

Corporate liability for gross human rights abuses

Towards a fairer and more effective system of domestic law remedies

**A report prepared for the
Office of the UN High Commissioner
for Human Rights**

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DISCLAIMER: This study was commissioned by OHCHR from Dr. Jennifer Zerk to enhance the understanding of legal and practical issues related to domestic law remedies for cases of corporate involvement in gross human rights abuses. The contents of this paper do not necessarily reflect the views of OHCHR.

Foreword

In February 2011, the then Special Representative of the Secretary General (“SRSG”) on human rights and transnational corporations and other business enterprises, Professor John Ruggie, presented recommendations for follow-up to his mandate to Human Rights Council delegates, upon their request. In this proposal, the then SRSG noted that:

“national jurisdictions have divergent interpretations of the applicability to business enterprises of international standards prohibiting gross human rights abuses, potentially amounting to the level of international crimes. The SRSG’s consultations with all stakeholder groups have indicated broad recognition that this is an area where greater consistency in legal protection is needed, and that it could best be advanced through a multilateral approach. Any such effort should help clarify standards relating to appropriate investigation, punishment and redress where business enterprises cause or contribute to such abuses, as well as what constitutes effective, proportionate and dissuasive sanctions. It could also address when the extension of national jurisdiction abroad may be appropriate, and the acceptable bases for the exercise of such jurisdiction.”

The former SRSG repeated this call in his opening remarks as Chair of the first UN Forum on Business and Human Rights held in Geneva on 3-5 December 2012.

Some Member States, and a number of civil society organizations, have expressed an interest in advancing this issue. In light of the mandate of the Office of the High Commissioner for Human Rights (“OHCHR”) to promote and protect human rights, and in view of the central role attributed by the Secretary General to OHCHR as the United Nation’s focal point for advancing the business and human rights agenda within the United Nations system (as set out in A/HRC/21/21), OHCHR wishes to commence a process of conceptual, normative and practical clarification of key issues relating to corporate liability for gross human rights abuses with the aim of creating a fairer and more effective system of domestic law remedies. This is done with a view to enable more effective and comprehensive implementation of the UN Guiding Principles on Business and Human Rights through enhanced preventative and remedial measures.

This report, commissioned by OHCHR in May 2013, sets out the findings arising from the first phase of this process, which was an investigation into the effectiveness of domestic judicial responses to business involvement in gross human rights abuses. This report identifies the barriers to accessing justice at domestic level, and the effect that differences in domestic approaches are having on the way that domestic remedial systems are used in practice and in access to justice and corporate accountability more generally. Based on these findings, the report then sets out recommendations for areas for further enquiry.

About the author

Dr. Jennifer Zerk is a writer, researcher, analyst and teacher specializing in business and human rights. A former commercial lawyer, she now works mainly in the area of regulatory analysis and reform and is a leading expert on international and cross-border regulatory issues. She has written extensively on regulatory problems and issues relating to business and human rights and is the author of “Multinationals and Corporate Social Responsibility” (Cambridge University Press, 2006), one of the first book-length explorations of the international law background to the social and environmental regulation of multinational companies.

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The author would also like to thank the members of the Group of Experts (named in Appendix 1) who provided comments both orally and in writing on earlier drafts of this report. Their help and advice is much appreciated, although this should not be taken to imply any endorsement by any of these individuals of the content of this report or its conclusions and recommendations.

Finally, the author would like to thank the Geneva Academy of International Humanitarian Law and Human Rights for generously hosting and facilitating the meeting of the Group of Experts that took place in Geneva on 7 and 8 October 2013 to discuss an earlier draft of this report.

¹ <http://www.fafono.org/indexenglish.htm>

² <http://www.business-humanrights.org/>

³ See Ramasastry and Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, FAFO, 2006. <http://www.fafono.org/pub/rapp/536/536.pdf> (referred to in this report as the “FAFO Study”).

⁴ <http://www.business-humanrights.org/LegalPortal/Home>.

