



# The Third Pillar:

Access to Judicial Remedies for Human Rights  
Violations by Transnational Business

.....

## EXECUTIVE SUMMARY & RECOMMENDATIONS

Professor Gwynne Skinner  
Professor Robert McCorquodale  
Professor Olivier De Schutter

with Case Studies by  
Andie Lambe



**The International Corporate Accountability Roundtable (ICAR)** is a coalition of human rights, environmental, labor, and development organizations that creates, promotes and defends legal frameworks to ensure corporations respect human rights in their global operations. ICAR is a project of the Tides Center.

Contact: Katie Shay – [katie@accountabilityroundtable.org](mailto:katie@accountabilityroundtable.org)

**CORE** is an authoritative and influential network of NGOs, academics, trade unions and legal experts which brings together the widest range of experience and expertise on U.K. corporate accountability in relation to international development, the environment, and human rights. Our aim is to reduce business-related human rights and environmental abuses by making sure companies can be held to account for their impacts both at home and abroad, and to guarantee access to justice for people adversely affected by corporate activity.

Contact: Marilyn Croser – [coordinator@coporate-responsibility.org](mailto:coordinator@coporate-responsibility.org)

**The European Coalition for Corporate Justice (ECCJ)** promotes corporate accountability by bringing together national platforms of civil society organizations including NGOs, trade unions, consumer advocacy groups and academic institutions from all over Europe. ECCJ represents over 250 CSOs present in 15 European States such as FIDH and national chapters of Oxfam, Greenpeace, Amnesty International and Friends of the Earth.

Contact: Filip Gregor – [filip.gregor@eps.cz](mailto:filip.gregor@eps.cz)

# THE THIRD PILLAR: EXECUTIVE SUMMARY

## Background

The United Nations Guiding Principles on Business and Human Rights (UNGPs or Guiding Principles) rest on three pillars: the State duty to protect human rights; the corporate responsibility to respect human rights; and access to remedy for those whose rights have been violated. Guiding Principle 25 recognizes that:

As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within the territory and/or jurisdiction those affected have access to remedy.<sup>1</sup>

The commentary of Guiding Principle 26 explains:

Effective judicial mechanisms are at the core of ensuring access to remedy . . . States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable . . .<sup>2</sup>

Alongside the UNGPs, a number of human rights treaty monitoring bodies have established positive obligations on States to provide effective remedies for violations of human rights, including the obligation to undertake effective investigations of the situation that led to the human rights violation, even if the action was carried out by a non-State actor or outside the State's borders.

Despite these established duties, significant barriers to access to judicial remedy for transnational human rights violations remain in place.

## The Project

The Access to Judicial Remedy (A2JR) Project set out to identify and analyze the barriers in the United States, Canada, and Europe. Three academic experts were commissioned to research and write this Report, and a series of consultations with legal practitioners and civil society representatives was carried out to inform the research.

The scope of this Report covers the situation in Canada, France, Germany, the Netherlands, Switzerland, the United Kingdom, and the United States, on the basis that the significant majority of transnational businesses are domiciled in these States.<sup>3</sup> These are also all member States of the Organisation of Economic Co-operation and Development (OECD), and are adherents to the OECD Guidelines for Multinational Enterprises 2011, which incorporates many of the core aspects of the UNGPs.<sup>4</sup>

The research was concentrated in those States where there have been some judicial remedies sought and where judicial decisions have been obtained, in particular in the United Kingdom and the United States, as the significant majority of cases have been brought before courts in these jurisdictions. This approach was intended to ensure that the research resulted in applicable and informed recommendations that would be the most relevant and helpful to victims, so that the reality of access to a remedy is as great as possible.

The detailed mapping exercise undertaken in the development of this Report shows that States are generally not fulfilling their obligation to ensure access to effective judicial remedies to victims of human rights violations by businesses operating outside their territory. Victims continue to face barriers that at times can completely block their access to an effective remedy. Such barriers exist across all jurisdictions, despite differences in legislation, the approaches of courts, human rights protections at the national level, and legal traditions. These barriers have been overcome in only some instances and, in those cases, usually as a result of innovative approaches adopted by lawyers, the patience of victims, and a willingness to engage by perceptive judges. States must make strong and consistent policy decisions to reassert that the human rights of victims matter more in relation to economic interests of businesses than has been the case so far. Victims of human rights violations by business, wherever the violations occur, are entitled to full and effective access to judicial remedies. In order to provide this, each State should examine the barriers in their jurisdiction and consider the range of actions they can take to alleviate them, and in particular, the recommendations contained in this Report.

## Summary of Findings

This Report identified ten key issues on which reform should be focused to ensure access to effective judicial remedy:

### 1. ABILITY TO BRING A CLAIM WHERE THE HARM OCCURS OUTSIDE THE HOME STATE

Given the large hurdles many plaintiffs face in bringing claims in the host State (where the harm occurred), the ability of courts in the home State (where the business is domiciled) to consider these claims often provides the only avenue for victims to obtain a remedy.

In the United States, most lawsuits against businesses that allege harms as a result of violations of rights protected by international law, and international human rights law in particular, have proceeded in U.S. federal court under the federal Alien Tort Statute (ATS) for violations of customary international law, or under state tort law. In 2013, perhaps the most significant barrier to accessing judicial remedies for human rights violations that occur in a host State arose from the case of *Kiobel v. Royal Dutch Petroleum, Co.* In *Kiobel*, the U.S. Supreme Court held that the presumption against the extraterritorial application of U.S. law applies to the ATS, which can only be overcome if the claim “touches and concerns” the United States “with sufficient force.”<sup>5</sup>

The effect of this decision on future litigation against businesses for liability under the ATS for acts occurring outside the United States remains unclear. In at least three cases applying the decision, lower courts have chosen not to dismiss the case based on *Kiobel*. Nevertheless, indications are that the vast majority of lower federal courts are applying *Kiobel* in a sweeping manner, dismissing cases simply because the alleged unlawful acts took place outside the United States.

Canada does not have a statute allowing for a cause of action for claims alleging violations of international law, although some courts have indicated that customary international law is part of Canadian common law. Rather, most claims for human rights violations are brought under the local tort law of the province. Litigation against businesses for human rights violations is relatively new in Canada. Although there has been some success, barriers remain.

In the European Union, the notion of extraterritorial jurisdiction is not as problematic when businesses are domiciled in the European Union. The Brussels I Regulation mandates the national courts of the EU Member States to accept jurisdiction in civil liability cases filed against defendants domiciled in the forum State. The situation in Switzerland is similar.

In recent years, victims of activities of businesses domiciled in the European Union have increasingly relied on Brussels I. The question of courts' jurisdiction over businesses that are not domiciled in the European Union, such as foreign subsidiaries of European businesses, remains to be regulated by law of the Member States, which have a diverging approach to this issue. Combined with the barriers posed by complex corporate structures and the principle of limited liability, there are still many obstacles for victims to bring their claims to courts in the European Union.

## 2. FORUM NON CONVENIENS DOCTRINE

The doctrine of *forum non conveniens* allows courts to prevent a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is the more appropriate venue for the case due to the location of the parties, witnesses, evidence, and given that the local court is more familiar with the local law, which is often the law applied in the case. In cases against businesses, this usually means that the case is dismissed under the theory that it can be filed in the host State. However, that is often not the case. For example, statistics suggest that almost all cases dismissed on *forum non conveniens* grounds in the United States are never refiled in the alternate forum, leaving the victims without any remedy. *Forum non conveniens* has been a barrier to some cases in the United States, but it is expected to be an increasing barrier as more cases are filed under state tort law due to the *Kiobel* decision.

