

Article 7: Access to Remedy

Access to effective remedy is a universal right already recognized in international instruments, including the main human rights treaties. The inclusion of provisions to address some of the specific problems in the implementation of this right in the context of business activities and abuses, and the existing obstacles that victims face to find justice and reparation are a central contribution of the proposed treaty to international law.

Article 7.1 however seems to deal with the jurisdiction of courts, which is most properly addressed under article 9. To avoid repetition and overlapping, 7.1 could be redrafted to focus on the duty to guarantee access to remedy in the context of business human rights abuse

Article 7.2 relating to access to information is currently drafted in a too general and ambiguous way. It should more clearly identify which kind of information and from whom is to be obtained. In this regard, victims should be entitled to "Access to relevant information concerning violations and reparation mechanisms both from businesses and state agencies." We agree in this regard with the delegation from Palestine.

Article 7.3 addresses some of the most important obstacles to access justice faced by victims of human rights abuse by requiring the provision of access to legal assistance in legal proceedings. In fact, it would be better to modify the chapeau of this article by referring more generally to "measures" since the issues addressed under this heading go beyond legal assistance.

7.3 (a) adds an important and welcome precision by incorporating children as one of the groups to provide information. To keep consistency, 7.3.(b) should also refer to the rights of children to be heard in an appropriate time and manner:

"b. Guaranteeing the rights of victims to be heard in all stages of proceedings, according to their special needs and rights keeping in mind that child victims may only be heard and participate voluntarily in a child-friendly setting and manner."

7.3 (d) addresses judicial doctrines such as *forum non conveniens* used in certain countries by judges to relinquish jurisdiction that they would otherwise have over a case when they judge another more appropriate forum exists. As such, this issue is more clearly already addressed and drafted under article 9 and should be deleted from article 7.

Article 7.5 addresses obstacles presented by the inability of complainants to access relevant information of evidentiary value in legal proceedings to substantiate their claim before a court of law. Such inability may be determined by lack of means or

simply legal and physical impediments to access the relevant information because it is legally in the possession or control of the defendant (a business enterprise in this case) or a third party. This problem has an impact on the fairness of the legal proceedings and its outcome and could breach the due process principle of equality of arms, but addressing the problem in an inappropriate manner may also breach due process rights of the defendant. For these reasons, it is recommended to slightly reformulate this provision to enable judges to order reversal of the burden of proof when necessary and taking into account whom is in a better position to provide the needed evidence. This has already been provided for in the Escazú Agreement and the CoE Recommendation on Business and Human Rights.

The ICJ has provided alternative language in its comments forwarded to the secretariat.

The ICJ also recalls that Article 7 should also include provisions on non-State-based grievance mechanisms, which under certain strict conditions of transparency and social participation, can play a role in providing rapid redress to harms caused. However, it should be made explicitly clear that in no circumstance should these grievance mechanisms be considered as a waiver of the right to a judicial remedy.