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Executive summary

The Guiding Principles on Business and Human Rights confirm the international legal duties of all States to protect against human rights abuses by third parties, including business enterprises. This is referred to as the “State’s Duty to Protect”. It requires, in the words of the Guiding Principles, “taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.” However, present arrangements for preventing, detecting and remedying cases of business involvement in gross human rights abuses are not working well. While these cases may attract the theoretical possibility of sanctions under the criminal laws of many States, and may also give rise to potential civil liability under domestic “tort-based” regimes,⁵ the reality of the experiences of those seeking justice is very different. Victims of gross human rights abuses face considerable legal, financial, practical and procedural barriers to accessing judicial remedies. In many cases, these can prove insurmountable. In addition, variations between national jurisdictions in relation to a range of matters – including jurisdictional issues, definitions of offences, causes of action, standards for assessing liability, methods of determining sanctions and compensation, and support for victims and claimants – exacerbate inequalities in the extent to which victims will have access to remedy, create legal uncertainty for both victims and companies, reinforce concerns about impunity and place obstacles in the way of future international cooperation. These divergences produce distortions in the distribution and use of domestic judicial mechanisms that have the potential to result in tension between States and raise questions as to whether many States are presently meeting their “duty to protect”.

In short, the present system of domestic law remedies is patchy, unpredictable, often ineffective and fragile. It is failing victims who are unable in many cases to access effective remedies for the abuses they have suffered. It is failing some States because of the implications of current patterns of use of remedial mechanisms for capacity-building and legal development. And it is failing many companies, which are obliged to operate in an environment of great legal uncertainty and where participants are not competing on anything approaching a level playing field with respect to legal standards and levels of legal and commercial risk.

This report builds on previous work relating to access to remedy by exploring in more detail the aspects of domestic law responses that require more development in order to contribute to a better-functioning system of domestic law accountability for business involvement in gross human rights abuses. It identifies the barriers to accessing justice at domestic level, and the effects that differences in national approaches are having on availability and patterns of use of remedial mechanisms and legal development in this area. It concludes that the best way forward – that is, the one most likely to deliver real and practical benefits to affected individuals and communities as well as greater legal certainty for companies – is an inclusive, multi-stakeholder,

⁵ See Ramasastry and Thompson, n. 3 above.

consultative process to be conducted in two parts. The first part would be directed towards clarifying certain issues of policy and principle. The second part would be aimed at creating new opportunities for technical cooperation and capacity building in relation to the practical and organizational issues that have a bearing on whether there is an effective remedy in individual cases.

Chapter 1 of this report sets the scene by explaining – with the help of several case studies – the different ways that businesses can become implicated in gross human rights abuses. It is noted that these cases tend to fall into four main categories: (i) cases where businesses and their managers are accused as the main perpetrators, (ii) cases where businesses supply equipment or technology in the context of a commercial trading relationship that is then used abusively or repressively, (iii) cases where businesses have been accused of providing information, or logistical or financial assistance, to human rights abusers that has “caused” or “facilitated” or exacerbated the abuse and (iv) cases where companies have been accused of being “complicit” in human rights abuses by virtue of having made investments in projects, joint ventures or regimes with poor human rights records or with connections to known abusers. The Chapter then moves on to explore the concept of “gross human rights abuses” and the definitional difficulties that have been encountered in previous work.

Chapter 2 explains the key features of domestic regimes (both private law and public law-based)⁶ that are relevant to legal determinations of corporate liability, and the ways these mechanisms operate in practice in cases where companies have been accused of causing or contributing to gross human rights abuses. For criminal law systems, the tests used to attribute criminal liability to corporations and their managers, and the concept of “corporate complicity” in gross human rights abuses, assume particular importance. As far as private law (or “tort-based”) remedies are concerned, there are many complexities surrounding the allocation of liability between members of corporate groups and liability for the acts of third parties which continue to give rise to uncertainties about the nature and scope of civil liability. A number of similarities in domestic approaches are noted – for instance, in relation to certain aspects of extraterritorial civil jurisdiction and the concept of “separate corporate personality” – which have played an important part in shaping domestic law responses, particularly as regards the liability of members of corporate groups. However, there is also considerable divergence between States – notably in the extent to which corporate entities can be held criminally responsible, the theories used to determine the criminal culpability of corporate entities, the allocation of liability between individuals and corporate entities and the standards required to establish liability on the