*Forum non conveniens* remains a potential barrier to victims seeking judicial remedy in Canada against businesses for their role in violations of human rights outside Canada. At present, it does not appear to be firmly established in either the common law or civil law jurisdictions in Canada that a plaintiff can defeat a *forum non conveniens* motion by showing that it would be difficult to obtain an adequate remedy in the host State.

The European Court of Justice has rejected the application of the *forum non conveniens* doctrine in the European Union. The European Parliament noted that the Brussels I Regulation mandates the national courts in the European Union to recognize their jurisdiction in cases where human rights violations are committed abroad, especially in developing States where European multinationals operate, as a result of the conduct of these businesses.

## 3: CORPORATE LIABILITY FOR HUMAN RIGHTS ABUSE

### Corporate Criminal Liability

In some jurisdictions, victims can bring a criminal complaint to a public prosecutor or use a criminal proceeding to assist with potential civil recovery later. In other jurisdictions this is not possible and the only option is to bring a civil claim under either customary international law or general tort law. In some instances, businesses have argued that they cannot be criminally liable for violations of international human rights law because they are not natural persons.

The United States has federal criminal statutes in the area of human rights that apply extraterritorially and which could be invoked against businesses, namely genocide, war crimes, torture, and forced recruitment

of child soldiers. The United States Department of Justice Human Rights and Special Prosecutions Section, established in March 2010, is charged with prosecuting these crimes. However, prosecutions against businesses for these human rights crimes remain rare. Moreover, federal criminal prosecutions of these crimes do not generally result in damages or compensation to victims.

The law of some European States, including Switzerland, allows businesses to be prosecuted for extraterritorial human rights violations. However, experience shows that public prosecutors, with whom the decision to proceed with cases rests, are generally hesitant to pursue prosecutions. The situation is more complicated in the United Kingdom where, in principle, there is no specific statute providing that prosecutors can be relied on with respect to criminal liability of businesses for human rights violations committed outside the United Kingdom.

### **Corporate Civil Liability**

In the United States, claims against businesses have been brought under the ATS and state law. Under general U.S. domestic law, businesses can be civilly liable for general torts because they are considered “legal persons.” However, the question remains somewhat unresolved in relation to whether they can be liable for violations of customary international law under the ATS. Business will likely continue to press this issue.

In Canada, while civil cases have gone forward against businesses alleging human rights abuse, there has yet to be a case alleging a direct violation of international law, and tort cases have typically been brought as negligence cases under the law of the province.

Today, all forty-seven Member States of the Council of Europe (which is different in scope and membership to the European Union, though includes all EU Member States) allow their courts to apply directly the European Convention on Human Rights, and in most European States (though not the United Kingdom), this would extend to litigation between private parties. However, courts of European States are not always willing to acknowledge the applicability of international law to claims filed against businesses.

## **4. TIME LIMITATIONS ON BRINGING CLAIMS**

Time limitations, such as statutes of limitations that seek to limit the time period within which causes of action may be brought are applicable to many claims, but pose specific barriers to human rights claims, given the difficulties in investigating and gathering evidence for such claims, among other factors.

In the United States, the ATS does not contain a statute of limitations. In some instances, courts have imputed the ten-year statute of limitations from the Torture Victim Protection Act (TVPA) to the ATS; in these cases, the statute of limitations has not posed much of a hurdle at the federal level. However, statutes of limitations are often barriers to cases brought under state law because state statutes of limitations are often fairly short, with many states imposing a two to three year statute of limitations for intentional tort claims. As such, statutes of limitations are often barriers to cases brought under state law because of the time it takes for cases to be investigated and for victims to locate a lawyer.

The limitation period for these actions in Europe is now governed by the Rome II Regulation, which means that the period depends on which national law is applied, and it is likely to be that of the State where the harm occurred. This can create barriers in terms of determining what those time limitations may be and when they apply, which may require costly additional expert evidence being obtained during the court proceedings. Furthermore, those time limitations might be unduly restrictive.

## 5. IMMUNITIES AND NON-JUSTICIABILITY DOCTRINES

Immunities and non-justiciability doctrines work either to absolve the defendant from liability or to disable or dissuade courts from considering certain claims. Immunity has posed barriers for victims in the United States, especially where businesses causing the harm are contractors to the U.S. government. For example, in a case involving a contractor's actions at Abu Ghraib prison in Iraq, one court found that it should apply Iraqi law, and in doing so, found Iraqi law provided immunity to the defendant. In a similar case, another court found that because the defendants had contracted with the United States for their work in Iraq, sovereign immunity pre-empted the plaintiffs' claims, even though the contractors were private entities. This resulted in the plaintiffs having no remedy at all.

## 6. APPLICABLE LAW

When courts consider cases for harm arising in another jurisdiction, they engage in a choice of law/applicable law analysis to determine which law applies to the case. In some cases, applying the law of the host State can create a barrier for victims bringing human rights cases for harm caused by businesses. This analysis will take on added importance in the United States after *Kiobel* and the likely consequence of more transitory tort litigation occurring in state courts. Each state in the United States employs its own law governing the choice of law analysis. If a court chooses to apply the law of the State in which the violation occurred, this could present significant barriers to litigation, such as when the chosen law (often the host State's law) affects statutes of limitations, does not recognize or limits vicarious or secondary liability, has elements for its torts that are more difficult to prove, or provides for stricter immunity than under the forum State's common law.

In the European Union, the Rome II Regulation applies to tort liability claims presented to the national courts of the EU Member States. This Regulation in principle designates the law of the State in which the harm occurred as the applicable law. Civil liability claims are decided on the basis of the rules in force in the State where the damage occurred. The Rome II Regulation theoretically allows courts to apply the law of the forum in situations where the law of the State in which the harm occurred is not sufficiently protective of the human rights of the person harmed. To date, the applicability of this exception has not been authoritatively confirmed and the applicable law may remain a barrier to effective remedy.

## 7. PROVING HUMAN RIGHTS VIOLATIONS

Barriers to effective remedy are also created by the burden the victims carry to prove their case. This is exacerbated by the difficulty of obtaining evidence and by rules of discovery or disclosure of information. In transnational claims, there are particular problems with the admissibility and reliability of evidence.

One of the major barriers to human rights litigation for violations by business is the difficulty victims have in commencing and maintaining litigation over several years, let alone in a foreign court. The difficult task of pursuing, preserving, and gathering evidence and providing testimony in the face of security risks and harm is something that is common to all such communities, and may be increased in areas of human rights violations where business interests are involved.

In continental European systems, evidence rules may pose a significant stumbling block for plaintiffs in the absence of the equivalent of a disclosure rule obliging the defendant to divulge information in its possession. To a certain extent, this obstacle may be overcome where the human rights violation alleged by the victim could constitute a criminal offense, which the public prosecuting system may pursue. This allows the victim

to rely on the public prosecutor for the collection of evidence. In practice, this option remains theoretical because public prosecutors—for a number of objective and subjective reasons including complexity of these cases, lack of resources and know-how, as well as lack of mandate—do not tend to pursue these types of cases.

