Amnesty International Submission on Brussels I Regulation Legislative Proposal - October 2011

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I. Introduction

On 21 April 2009, the European Commission (EC) published a Report and Green Paper[1] reviewing Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I), and requesting comments on proposed reforms. In June 2009, Amnesty International made a joint submission with the European Coalition for Corporate Justice (ECCJ) in response to the Green Paper.[2] This submission focused on the effects which the proposals in the Green Paper might have on access to justice for victims of human rights abuses committed by corporations and recommended the addition of further grounds for jurisdiction over non-EU domiciled defendants. On 14 December 2010, the EC published a Legislative Proposal for reforming Brussels I (the Proposal).[3] Amnesty International has reviewed the Proposal and finds that the implications of aspects of the Proposal are concerning. At least two new provisions could lead to a reduction of avenues of redress for victims of human rights abuses by corporations.

II. Amnesty International Recommendations on the Proposal

Amnesty International seeks the expansion of avenues of redress for victims of human rights abuses by or in complicity with corporations. Amnesty International's analysis and recommendations are informed by a reality whereby individuals and communities whose human rights are affected by corporate activities in third countries often lack the means to obtaining reparation from the perpetrators in their own countries. The recommendations that follow seek to ensure alternative avenues of redress for these

[1] Available at http://www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN and http://www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN respectively.

[2] Available at http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/amnesty_international_and_european_coalition_for_corporate_justice_en.pdf

[3] Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010PC0748:en:NOT

sorts of cases exist. Amnesty International has chosen to focus on two of the most critical issues in the Proposal with implications for access to justice for victims of corporate human rights abuse:

1. **Partial harmonisation of jurisdiction over non-EU domiciled defendants**

Proposed new Article 4:

2. Persons not domiciled in any of the Member States may be sued in the courts of a Member State only by virtue of the rules set out in Sections 2 to 8 of this Chapter.

Proposed new Article 25:

Where no court of a Member State has jurisdiction in accordance with Articles 2 to24, jurisdiction shall lie with the courts of the Member State where property belonging to the defendant is located, provided that

(a) the value of the property is not disproportionate to the value of the claim; and
(b) the dispute has a sufficient connection with the Member State of the court seised.

Proposed new Article 26:

Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular:

(a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or
(b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied;

and the dispute has a sufficient connection with the Member State of the court seised.

Recommendation:

Amnesty International recommends retaining the existing residual national rules on jurisdiction over non-EU domiciled defendants while introducing new articles 25 and 26 across all EU Member States.

Supporting analysis:

Amnesty International welcomes proposed new articles 25 and 26 which expand the grounds for jurisdiction over non-EU domiciled defendants and therefore the avenues to seek reparation from non-EU corporations allegedly involved in human rights abuses. Article 26 in particular provides for a forum of necessity ("Forum Necessitatis") if the right to a fair trial or the right to access to justice so require. Albeit limited, this provision provides at least a partial acceptance of Amnesty International's and ECCJ's proposition in their 2009 joint submission that EU courts should be able to exercise jurisdiction where there is no other reasonably available forum which could fairly exercise jurisdiction over a dispute. From a human rights perspective both articles are positive developments and should therefore be adopted. But at the same time as articles 25 and 26 would be expanding avenues of redress for victims of human rights abuses by corporations, proposed article 4 would have as an effect a severe restriction of these avenues and should therefore be rejected. Jurisdiction over non-EU domiciled defendants is, with minor exceptions, presently governed by the national rules of the Member States. Proposed article 4 suggests extending Brussels I to cover non-EU domiciled defendants, as a replacement for national jurisdictional rules. The implication is that national rules governing jurisdiction over non-EU domiciled defendants would no longer apply. The concern is that some national grounds for jurisdiction over non-EU domiciled defendants are not reflected in the Proposal, such as jurisdiction based on the presence of the defendant (for example, through a local branch office), or the residence or nationality of the claimant, and would therefore no longer be available to claimants in cases of alleged human rights abuses by corporations. As far as they are concerned, the elimination of these possible grounds for jurisdiction in those Member States would constrain, rather than expand, their avenues for redress. While it is true that the total harmonization of jurisdictional rules over non-EU domiciled defendants across EU Member States would contribute to making litigation more predictable, it would equally restrict claimants' ability to rely on the range of existing national rules to seek reparation from non-EU corporations allegedly involved in human rights abuses. From a human rights perspective, this would be a regressive development.

2. Amendment to proposed new Article 6(1)

Proposed New Article 6:

A person may also be sued:

1. where he is ***domiciled in a Member State*** *and is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;*

Recommendation:

Amnesty International recommends the elimination of the qualification *"domiciled in a Member State"* from proposed article 6(1), therefore allowing the addition ("joinder") of both EU and non-EU domiciled defendants to proceedings in EU courts.

Supporting analysis:

Proposed article 6(1) deals with the addition of defendants to proceedings or joinder of parties. Where a claim is brought against more than one defendant and jurisdiction can be established against one of the defendants, national jurisdictional rules of most Member States currently permit the claim to be extended to include other defendants domiciled outside the EU. UK courts, for example, can join one or more non-EU domiciled parties to proceedings against any defendant subject to the jurisdiction of the court (whether under Brussels I or under national rules) where the former are "a necessary or proper party" to the claim (Practice Direction 6B, 3.1(3) and (4), Civil Procedure Rules). The effect of proposed article 6(1) would be that defendants domiciled outside of the EU could no longer be added to proceedings in a Member State. It would effectively eliminate a basis for jurisdiction against non-EU domiciled defendants which already exists in most Member States. This is regressive and would have a severe impact on claimants in cases of alleged human rights abuses by companies, in that they would no longer be able to join corporations domiciled outside of the EU to proceedings against EU-domiciled or non-EU domiciled corporations. It would equally restrict the ability of a corporation being sued in a Member State to join a non-EU domiciled corporation as a co-defendant, even though the latter may be claimed to have contributed to the tort giving rise to the claim. The possibility to join non-EU domiciled corporations to proceedings against other defendants in "closely connected" claims of human rights abuses must be retained across Member States. This is important not least because: (a) the non-EU domiciled company may be jointly liable for the alleged abuse; (b) the non-EU domiciled company may be in possession of documents and other evidence required to evaluate the liability of the other defendant or defendants; (c) it is required for a sound administration of justice and the avoidance of potentially irreconcilable judgments and, most importantly, (d) it safeguards existing avenues of redress for victims of human rights abuses by corporations. Retaining proposed article 6(1) on the contrary would lead to a regressive harmonisation of rules across EU Member States and a severe restriction, rather than an expansion, of access justice for victims of human rights abuses committed by or in complicity with corporations.

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