⁶ In this report, a distinction is drawn between legal enforcement through private law remedies and public law enforcement. While the background regimes for enforcement vary from State to State, the term “private law” is used to refer to the legal rules that are enforced by private individuals or entities (usually those directly affected by a wrong committed by another person). The term, “civil liability” is used in this report to refer to the liability of individuals or companies under private law (including “tort-based” regimes). The term “public law” is used to refer to laws that are enforced primarily by public law enforcement bodies (including, but not limited to, criminal prosecution bodies).

basis of complicity – that have the potential to deliver different legal outcomes in different jurisdictions. Having introduced the basic concepts and themes that flow through this report, it is noted that, overall, domestic law on business involvement in gross human rights abuses is still in an undeveloped state. As far as public law enforcement is concerned, domestic criminal law investigation and prosecution bodies have yet to play a significant role. There has been much more activity in the private law sphere, although this has been mainly confined to United States courts. It is noted that, despite all this activity, there have been relatively few successes for claimants so far, at least as far as financial settlements or compensation awards are concerned.

Chapter 3 lays out the international standards relating to the ‘State duty to protect’ and access to remedy. This Chapter reviews the relevant provisions of the UN Guiding Principles and the *2005 UNGA Basic Principles on Right to Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law*, focusing in particular on the guidance relating to States’ duties with respect to access to remedy. It also considers the recommendations addressed to both States and companies in relation to the risk of involvement in gross human rights abuses, and the special considerations that apply in relation to conflict-affected areas. It notes the broad consensus that has emerged regarding expectations of all States in respect of access to justice and fulfilling the “duty to protect”, particularly as regards business activities in conflict-affected and high-risk areas.

Chapter 4 assesses, in light of the evidence of State practice and litigation experiences collected to date, how well domestic judicial mechanisms are responding to cases of business involvement in gross human rights abuses in practice. It reviews the evidence compiled during the course of the mandate of the former Special Representative of the Secretary-General on Business and Human Rights regarding barriers to justice and shows the ways in which variations in domestic approaches create further inequalities, obstacles and uncertainty. It is noted that companies are not operating, as is sometimes claimed, in an environment of impunity. On the contrary, as is explored in Chapter 2, involvement in gross human rights abuses carries at least the theoretical possibility of civil or criminal liability (or both) in many (if not most) jurisdictions. However, there are variations in coverage and the available evidence does support the claim that domestic judicial mechanisms are presently failing, for a complex array of reasons, to translate theoretical legal liability into actual accountability for wrongs. There remains in many cases a lack of realistic prospects for legal redress at local level, a lack of action on the part of criminal prosecution and law enforcement bodies, significant legal uncertainty surrounding the scope of key liability concepts, unevenness in distribution and use of domestic remedial mechanisms, some political concerns over extraterritorial regulatory and enforcement issues and a general lack of international coordination and cooperation.

Chapter 5 looks to the future and the search for a possible way forward. What kinds of activities should be undertaken to begin to address the many complex and interrelated problems identified in this study? The chapter begins by noting the convergence models developed for the purpose of

strengthening domestic anti-bribery regimes. However, there are reasons to doubt that these approaches, and the experiences gained, will be readily transferable to the context of business involvement in gross human rights abuses. First, it is not yet clear that, in relation to business and human rights, close convergence of legal standards and procedures is a desirable, let alone feasible, project. Second, there would be immense implementation difficulties associated with a treaty aimed at addressing the full range of gross human rights abuses, and all the contexts and circumstances in which they potentially arise. Finally, such a solution is unlikely to overcome many of the most serious barriers to remedy identified in Chapter 4.

On the other hand, there are many difficult issues of policy and principle which would benefit from further examination and clarification. Therefore, the first recommendation to come out of this study is that a *consultative, multi-stakeholder process of clarification* be launched. This consultative process would be carried out in two parts.