## 8. THE COST OF BRINGING TRANSNATIONAL LITIGATION

It is incredibly costly to bring transnational litigation in Europe and North America. This is because of the costs associated with gathering evidence in a foreign State to support a claim, the cost of legal and technical experts, and the sheer fact that these cases can take upwards of a decade to litigate. For human rights victims who may have very limited financial resources, the cost of litigation can preclude access to a judicial remedy.

### Legal Aid

Plaintiffs who bring civil cases in U.S. courts, whether federal or state, are not entitled to direct legal aid. Claims brought under the ATS or the TVPA do not provide for lawyers' fees or costs to the prevailing party; neither do claims brought under state common law. Rather, lawyers will recover a percentage of any settlement or award of fees. This has resulted in private lawyers taking a few cases, but overall these cases are seen as risky and unlikely to result in any award of fees. NGOs and some firms take the cases pro bono. However, the fact that the costs in these cases tend to be high and that cases often take years to litigate can make finding representation a barrier to effective remedy.

Under European Union law, legal aid is not generally available to victims of human rights abuses occurring outside the European Union. A 2003 Directive seeks to promote legal aid in cross-border disputes for persons who lack sufficient resources to secure effective access to justice. However, the Directive is limited to cross-border disputes within the European Union and so may not be applicable where the claim is against a parent company domiciled within the European Union and the harm was caused outside the European Union. It also benefits only nationals who are domiciled or reside in the territory of a Member State and third-State nationals who lawfully reside in a Member State. Thus, it would not assist victims who reside outside the European Union.

The earliest cases filed against businesses domiciled in the United Kingdom for human rights violations committed outside the United Kingdom were funded by legal aid. This meant that government funding was provided where the claimants had a good, arguable case but insufficient funds, and this government funding paid the legal fees at a fixed rate. This provision has since been limited greatly due to deliberate government policies to reduce legal aid funding generally in the United Kingdom, which makes it very difficult to obtain aid for these types of cases. In some continental European States, including Switzerland and the Netherlands, foreign plaintiffs can acquire legal aid, although it is granted only for legal assistance provided by local lawyers and cannot cover the full costs of complex extraterritorial cases. In France, legal aid outside criminal proceedings may be obtained by foreign plaintiffs only in exceptional circumstances.

### Loser Pays Provisions

In the United States, the general rule is that each side in litigation pays its own lawyers' fees. Courts can award costs, but most plaintiffs in human rights litigation are without financial resources, and thus, the court usually does not award such costs against them. State rules of procedure on this issue typically mirror the federal rule.

In Canada and its provinces, the loser in litigation typically has to pay the prevailing party's costs (known as "loser pays"), which include lawyers' fees, although it is often on a partial scale. This is a continuing obligation throughout the case. At least in British Columbia, plaintiffs can apply for a no costs ruling in public interest litigation and it appears that this practice, and its likely success, may be increasing in Canada. However, due to the financial risk, and given that human rights cases are still relatively new in Canada, the loser pays system is likely to continue to inhibit human rights litigation.

In many European States, the party that loses must pay the costs of the other party; this may include the lawyers' fees. However, it is not unusual for courts to waive the rule, and to decide that the parties carry their own costs. This still constitutes a serious obstacle for plaintiffs from developing States.

The general position in U.K. litigation is that the unsuccessful party to the litigation has to pay the successful party's costs, which include lawyers' fees. However, the barrier to actions in the United Kingdom in terms of recovery of costs has increased significantly with the passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Legal fees for a successful claimant now have to be paid out of the claimant's compensation damages and cannot exceed twenty-five percent of the damages. In addition, due to the Rome II Regulation, damages will be assessed in accordance with the law and procedure of the State where the harm occurred, which may be considerably lower. The combined effect of the measures has made it very difficult to bring these types of cases in the United Kingdom.

### Legal Standing of Third Parties to Bring Claims

Nearly all cases in the United States are brought by either individual victims or by multiple victims who have "standing" to bring the case. Organizational standing and third party standing is permitted in certain limited circumstances where the organization or third party himself has suffered injury. Litigants interested in the outcome of a case that have not otherwise been injured by the actions of the defendant are not allowed in U.S. courts on behalf of third parties. Practitioners did not identify the lack of third party standing as a barrier in human rights litigation in the United States. However, there have been a few attempts by non-affected third parties to bring cases under the ATS on behalf of others, all of which have been dismissed.

It is increasingly recognized before the domestic courts of the EU Member States that associations/non-governmental organizations may file claims for damages based on the statutory interest that they represent, or in other terms, on the purpose for which they have been established.

### Collective Redress and Class Action Mechanisms

Class action litigation in human rights cases in the United States has occurred in several cases, although the large majority of human rights cases have not been brought as class actions. Although litigating on behalf of a class poses logistic burdens, this can be an efficient way to ensure remedy to a large number of victims. In the United States, proceeding as a class action is viewed by many as more difficult after the 2011 Supreme Court decision in *Wal-Mart v. Dukes*, in which the Court appeared to impose a higher requirement for certifying a class action. In the context of many cases, including some human rights abuses, this poses serious challenges.

Though most European States have not adopted the class action mechanism, some analogous collective redress mechanisms have emerged in recent years. However, the effectiveness of these mechanisms usually have been limited by restrictive conditions. The most effective collective redress mechanism is provided in the United Kingdom, where procedural rules enable courts to allow collective actions on an opt-in basis. While this mechanism has enabled some groups to bring what amount to collective claims,

considerable negotiation is required between each party's lawyers for the process to be effective, and it remains at the discretion of the court to allow it.

## 9. THE STRUCTURE OF THE CORPORATE GROUP

A classic obstacle in transnational litigation against businesses is that corporate groups are organized as a network of distinct legal entities, with varying degrees of influence exercised by the parent company on its subsidiaries or other parts of a business enterprise. Corporate groups receive tax and financial benefits by having legal subsidiaries but can avoid liability for the harmful and illegal actions of these same subsidiaries. Under most legal systems, it is possible to lift the “corporate veil” only in exceptional circumstances. This, combined with restrictive rules on access to evidence and evidentiary burden to prove the direct involvement of a parent company in the management of the harmful act, and lack of statutory clarification of the standards of human rights due diligence, makes it very difficult for those harmed by the conduct of a subsidiary (or part of a business) to seek reparation by filing a claim against a parent company or the controlling business entity.

In the United States, this lack of liability on the part of the parent company over which the home State has personal jurisdiction in relation to its subsidiary's actions due to limited liability statutes is one of the largest barriers to a judicial remedy that victims face.

Similarly, the limited liability of the parent company is one of the largest barriers to victims seeking accountability in Canada for human rights abuses abroad. In Canada, most litigation against the parent company is based on the direct involvement in the acts or on “piercing the corporate veil,” which is very difficult.

In Europe, whether or not the “corporate veil” can be lifted, and whether or not a parent company can be held liable for the conduct of subsidiaries, which it controls or ought to control, depends on the law applicable to the case. The principle of limited liability remains the dominant one, however, and under most legal systems, only exceptionally will it be possible to lift the “corporate veil.” This may make it very difficult for victims of the conduct of the subsidiary to seek reparation by filing a claim against the parent company.

