



**Joint Amnesty International and ECCJ submission on the
Green Paper
on the Review of Council Regulation (EC) No 44/2001 on
jurisdiction and recognition and enforcement of judgements
in civil and commercial matters**

June 2009

About Amnesty International

Amnesty International is a global movement of 2.2 million people in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion – funded mainly by our membership and public donations.

About ECCJ

The European Coalition for Corporate Justice (ECCJ) brings together national platforms of civil society organizations including NGOs, trade unions, consumers' organizations and academic institutions promoting corporate accountability from all over Europe. ECCJ represents over 250 civil society organizations present in 16 different countries around Europe like the FIDH and national chapters of Oxfam, Greenpeace, Amnesty International and Friends of the Earth.

Overall ECCJ is aimed at increasing European co-operation amongst NGOs working on corporate accountability and raising public awareness about the role of the European Union to regulate business.

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**Green Paper on the Review of
Council Regulation (EC) No 44/2001**

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Background

"The root cause of the business and human rights predicament today lies in the governance gaps created by globalization - between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences. These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge."

Professor John Ruggie,
Special Representative for Business and Human Rights of the UN Secretary General

Globalization has significantly changed the world we live in, presenting new and complex challenges for the protection of human rights. Economic players, especially companies that operate across national boundaries, have gained unprecedented power and influence across the world economy. This is not always to the benefit of the communities in which companies operate.

As Professor John Ruggie, the Special Representative for Business and Human Rights of the UN Secretary General has pointed out, globalization has created 'governance gaps' which provide *'the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.'*

Amnesty International's research and that of other civil society partners in the ECCJ has highlighted the negative impact companies can have on the human rights of the individuals and communities affected by their operations. Companies can cause harm by directly abusing human rights, or by colluding with others who violate human rights. And yet despite this potential to cause significant harm, there are few effective mechanisms at the national or international levels to prevent corporate human rights abuses or to hold companies to account.

This means those affected by company operations – often the already marginalized and vulnerable - are left powerless, without the protection to which they are entitled, or meaningful access to justice.

The European Dimension

In March 2007, the European Parliament passed a resolution on Corporate Social Responsibility that recognised the need to improve the accountability framework in which businesses operate.¹

More recently, in February 2009, this recognition of the need for the European Union to ensure greater corporate accountability was echoed by Günther Verheugen, Vice-President of the European Commission and Commissioner for Industry and Enterprise who stressed that:

*"It is in our interest and in the interest of obtaining a level-playing field for our businesses to remind each and everybody that human rights are universal and should be globally respected."*²

A key element of any accountability framework must be that individuals and communities whose human rights are affected by the operations of multinational companies can access justice before fair and impartial judicial bodies. But far too often, because of the governance gaps that Professor John Ruggie has identified, meaningful access to justice is not possible.

The Proposed Review of the Brussels I Regulation

Currently, the existing rules on jurisdiction under the Council Regulation (EC) No 44/2001, also known as the Brussels I Regulation (herein 'the Regulation'), provide an important vehicle for victims of human rights violations to bring claims for compensation against EU domiciled companies.

For defendant companies who are not domiciled in the EU, questions of jurisdiction are largely governed by national rules and Member States have widely differing national approaches to jurisdiction, which present a range of opportunities to civil claimants seeking compensation for human rights violations. Hence any extension of the Regulation to non-EU domiciled defendants would have important implications from an access to justice perspective which should be taken into account.

As outlined in the Amnesty International and ECCJ's joint submission below, an extension of the Regulation could present significant opportunities for ensuring greater access to justice for victims of human rights violations committed by non EU-domiciled companies that are connected to the EU internal market. Equally, harmonization must not be carried out at the cost of denying justice to claimants who would, under current law, have access to the courts of a Member State.

1 European Parliament, Committee on Employment and Social Affairs, Report on CSR : A New Partnership, (2006/2133(INI))

2 Closing speech of Mr. Verheugen at European Multi-stakeholder Forum on CSR, 10 February 2009. http://ec.europa.eu/enterprise/csr/documents/stakeholder_forum/csrforumspeech_onlineversion.pdf

Green Paper question: Do you think that the special jurisdictional rules of the Regulation could be applied to third State defendants? What additional grounds of jurisdiction against such defendants do you consider necessary?

The extension of the Regulation to apply to third State defendants (whether for all cases or for a subset of cases, such as those involving EU domiciled claimants) would require at least amendments to Articles 4, 5 and 6, to provide that the grounds for jurisdiction in Articles 5 and 6 also apply to defendants not domiciled in any Member State. This would have the benefit of ensuring that defendants domiciled outside the EU are subject to minimum rules of jurisdiction before the courts of Member States, consistent with the rules applicable to EU domiciled defendants.

At present, non-EU domiciles may benefit from the fact that the jurisdiction of Member State courts over them is a matter of national law – the national rules may be more limited than the rules applicable to EU domiciles under the Regulation. If the Regulation were extended to non-EU domiciled defendants this would ensure a level playing field for both EU domiciled and non-EU domiciled companies within the EU internal market and could ensure greater access to justice for victims of human rights violations. For example, it would ensure under Article 5(3) of the Regulation claimants' ability to sue both domiciles and non-domiciles for torts (which might include human rights violations) committed in a Member State.