The first part of this process would focus on the appropriate tests for legal accountability, and the respective roles of “home” and “host” States in investigation and enforcement, which would take account of differences between States in their legal systems and traditions. This would include an examination of:

- The elements of corporate liability for involvement in gross human rights abuses, under both private law regimes and public law regimes (and in particular as a matter of criminal law) (a) where the corporation is the primary perpetrator and (b) under theories of secondary liability, and the conceptual similarities and differences between the two;
- The tests for attribution of liability to corporate entities (under both public law and private law regimes);
- Legal coverage and definitions of offences;
- The application of limitations periods;
- Different approaches to the choice of law in cross-border cases; and
- The international law rules governing the use of extraterritorial jurisdiction in cases of business involvement in gross human rights abuses (in both the public law and private law spheres) and the appropriate use of that jurisdiction in practice.

The aim of this process would be a better understanding of the strengths and weaknesses of different legal strategies, in light of the guidance in the UN Guiding Principles and other relevant international instruments, to identify ways of strengthening domestic legal responses at the level of law and policy (and against the background of different legal systems and traditions) and to determine useful and viable bases for greater international cooperation in future.

While greater clarity on these issues will be helpful from an access to justice perspective, it will not solve all of the problems identified in this study. As Chapter 4 of this study shows, many of the most serious barriers to justice are not legal but practical and financial in nature. The second part of the

consultative process, therefore, would be aimed at improving the accessibility and performance of domestic judicial mechanisms from a practical, victim-centred point of view. The recommendation is for a programme of activities to promote technical cooperation and knowledge exchange between policymakers, operators and users of domestic judicial mechanisms so that examples of good practice (with respect to matters such as legal funding, criminal investigation, protection of victims and witnesses, liaison with affected groups and communities, sentencing, monitoring and enforcement) are identified, analysed and replicated. The list of topics that would be useful to explore in this setting would include:

- Legal funding options;
- Management of “collective”, representative and “group” actions;
- Simplifying and streamlining the process of making and prosecuting a claim;
- Rules of discovery;
- Challenges faced by prosecution bodies in investigating allegations (including in cross border cases);
- Processes to ensure appropriate levels of involvement of victims in decision-making by prosecution bodies, including access to information and rights of consultation at different stages of the proceedings;
- Access to legal representation;
- Promoting awareness of legal rights and remedial mechanisms;
- Protecting prosecution bodies and courts from political interference and the effects of corruption;
- Devising appropriate and effective sanctions;
- Calculating damages;
- Protecting victims and witnesses from intimidation and harm; and
- International cooperation, managing jurisdictional conflicts, mutual legal assistance and enforcement of foreign judgments.

The aim of this second part would be to clarify, in far more detail than has been done thus far, what the relevant recommendations of the UN Guiding Principles (discussed in Chapter 3) mean for States at a practical, procedural and administrative level. A possible outcome of this work could be a set of agreed “best practice” models which demonstrate, using practical examples, what effective State responses to the problem of business involvement in gross human rights abuses would look like in practice, taking account of differences in legal systems and conditions, economic conditions and levels of development. These models could then be used by policymakers, decision-makers and advocates to help assess, in an objective and realistic way, the efficacy of States’ responses to the problem of business involvement in gross human rights abuses, and the quality of implementation of the UN Guiding Principles. They could be used to help identify priorities for future capacity-building activities involving relevant domestic institutions, such as police, prosecution bodies, court services, legal professional bodies and the judiciary. They would provide a more solid basis for advocacy, and offer States a practical and pre-tested set of ideas and action points to help improve the

performance of domestic judicial mechanisms from the perspective of affected individuals and communities.

The study has identified an urgent need for a renewed focus on the area of criminal law enforcement, given the apparently very low levels of activity by domestic law enforcement bodies, which also seem to be limited to a very small number of States. This report therefore includes recommendations for additional work to be undertaken specifically with domestic law enforcement and prosecution bodies, to better understand the legal, political and practical challenges they face, and to help build local enforcement know-how and capacity.