## 10. REMEDIES: REACH AND ENFORCEMENT

The types of remedies available to victims may themselves present a barrier to effective remedy for victims of corporate related human rights abuse. The court of the forum State (the State where the litigation is brought) may not be in a position to adopt certain remedies, or ensure their enforcement, when the litigation includes assets located outside the forum State's jurisdiction.

U.S. courts typically award monetary compensatory damages (to compensate for the injury) in tort cases and they can award punitive damages as well in ATS cases. Courts also have the power to issue injunctions to stop certain behavior. However, as described above, obtaining the remedy when assets are outside the United States can be difficult.

In Europe the Rome II Regulation requires that the type of remedies, including the character and amount of damages, must be determined on the basis of the law of the State where the harm occurred. The consequence of this is that the available remedies might not be always appropriate, in particular where the maximum amount of compensation is too low even to cover the costs of the litigation.

The combined effect of the unavailability of punitive damages and class actions, and absence of effective public financing for this type of case in European civil law States makes it financially unfeasible for victims of human rights violations to pursue such litigation. This problem is further exacerbated by lack of criminal prosecution of these extraterritorial cases, which might otherwise provide an alternative for victims' access to remedy.

## Conclusions

In order to ensure effective remedy for victims of business related human rights abuse, States must adopt a range of legislative and policy measures to alleviate these barriers. States must also make strong and consistent policy decisions to reassert that the human rights of victims matter more in relation to corporate power than has been the case so far. Victims of human rights abuse by business, wherever it occurs, are legally entitled to full and effective access to judicial remedies. In order to provide this, States should examine the barriers in their jurisdiction and consider the range of actions they can take to alleviate them.

# RECOMMENDATIONS

## A. SUMMARY OF RECOMMENDATIONS

In order to ensure effective remedy for victims of corporate related human rights abuse as is required under the UNGPs and international law more generally, States must adopt a range of legislative and policy measures to alleviate the barriers that these victims face. The following are the recommendations that the Authors consider are necessary to overcome some of the most substantial of the barriers that were found to exist in the States reviewed.

Before moving to the specific recommendations relating to reviewed States, it should be noted that many recommendations are common to all jurisdictions, though they are addressed below with reference to each of the jurisdictions reviewed. These recommendations include, first, revisions to the protection of limited liability of multinational enterprises' parent or head office companies for human rights impacts of their enterprises, particularly by ensuring these companies' responsibilities under human rights due diligence. Second, ensuring that forum States can hear claims arising from illegal extraterritorial conduct. Third, ensuring that the prosecution of such claims is economically feasible, and lastly, ensuring appropriate criminal prosecution of business' extraterritorial criminal violations in a manner that also allows for victim compensation.

### 1. ENSURE THAT CONTROLLING ENTITIES WITHIN BUSINESS ENTERPRISES HAVE A LEGAL DUTY WITH REGARD TO ALL PARTS OF THE ENTERPRISE FOR HUMAN RIGHTS IMPACTS.

There are multiple obstacles to access to judicial remedy in the transnational context, which combine to make access to justice for victims exceptionally difficult and frequently impossible. The complex corporate structures and value chains that characterize the organization of modern business are at the heart of these obstacles; practically speaking, victims have to deal with the combined effect of the twin principles of separate legal personality and limited liability, limitations on extraterritorial jurisdiction, and evidentiary burdens. Establishing that a business enterprise is liable for adverse human rights impacts caused by deficiencies in its group's operations is a complex, time-consuming, and costly exercise invariably undertaken in the context of litigation. At the same time, the local multinational enterprise's group entity or business partner often remains out of reach of the home State court's jurisdiction, and may not be held accountable in the host State due both to the weak capacities of many judicial systems across the world and, sometimes, to the protection of foreign investors' rights. Legislation imposing minimum due diligence standards on the controlling entities within business enterprises, for example on their headquarters companies, would clarify their legal responsibility and significantly reduce the need for costly litigation.

The principle of limited liability and the separation of legal personalities within a business enterprise as well as the complex organization of the value chain should not constitute a barrier to engaging a business enterprise's liability for human rights impacts arising from the conduct of its group. To that effect, the duty of the business enterprise to exercise due diligence with regard to all aspects of the group to ensure the business enterprise does not directly or indirectly cause or contribute to human rights impacts, should be clearly affirmed. This should be seen as part of the due diligence necessary to meet the corporate responsibility to respect human rights, as set out in the UNGPs. The concept of corporate responsibility to respect human rights amounts to imposing on the controlling entities within the business enterprise a duty

to avoid causing or contributing to adverse human rights impacts through its own activities, and to address such impacts when they occur. Additionally, there is a duty to identify, prevent and mitigate impacts that are directly linked to the enterprise's operations, products, or services by its business relationships, even if the companies forming the enterprise have not directly contributed to those impacts. In contrast to the limited liability approach, this incentivizes the business enterprise to ensure that the group entities and business partners comply with human rights.

All home States of multinational enterprises should therefore make it clear that a business can be found civilly liable for human rights impacts where it has not complied with a legal duty to carry out due diligence to prevent such impacts from occurring.

## **2. ENABLE VICTIMS OF BUSINESS' HUMAN RIGHTS VIOLATIONS TO BRING A CASE IN THE BUSINESS'S HOME STATE.**

Dealing with extraterritorial human rights violations by businesses is an issue in all of the surveyed jurisdictions. In the United States, the Supreme Court's recent decision in *Kiobel v. Royal Dutch Petroleum* has further confused matters. In Europe, in contrast, the Brussels I Regulation mandates the national courts of the EU Member States to accept jurisdiction in civil liability cases filed against defendants domiciled in the forum State. The situation in Switzerland is similar. However, the issue of courts' jurisdiction over businesses not domiciled in the European Union (such as foreign subsidiaries of European businesses), is not currently addressed in Member State laws. National legal systems take a variety of approaches to this issue. Given such divergence, minimum rules should be defined in this area. Actions by all these States, recommended in further detail below, would ensure a greater degree of coherence across home States to enable victims of violations that occurred outside the forum State to bring a case in these States. This would give stability and certainty for business, governments and civil society.

## **3. ENACT LEGISLATION TO LIMIT OR REMOVE FINANCIAL BARRIERS THAT PREVENT VICTIMS FROM BRINGING AND PROSECUTING A CASE.**

A major barrier seen in every one of the surveyed jurisdictions is the costs and financial risks of litigation. Business and human rights litigation in the transnational context is highly expensive. This situation is further exacerbated by the inequality of the parties—while the plaintiffs usually belong to the most marginalized groups, the defendants are usually very well resourced. Both in the United States and Europe (including in Switzerland), as well as in Canada, the situation would be significantly improved by reforms to the collective redress system and to liability for costs of proceedings incurred by both parties to a dispute to enable these claims to be brought by lawyers in these States. In Europe, the situation would also be improved by reforms to the legal aid system. The precise details of these reforms would depend on the different legislation and legal traditions in each of the States concerned, and are discussed below.

## **4. DEVELOP AND ENHANCE CRIMINAL LAWS TO HOLD BUSINESSES ACCOUNTABLE FOR THEIR INVOLVEMENT IN EXTRATERRITORIAL HUMAN RIGHTS VIOLATIONS.**

In every jurisdiction there is a potential to improve access to remedy through the mechanisms of criminal law. The details of the recommendations for reform will differ depending on the situation in each jurisdiction. Criminal prosecution of businesses for their involvement in crimes amounting to human rights violations is possible and often appropriate. Yet currently it often remains a remote possibility. To address this, steps

should be taken to clarify standards of corporate liability in the criminal and extraterritorial contexts, to define the mandate of public prosecutors to pursue such cases, and to make sufficient resources available to enable them to do so. Any decision by public prosecutors not to take action should be amenable to judicial review at the request of the victims.

