and make pressure together before Governments and institutions, in order to have a stronger impact. Furthermore, NGOs, trade unions and other stakeholders should share resources, personnel, information and know-how in order to maximize their efficiency. Importance should also be given to social networks and the internet as a whole as a means to put members of NGOs, trade unions and all types of stakeholders in touch with each other and maximize their efforts. In this regard, websites or databases where all this information can be accessed by stakeholders might be a useful tool.

9.- Work towards improving HRs education in both the countries where TNCs operate –specially developing countries- and in the countries of origin of TNCs.

The more people are conscious of their rights, the more active will they be to demand that those rights are respected. HRs education must be fostered both in the countries where TNCs operate and in the countries of origin of the TNCs. A special effort should be made to grant social leaders (trade union officials, NGO members, church leaders, lawyers, etc) and students access to HRs education, because they will be the leaders of the future.

10.- Work towards the involvement of mass media in exposing those TNCs which violate HRs, specially in developing countries.

It is a fact that Governments' foreign policy is to a great extent driven by the interest that the public shows in foreign affairs at any given moment and that interest may be arisen by mass media. It is contended that HRs violations by TNCs are not one of the main concerns of the public, partly because there is not enough information about those violations. Convince news corporations of their responsibility to inform about such HRs violations and lobbying in that regard

may achieve an increased amount of news dealing with HRs and an increased interest in the public, which will in turn augment the interest of Governments in putting pressure on TNCs based in their countries and/or finding appropriate solutions. To this end, a special data base and web page may be designed to provide mass media with quality information on HRs violations by TNCs.

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