The present rules on jurisdiction in the Regulation operate on the basis that Article 5 and 6 jurisdiction is subsidiary to the jurisdiction which will always be available in the Member State of the domicile of the defendant under Article 2. If the Regulation is extended to cover non-EU domiciled defendants, there will clearly be no guarantee that this will be the case. Even if such jurisdiction is available, its primacy in the existing Regulation depends on the mutual trust which operates between Member States, which will not apply. It would therefore not be appropriate merely to extend the existing rules in Articles 5 and 6 of the Regulation to apply to disputes involving non-Member State defendants without ensuring that additional grounds for jurisdiction were also available in respect of those defendants.

This could be achieved by:

- introducing additional rules into the Regulation to apply to non-EU domiciled defendants; and/or,
- by providing that the jurisdictional rules in the Regulation do not preclude reliance on existing residual national rules on jurisdiction for claims against non-EU domiciled defendants.

It would be preferable that the existing residual national rules on jurisdiction continued to apply to non-EU domiciled defendants, together with the rules of the Regulation. This would require an amendment to Article 4, to provide that it is subject not only to Articles 22

and 23, but also (where those articles do not apply) to Articles 5 and 6, and to any additional articles which may be introduced (such as Article 5A below).

If additional rules are introduced to supplement or replace the residual national rules, these rules should reflect the shared understanding of EU Member States that there are a range of circumstances in which it is appropriate for jurisdiction to be exercised against non-EU domiciled defendants. Harmonization must not be carried out at the cost of denying justice to claimants who would, under current law, have access to the courts of a Member State. The EU internal market should not serve as a driver for corporate abuse in third countries where the victims of such abuse cannot be served justice.

If the grounds for jurisdiction under the Regulation applicable to non-EU domiciled defendants are defined too narrowly, this may also create a competitive advantage for those defendants, compared with EU domiciled defendants, in respect of their activities outside the EU. For example, while an EU domiciled corporation (doing most of its business in the EU) would be appropriately subject to the jurisdiction of a Member State court in respect of tortious activities involving human rights violations outside the EU, a non-EU domiciled corporation (also doing most of its business in the EU) would escape that jurisdiction for similarly tortious activities if the rules of the Regulation are too narrowly defined. This would create an incentive for ‘free rider’ corporations to locate their domicile outside the EU, even if most of their business activity is directed toward the EU.

Additional rules should therefore be introduced into the Regulation to apply to non-EU domiciled defendants. These should be both more extensive than the existing rules under the Regulation and also more flexible, to recognise that the appropriateness of exercising jurisdiction may depend on the circumstances of each individual case. Where significant territorial or business connections with a Member State exist, concerns of comity should not prevent the expansion of grounds of jurisdiction, particularly over multinational corporations whose activities are not focused on (or easily regulated by) any single state. In providing for flexibility, these rules must also reflect the concern for access to justice for claimants which is not only a Community value but is also reflected in a range of national rules of residual jurisdiction, including in particular the common law *forum non conveniens* test and the concept of a forum of necessity. The rules should ensure that jurisdiction is exercised where this is needed for a claimant to have access to justice,

A rule could, for example, be introduced on the following terms:

Article 5A

(1) A person not domiciled in any Member State may also be sued in a Member State if any one or more of the following applies:

- (a) the person has a significant territorial or business connection with the Member State (even if the claim does not derive from that territorial or business connection);
- (b) the claimant is domiciled in the territory of the Member State; or

(c) there is no other reasonably available forum which could fairly exercise jurisdiction over the dispute.

(2) A court seised under section (1) above may decline jurisdiction if it is satisfied that, taking into consideration all the circumstances, including in particular the claimant's right of access to justice, it would be inappropriate to exercise jurisdiction over the dispute.

Green Paper question: How should the Regulation take into account exclusive jurisdiction of third States' courts and proceedings brought before the courts of third States?

It is appropriate that the Regulation takes into account the exclusive jurisdiction of third States' courts and proceedings brought before the courts of third States, whether this is achieved through reform of the Regulation or through the case law of the ECJ. However, the existing rules of exclusive jurisdiction and *lis pendens* are premised on the existence of a strong principle of mutual trust between the courts of the Member States. Greater flexibility is required in the adaptation of these rules to deal with proceedings in non-Member State courts. In particular, the courts of a Member State must not be required to stay proceedings where this might affect access to justice for claimants. For example, any *lis pendens* rule relating to proceedings in a non-Member State must allow the court to take into consideration the question of whether those proceedings are likely to do justice to the parties and their claims. If not, the proceedings in the relevant Member State should be allowed to continue, notwithstanding that this will lead to parallel proceedings. Any power which may exist or be introduced to stay proceedings commenced under the Regulation (whether under its existing rules or any amended rules which are contemplated) must take into consideration the availability of an alternative forum, and the possibility that the claimant would be denied justice if denied access to the courts of the relevant Member State.

Green Paper question: Under which conditions should third State judgments be recognised and enforced in the Community, particularly in situations where mandatory Community law is involved or exclusive jurisdiction lays with the courts of the Member State?

Harmonization of rules for recognition of non-Member State judgments presents an opportunity to expand the circumstances in which a successful claimant before a non-EU court is able to have their judgment enforced in the EU. While it would be appropriate to provide for safeguards to protect Community and Member State law and public policy, and to ensure that foreign judgments meet standards of justice and fairness, the adoption of harmonized rules should not otherwise reduce the enforceability of foreign judgments before EU courts.