## B. SPECIFIC RECOMMENDATIONS FOR EACH OF THE JURISDICTIONS REVIEWED

### RECOMMENDATIONS FOR POLICY MAKERS IN THE UNITED STATES

Recommendations regarding ensuring a remedy for abuses that occur extraterritorially:

#### 1. Amend the Alien Tort Statute to apply to extraterritorial conduct.

Amending the ATS to clarify that it pertains to conduct occurring abroad is the clearest way to move forward in reducing the barrier *Kiobel* has erected. Although such legislation may be very challenging to achieve in the current Congress, arguments for such legislative changes do exist.

For example, many policy makers who are sympathetic to corporate interests are also sympathetic to human rights concerns, and understand that businesses can be run responsibly, with attention to respect for human rights. There have been recent examples of pro-human rights legislation passing despite business opposition, such as sections 1502 (conflict minerals) and 1504 (extractives industry transparency) of the Dodd-Frank Act.

Second, if *Kiobel*'s touch and concern requirement results in U.S. businesses being the only feasible defendants in ATS litigation, as opposed to other businesses over which U.S. courts have personal jurisdiction, an argument then exists that the ATS should apply to extraterritorial conduct generally, so as to create a “level playing field” for U.S. businesses among businesses doing work abroad.

Alternatively, amending the ATS itself or adding a note to the statute defining what sorts of activity “touches and concerns” the United States could reduce the extraterritorial barrier erected by *Kiobel*.<sup>6</sup> This would still limit ATS litigation over events that occurred outside of the United States, but it would allow a broader definition of “touch and concern” than has been applied in post-*Kiobel* litigation before the District Courts. As another alternative, Congress should consider enacting a “jurisdiction by necessity” statute allowing for subject matter jurisdiction for claims under the ATS where the court can attain personal jurisdiction over the business, and there is no other suitable jurisdiction where the victims can reasonably obtain a remedy.

As a note of caution regarding this potential way forward, litigation is still taking place in the wake of *Kiobel*, and litigators might be successful in arguing that cases which “touch and concern” the United States include cases involving violations of international human rights law, especially where the defendant is a U.S. business, or a business with significant activities within the United States. Thus, any recommendation concerning amendments to the ATS that address what cases “touch and concern” the United States might be premature. Any work on such amendments should be stayed until the outcome of litigation on this issue makes it more clear how courts will interpret “touch and concern” in the context of ATS litigation.

## 2. Amend the Torture Victims Protection Act to apply to persons and expand the type of claims allowed.

Amending the TVPA so that legal persons (including businesses) can be defendants, as opposed to “individuals” would rectify many of the barriers regarding extraterritoriality. The TVPA is a specific cause of action for extraterritorial human rights violations that Congress has enacted. This might be palatable to some policy makers because there already exists an inherent limitation to TVPA claims, given that the TVPA applies only to those “acting under actual or apparent authority, or color of law, of any foreign nation,” as opposed to any business working abroad. Thus, even if such a change were made, only those businesses which are actively working under authority of a foreign State and engaging in human rights violations while doing so could be potential defendants. In addition, ideally, any such amendment should also clarify that legal persons can be defendants in such cases where they have conspired with, or aided and abetted, such actions along with foreign governments. Finally, in order to rectify the limitation on human rights cases for extraterritorial conduct post-*Kiobel*, any amendment expanding the TVPA to allow for legal persons to be defendants should also include more types of violations than those currently allowed under the TVPA, torture and extrajudicial killing. For example, the TVPA should be expanded to allow for violations such as war crimes generally, forced disappearance, ethnic cleansing, and cruel, inhuman and degrading treatment.

A cautionary note: Regarding any new potential amendments, advocates must be careful to ensure that any possible new legislation does not affect victims’ rights under other statutes. When the TVPA was enacted in 1991, its legislative history made clear that Congress did not intend the TVPA to supplant the ATS or the claims brought thereunder, and that Congress believes it is appropriate for federal courts to adjudicate human rights claims that occur abroad under the ATS. Any attempts to amend the TVPA, or enact any new legislation, should be sure to include appropriate legislative history indicating that such amendments are not meant to limit rights under the ATS or other statutes.

## 3. Enact state laws criminalizing violations of international human rights law and providing private rights of action for such violations.

Given that most corporate legal matters are addressed by the individual states, state legislatures should enact or amend existing state statutes both to criminalize extraterritorial violations of international human rights law by businesses, and provide for parallel private rights of action against such businesses for the violations.<sup>7</sup> States should also ensure that with the private rights of action, the choice of law—the applicable law—in these cases should be customary international law for purposes of the underlying violation, and the law of the forum state with regard to other matters.

## 4. Clarify choice of law.

As mentioned above, under most state and federal courts’ (in diversity of citizenship cases) choice of law analysis, whether governed by statute or common law, courts apply the law of the state where the harm occurred unless the forum state has a greater interest in determining a particular issue, or if it has a more significant relationship to what occurred and to the parties. State courts should either clarify through amending existing choice of law statutes or enact new choice of law statutes clarifying that where lawsuits allege that businesses (over which the court has personal jurisdiction) have engaged in illegal conduct abroad, the courts should apply the law of the state in which it is sitting (forum state) in the event that the plaintiffs would not receive an adequate remedy if the law of the state where the harm occurred was applied.

This could be a stand-alone requirement, or legislation could clarify that such considerations should be taken into account when the court is determining whether it has a “greater interest” in a particular issue.

## 5. Clarify that businesses are legal persons for purposes of international law.

Lawmakers, federal and state, should amend or enact legislation to clarify that businesses are legal persons for purposes of international law, and that they can be held liable for violations of torts in violation of customary international law.

## 6. Codify *forum non conveniens* to ensure courts do not improperly dismiss cases.

Both federal and state lawmakers should codify the doctrine of *forum non conveniens* so that courts do not improperly dismiss such cases. Such efforts may take the form of drafting a model *forum non conveniens* statute for adoption in various states and by the United States for cases heard in federal courts. Such a statute should provide that a foreign plaintiff filing a case in U.S. or state courts for acts that occur abroad should create a presumption that the foreign forum is not adequate. This is because most, if not all, plaintiffs would prefer to file in the State where they are located or where the harm occurred, and the fact that they are bringing a case in the forum State demonstrates that a remedy cannot be easily had, or had at all, in the host forum. To overcome the presumption, the burden should be on the defendants to establish that that the foreign forum is a better and more convenient alternative for the witnesses and the parties; that the public policy of the United States can be achieved through filing in the foreign forum; that an adequate remedy, similar to what the plaintiff could achieve in courts in the United States, is available and would be provided as promptly as such would be provided in American courts; that the State’s judiciary is stable; that the defendant would agree to personal and subject matter jurisdiction in the foreign forum; that there are no rules which would prevent the plaintiff from achieving a remedy; and that the State does not have “blocking statutes” which would prohibit the plaintiff from re-filing in the foreign forum. Any such statute should also allow courts to set conditions for dismissals on *forum non conveniens* grounds. Such statutes should also provide that any case dismissed on *forum non conveniens* grounds be dismissed “without prejudice,” meaning that the case can be re-filed in U.S. courts, and that the courts will entertain the case again if one of the conditions are not met. Alternatively, the court could keep jurisdiction over the matter pending the litigation in the host forum.

## 7. Require or encourage businesses to obtain insurance to adequately cover their actions abroad.

Businesses, especially transnational businesses, universally retain insurance to cover various liabilities of the business. Such insurance often covers the costs of defense as well as any award of damages. Companies routinely carry insurance for things such as environmental matters, labor and employment claims, and other areas of negligence, although most insurance excludes intentional misconduct. Although understanding the complexities of such insurance is outside the scope of this Report and thus recommendations regarding such are limited, it is recommended that advocates encourage policy makers to investigate the enactment of such legislation (at the federal or state level) that requires or encourages businesses to obtain insurance that clearly cover claims against the business brought by citizens abroad who have been damaged by corporate actions. Insurance companies typically provide resources for risk assessment and avoidance, given that doing so is in their financial interests. Such resources and risk aversion mechanisms would serve businesses well.

### Recommendations regarding statute of limitations:

#### **8. Increase the statute of limitations for torts that occur abroad and set aside the statute of limitations for genocide, war crimes, and crimes against humanity.**

State legislatures should be encouraged to amend their statute of limitations, which limit the time in which victims may bring cases, by increasing the statute of limitations for human rights claims or for torts that occur abroad. In addition, both state and federal lawmakers should be encouraged to amend any statutes to ensure that there is no statute of limitations for certain crimes, such as genocide, war crimes, and crimes against humanity. In fact, the American Bar Association, in August 2013, passed a resolution taking this position.<sup>8</sup>

### Recommendations regarding vicarious liability of businesses:

#### **9. Clarify that civil aiding and abetting is governed by the knowledge standard.**

Depending on how ATS cases in which the issue of aiding and abetting standards resolve, lawmakers should consider amending the ATS or enact other legislation to clarify that civil aiding and abetting is governed by the knowledge standard, not by the intent standard, and that such standards should apply to cases involving various liability under the ATS or similar statutes. This should be standard for all civil liability cases. This is important given the various and unsettled law in this area.

### Recommendations regarding structure of the business and limited liability:

#### **10. Remove the limited liability for parent companies with wholly-owned subsidiaries operating abroad.**

Lawmakers in the various states within the United States should enact changes to state limited liability statutes, removing the limitation on liability for parent companies with wholly-owned subsidiaries operating abroad, especially where there are tort claims involved. There is an increasing recognition that it is unfair that businesses receive tax and other benefits from using such wholly-owned subsidiaries while being able to avoid liability when those wholly-owned subsidiaries engage in human rights violations. Since 1947, many have advocated a concept known as “enterprise theory,” arguing that the entire enterprise benefited the parent company as part of a unified economic scheme and that the entire enterprise should thus be held liable for the human rights violations.<sup>9</sup>

Perhaps at a minimum, limited liability rules should be changed by statute to create a presumption of parent liability where a business’s subsidiary has engaged in human rights violations (or all serious tort violations). To overcome such a presumption, the parent business would need to establish that it engaged in some type of due diligence regarding human rights with regard to the subsidiary.

Businesses’ due diligence obligations in many ways are or should be designed to create such mechanisms to ensure the business is aware of abuses or potential abuses, and takes action to ensure the abuse does not occur.

## **Recommendations regarding economic viability:**

### **11. Allow for the recoupment of attorney fees.**

In order for human rights cases to be more economically viable, both federal and state legislators should enact legislation providing that prevailing plaintiffs be awarded lawyers' fees. Lawyers' fees give lawyers an incentive to engage in "private" enforcement of violations of international human rights law, the enforcement of which is a matter of public policy. There is significant precedent for such attorney fee provisions, especially for statutes in the area of civil rights, discrimination, and environmental abuses. As the congressional research service notes:

There are also roughly two hundred statutory exceptions [to the general rule], which were generally enacted to encourage private litigation to implement public policy. Awards of attorneys' fees are often designed to help to equalize contests between private individual plaintiffs and corporate or governmental defendants. Thus, attorneys' fees provisions are most often found in civil rights, environmental protection, and consumer protection statutes.<sup>10</sup>

### **12. Amend rules easing the requirements of certifying class.**

Whether a case can proceed as a class action is primarily governed by Federal Rules of Civil Procedure. The Supreme Court, in interpreting those rules, made certifying class actions more difficult in the case of *Wal-Mart v. Dukes*.<sup>11</sup> Members of Congress, or members of the various states that have similar rules, should amend the rules to make certification of class actions easier for those cases in which large groups of victims would benefit from such actions. Whether a case proceeds as a class action or not often has a serious impact on whether victims of human rights abuses abroad have access to a judicial remedy. Disallowing a case to proceed as a class action has a disproportionate effect on victims abroad, who have a much more difficult time accessing the courts.

### **13. Prevent retaliatory actions.**

In order to address the growing problem of retaliatory lawsuits, each state should enact anti-SLAPP legislation to prevent lawsuits that are meant simply to chill victims and their lawyers from bringing legitimate cases. Similarly, Congress should to enact a federal anti-SLAPP statute, given the uncertainty as to whether a state's anti-SLAPP statute applies in federal court sitting in diversity jurisdiction. Such statutes are needed given the rising number of SLAPP suits.

## **Recommendations regarding evidentiary barriers:**

### **14. Create legal presumptions for failure to engage in human rights due diligence to overcome evidentiary burdens.**

Where a case proceeds either against a parent or subsidiary for its involvement in human rights abuses, lawmakers should consider enacting a statutory presumption of breach of duty of care where the business does not have or does not follow due diligence standards for human rights. This is necessary given that even where cases can proceed, obtaining information about certain violations through the traditional discovery process is very difficult. It is even more difficult where the actions occurred abroad. Given the recent emphasis on the importance of businesses' due diligence, such a presumption seems fitting.

## 15. Create special visas for victims and witnesses and allow depositions by video.

Given the difficulty some witnesses and victims have in coming to the United States to prosecute their otherwise valid case, lawmakers should consider creating a special litigant visa for victims and witnesses, with the process for applying for and approving such visas the courts' involvement. With regard to depositions, changes could be made to the rules of procedure clearly allowing depositions by video. This would not eliminate all hurdles, but would be a good start.

### Recommendations regarding criminal liability:

## 16. Provide for “command responsibility” in criminal liability statutes; enhance criminal enforcement.

The criminal liability statutes as currently written do not allow for command responsibility liability. This one change would allow for further liability under the criminal statutes, including for business activity.

Similarly, the federal government should more aggressively seek to prosecute businesses and individuals within businesses for their role in human rights violations that the federal government can currently prosecute, namely, genocide,<sup>12</sup> war crimes,<sup>13</sup> torture,<sup>14</sup> and forced recruitment of child soldiers.

## 17. Enact legislation that provides for victim compensation when businesses or their officers are found guilty of human rights abuses.

Currently, there is no specific mechanism in place that allows for victims of businesses (or their officers) that have been convicted of a human rights crime to receive compensation. Lawmakers should enact measures ensuring such restitution. There is precedent for this. For example, individuals convicted of engaging in international child pornography must pay restitution to the victims.<sup>15</sup> Given the difficulty those abroad have in accessing a civil remedy for criminal conduct by businesses, and given that this recommendation applies only to those businesses or their officers found guilty of a serious crime, this recommendation should not be controversial.

## RECOMMENDATIONS FOR POLICY MAKERS IN CANADA

Many of the recommendations for the United States, as described above, also apply to Canada. These include (1) clarify that businesses are legal persons under international law; (2) require businesses to obtain insurance that would cover human rights abuses abroad; (3) expand the statute of limitations; (4) allow for various theories to pierce the corporate veil and prevent limited liability laws from preventing redress; (5) prevent retaliatory actions by enacting anti-SLAPP legislation; (6) create legal presumptions for violations of due diligence, and the like.

However, the following recommendations apply to Canada in particular:

## 18. Enact a statute providing a cause of action for violations of customary international law.

Neither Canada as a whole nor its provinces have a statute that allows plaintiffs to bring a cause of action directly for violations of customary international law. Although there is some case law suggesting that customary international law is part of Canada's common law, a private cause of action does not yet clearly exist in the manner that such exists in the United States. There have been attempts at introducing a bill that would provide jurisdiction over such claims, but such attempts have not yet succeeded. Given the number of businesses in Canada that engage in activity abroad, some of which have resulted in cases alleging violations of human rights, advocates should engage in new efforts for the enactment of such legislation, either at the national level or at the provincial level. Recommendations for limitations and ways to narrow such causes of action, if such would be needed to be palatable, can be gleaned from the sections above regarding the ATS and TVPA in the United States.

## 19. Codify *forum non conveniens* to clarify the test and ensure that victims have an adequate remedy available before dismissing the case.

It appears that the notion that plaintiffs must have an adequate available remedy abroad is not yet firmly rooted in the *forum non conveniens* law in Canada, and this requirement is not contained in either British Columbia's statute, which is meant to codify common law, or in the *Uniform Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") drafted by the Uniform Law Conference of Canada. It is also not contained in Quebec's law. To rectify this, the Uniform Law Conference of Canada and lawmakers, especially at the provincial level where human rights litigation occurs, should amend their model law and statutes to require that courts find that there is an adequate remedy in the foreign forum before dismissing the case on *forum non conveniens* ground. The Uniform Law Conference should also consider drafting a model statute setting forth the factors for "forum of necessity" to similarly provide jurisdiction to Canadian courts over victims' claims of harm by acts of Canadian businesses where they would otherwise not be able to access an adequate remedy in the host State.

## 20. Create exceptions for "loser pays" in public interest litigation, and ensure that such litigation includes international human rights cases.

The "loser pays" doctrine in Canada significantly inhibits victims from accessing judicial remedies in Canada. Canadian lawmakers should consider codifying certain rules allowing plaintiffs in public interest litigation to seek a "no cost ruling," and clarify that such public interest litigation can take place against businesses for human rights abuses abroad. Businesses should anticipate the risks of litigation when operating in foreign States and should be expected to understand that litigation is a cost of doing business abroad. The equities in this equation should be on the side of victims, especially victims who presumably do not have the financial means to engage in such lawsuits, and their advocates, public interest law groups. Lawmakers could still allow courts to award damages for lawsuits they find to be frivolous, if the concern is that this will cause frivolous lawsuits.

## RECOMMENDATIONS FOR POLICY MAKERS IN EUROPE

### **Recommendations regarding ensuring a remedy for abuses that occur extraterritorially:**

#### **21. Make businesses domiciled in the European Union and in Switzerland, and their subsidiaries, liable for harm resulting from human rights impacts.**

The European States, including Switzerland, should ensure that a business can be found civilly liable for harm caused to others resulting from violations of human rights norms where it has not conducted due diligence to prevent such harm from occurring. This could be extended to all parts and operations of the multinational enterprise's business.

This would be enhanced by clear statements from the relevant Ministers in national parliaments, setting out their expectations that all businesses (including their subsidiaries and parts of the business enterprise) domiciled in that State, comply with their responsibility to respect human rights in all their activities, both within the national territory and extraterritorially. Such statements, however, cannot and should not be regarded as substitutes for regulatory reform.

#### **22. Allow cases to be heard in the European Union when no other forum is available.**

The European Commission should re-introduce its proposal (which it considered making as part of the 2011 recast of Brussels I Regulation) to add a *forum necessitatis* provision to the Brussels I Regulation. This would require the courts of those Member States which do not already have this provision to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available, and the dispute has a sufficient connection with the Member State concerned.

This would be an additional means by which EU Member States could discharge their duty to provide effective access to justice for victims of human rights violations linked to businesses domiciled in their territory.

As a note of caution regarding future revisions of jurisdictional rules in Europe: any proposed reform should be carefully evaluated to ensure that it will not limit access to the courts for extraterritorial cases that is currently available in some EU Member States.

#### **23. Apply the law of the State where the case is heard in situations where the law of the State where the harm occurred does not provide effective remedy.**

An interpretative communication of the European Commission or a European Parliament resolution should clarify that, consistent with Article 16 of the Rome II Regulation, the law of the forum should be applied instead of the law of the place where harm occurred where the latter law is not sufficiently protective of

the human rights of victims. This may be the case, for example, where the law of the State where the harm occurred does not recognize certain human rights, such as core labor rights, or where it severely restricts the ability of victims to bring claims.

### **Recommendations regarding economic viability of Claims:**

#### **24. Reform collective action.**

Human rights violations frequently involve a large number of victims, for instance an entire village adversely affected by a development project or all workers employed on a particular industrial site. Such collective violations are unlikely to be remedied adequately through individual complaints. Though most European States have not adopted the class action mechanism, some analogous collective redress mechanisms have emerged in recent years. However, the effectiveness of these mechanisms is usually limited by restrictive conditions. The most effective collective redress mechanism is provided in the United Kingdom, where procedural rules enable courts to allow collective actions on an opt-in basis. While this mechanism has enabled some groups to bring what amounts to collective claims, considerable negotiation is required between each party's lawyers for the process to be effective, and it remains at the discretion of the court to allow it.

There is a need to reform EU Member States' laws, as well as the law of Switzerland, to enable collective actions (in various forms, including class actions and public interest litigation filed by non-governmental organizations) to be brought against businesses domiciled in Europe. These reforms should include enabling claims to be brought, based expressly on human rights terminology and by reference to the human rights included in the UNGPs and in European human rights treaties, including the European Convention on Human Rights, the European Social Charter and the Charter of Fundamental Rights.

#### **25. Extend legal aid.**

Switzerland, EU Member States and the EU Commission should examine the possibilities for providing financial support to victims of alleged human rights violations, to enable them to bring cases in the European Union and in Switzerland respectively.

At the EU level, one option could include extending Council Directive 2002/8/EC of 27 January 2003, which already provides framework for legal aid in cross-border disputes within the EU. This could be extended to cover all cases where claims are filed on the basis of a jurisdiction attributed by the Brussels I Regulation. Extending this framework to extraterritorial disputes concerning third States can be justified on the basis of article 81(2)(e) of the TFEU, which allows for the adoption of legislative measures "when necessary for the proper functioning of the internal market, aimed at ensuring . . . effective access to justice."

### **Recommendations regarding evidentiary burden and due diligence:**

#### **26. Affirm the duty of the business enterprise to conduct human rights due diligence with respect to group's subsidiaries and business partners.**

To give effect the first general recommendation, European States should enact legislation or give a clear mandate to the European Commission to present a legislative proposal that would establish a presumption

for a breach of legal duty where a business does not have, or has not followed, due diligence standards to identify and address deficiencies that may give rise to harm to others. This should apply both to the group headquarters company's own connection to the harmful operations and to identifying and addressing impacts where they are connected with other parts of the business enterprise. This is necessary given that even where cases can proceed, obtaining information about responsibility and control within the corporate group is very difficult. It is even more difficult when the actions concerned were taken extraterritorially.

## **27. Increase reporting requirements of businesses in relation to their human rights responsibilities.**

To enhance transparency and accountability, businesses should be required to report publicly on significant human rights risks and impacts—including providing specific human rights impact assessments—in relation to their core business activities, and monitor their compliance with mandatory reporting requirements. In line with the human rights due diligence concept, this includes reporting on their subsidiaries, wherever incorporated and operating, and their business relationships. The requirement to disclose this information should be subject to an assessment of the severity of the impacts on the individuals and communities concerned, not to a consideration of their materiality to the financial interests of the business or its shareholders.

This could be supported by ensuring that data disclosure and whistle-blowing regulations require information about corporate human rights violations to be provided, and support the ability of those who have information to give it without legal consequences or personal security difficulties.

This would also be enhanced by requiring businesses to provide these reports and assessments as a compulsory condition to have access to export credits, to be awarded public contracts or to other financial benefits provided by the State.

## **28. Reform Access to Evidence.**

The ability of victims to access evidence is crucial, because plaintiffs have to provide proof that the defendant business managed, failed to manage, or was otherwise involved in the harmful operation carried out by its subsidiary or other business partner. Such information is, however, rarely publicly available; in most situations it is in the possession of the defendant. In the EU, each State defines the conditions under which its courts should assess the evidence with which they are presented. In common law systems, disclosure rules require defendants to divulge information in their possession. In continental European legal systems, where an equivalent rule exists, it is typically in an attenuated form only, posing a significant stumbling block for plaintiffs.

Therefore, there should be legislative reform across all European States to increase access to evidence and broaden the disclosure rules. This reform should be coupled and discussed jointly with legislative proposals on collective action, as described above.

**Recommendations regarding criminal and administrative liability:**

**29. Criminalize human rights violations, including those that take place outside the European Union and Switzerland.**

The EU Member States and Switzerland should make it a criminal offense for businesses domiciled in their jurisdiction to contribute to human rights violations, including violations which take place outside their national territories. In addition to clarifying standards for corporate criminal liability, prosecuting authorities should be provided with the guidance and resources necessary for effective law enforcement in such cases. For example, the Serious Crimes Act (U.K.) could be extended (by modification of sections 30-32) and the Homicide Act (U.K.) to cover specifically abuses of human rights by businesses operating extraterritorially.

Ideally, the EU Member States should also act collectively and explore opportunities to adopt an EU-wide legislative proposal in this area. EU Member States still have widely divergent approaches to the question of criminal liability of businesses for human rights violations, and therefore action at the EU level would be desirable; this would also avoid a situation in which action at the Member State level would be discouraged because of the fear of distorting competition. EU instruments adopted to date illustrate the potential for the European Union to adopt legislation making it a criminal offense for businesses domiciled in the European Union to contribute to certain human rights violations, even where such violations take place outside the European Union.

**30. Training and awareness raising for public prosecutors and judges.**

In European jurisdictions where it is possible for businesses to be held criminally liable for human rights abuses committed overseas, prosecutions remain rare. For a number of reasons, linked either to the legal systems concerned or to the attitude of the prosecuting authorities, and because of the complexity of these cases, lack of resources and know-how, as well as lack of mandate, public prosecutors do not pursue cases involving corporate complicity in human rights violations that occur abroad. To begin to address this, governments of the States in which such prosecutions are possible should ensure that prosecutors and judges are better equipped to deal with cases brought before them. This could be achieved through a range of practical measures such as providing training and sharing expertise, as well as providing public prosecutors with clear mandates and resources to enable them to pursue these cases.

## ENDNOTES

<sup>1</sup> Special Representative on Business and Human Rights, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, adopted by the United Nations Human Rights Council, at princ. 25, U.N. Doc. A/HRC/17/L.17/31 (June 2011).

<sup>2</sup> *Id.* at princ. 26.

<sup>3</sup> See United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2013*, Annex Table 28: The World’s Top 100 Non-Financial TNCs, Ranked by Foreign Assets, 2012, UNCTAD/WIR/2013 (June 26, 2013), available at <http://unctad.org/en/Pages/DIAE/World%20Investment%20Report/Annex-Tables.aspx>.

<sup>4</sup> ORG. FOR ECON. CO-OPERATION AND DEV., OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2011), available at <http://www.oecd.org/daf/inv/mne/48004323.pdf>

<sup>5</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. \_\_\_, 133 S.Ct. 1659, 1669 (2013).

<sup>6</sup> Moreover, adding an exhaustion of remedies requirement to the ATS, similar to that contained in the TVPA, might make any amendments to the ATS regarding applying extraterritorially more palatable to some.

<sup>7</sup> There likely is no need to enact legislation at the state level to clarify that state courts’ common law torts apply abroad because 1) state common law already assumes such is the case for violations of state law, if state law applies, and 2) states already have choice of law analysis they would apply to transitory tort violations.

<sup>8</sup> ABA Resolution, 107A, enacted August 12, 2013.

<sup>9</sup> See, e.g., Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CAL. L. REV. 195 (2009). This theory was also advocated in the Unocal cases, discussed above. *Id.* This concept has not yet gained traction in U.S. law, but perhaps the time is approaching.

<sup>10</sup> CRS REPORT FOR CONGRESS, AWARDS OF ATTORNEY FEES BY FEDERAL COURTS AND FEDERAL AGENCIES (June 20, 2008), available at <http://www.fas.org/sgp/crs/misc/94-970.pdf>.

<sup>11</sup> *Wal-Mart v. Dukes*, 131 S.Ct. 2541 (2011).

<sup>12</sup> 18 U.S.C. § 1091.

<sup>13</sup> 18 U.S.C. § 2441.

<sup>14</sup> 18 U.S.C. § 2340A.

<sup>15</sup> Mandatory restitution was part of a comprehensive federal statutory framework that also included criminalizing participation in any stage of the child pornography market. 18 U.S.C. §§ 2251–2260 (2012).

States are failing in their obligation to ensure access to effective judicial remedies to victims of human rights violations by businesses operating outside their territory.

Victims of human rights abuse by business, wherever it occurs, require full and effective access to judicial remedies. Two years from the universal endorsement of the UN Guiding Principles on Business and Human Rights, there is more work to be done.

“The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business” identifies and analyzes the barriers to remedy in the United States, Canada, and Europe, setting out detailed recommendations for the actions States should take to address the issue.



**CORE** PUTTING PEOPLE  
& THE PLANET AT THE  
CORE OF BUSINESS



Co-funded by the  
Civil Justice Programme  
of the European Union

This publication has been printed with the financial support of the Civil Justice Programme of the European Union. The contents of this publication are the sole responsibility of the authors and can in no way be taken to reflect the views of the European Commission.