Making domestic remedial systems work better for victims of gross human rights abuses will take time and effort. This study has been concerned with two main problems: first, the barriers to justice that are frequently faced by affected individuals and communities, regardless of jurisdiction and, second, the serious inequalities that exist in the levels of legal protection enjoyed by different groups of affected individuals and communities and in their ability to enforce their rights in practice. These inequalities occur partly because of divergences in legal standards, but there are other reasons too, such lack of availability of financial resources, lack of capacity of prosecution bodies, limitations on court resources and, in some jurisdictions, problems associated with political interference and corruption. Because of this array of factors it is unlikely that it will ever be possible to eradicate “protection gaps” altogether. However, there is much that could be done to address at least the worst of these. The question is where to begin. This study does not make any case for extraterritorial solutions over local solutions (or vice versa) taking the view that both have a role to play. By clarifying the key issues of principle and policy, it will be possible to start to address the unevenness that presently exists in relation to cross-border enforcement and lay the foundations for greater international cooperation on this issue in future. However, this is not to overlook the urgent need to raise standards and build capacity everywhere. The second part of the consultative process outlined above is aimed at improving the ability of all domestic legal systems to respond appropriately and effectively to cases of business involvement in gross human rights abuses, whether they occur within territorial boundaries or beyond.

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Introduction

The last century has seen significant advances in international humanitarian law. Concepts of individual criminal responsibility have been developed and refined, and credible enforcement regimes have emerged which are steadily making inroads into the culture of impunity that has historically surrounded the worst human rights abusers and abuses.

While international regimes have thus far focussed on individual offenders, the contribution of business enterprises to gross human rights abuses around the world has not gone unnoticed. After the Second World War, senior managers and representatives of several companies were convicted in military courts of grave human rights abuses as a result of their contributions, through their respective business activities, to aggression and atrocities carried out by the Nazi regime. In the decades since, there have been numerous allegations, from almost every part of the world, of corporate involvement in gross human rights abuses either directly, or by reason of their associations with State authorities, militia or rebel groups, police and security providers. Cases that have been brought to the attention of domestic courts so far – many of which are discussed in more detail in the body of this report – have seen companies accused of providing logistical assistance, transportation, technology, information or funding to alleged human rights abusers which, it is claimed, materially increased the likelihood or the severity of the gross abuses that then took place.

Globalisation and the dramatic growth of transnational economic activity over the past few decades have been accompanied by calls for businesses to do more to address their adverse human rights impacts, and to be more accountable to those who are affected by them. The mandate of the Special Representative of the UN Secretary General, Professor John Ruggie, provided an important focus for discussion between States, companies and NGOs about these issues. The Guiding Principles on Business and Human Rights, unanimously endorsed by the Human Rights Council in 2011, states that “business enterprises should ... [t]reat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate”.⁷ The commentary to Guiding Principle 23 goes on to note the “expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of the provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal responsibility.” Moreover, the commentary continues, “corporate directors, officers and employees may be subject to individual liability for acts that amount to gross human rights abuses.”

As the UN Guiding Principles make clear, the lack of accountability mechanisms for companies at international level does not mean that corporate entities involved in gross human rights abuses enjoy impunity for their actions. On the contrary, corporate complicity in gross human rights abuses attracts the possibility of sanctions under the criminal laws of many

⁷ UN Guiding Principles, Guiding Principle 23.

States, and may also give rise to the possibility of civil liability towards affected parties under private law (or “tort-based”) regimes.⁸

Comparative surveys of domestic law and legal systems have revealed both similarities and differences between States in the way courts and legislatures have approached key issues relating to corporate liability at domestic level, such as the extent to which companies can be held criminally liable, the standards of attribution of elements of criminal offences to corporate entities and the point at which a corporate entity can become complicit, in a legal sense, in the wrongful actions of another. There are also, as one would expect, great variations in the effectiveness of domestic legal regimes in terms of settlement of disputes and enforcement. As a result there are, practically speaking, disparities between national jurisdictions in the levels of legal protection enjoyed by affected individuals and communities as regards serious human rights impacts of, or associated with, business activities.

It is often argued that the present system of “territorial” regulation by States, in which each State has responsibility to regulate the human rights impacts of companies within its own territorial boundaries, is ill-equipped to deal with the realities of cross-border economic activity. Differences from State to State in the extent to which national authorities and domestic courts are prepared to take jurisdiction over the activities of members of corporate groups, and particularly foreign subsidiaries and commercial partners, complicate the picture further. Depending on the nature, geographical scope and manner of implementation of rules in each of the States with an interest in a matter, a company can potentially be subject to one or more (potentially overlapping) domestic regimes – or none. It is the latter situation that is often referred to in this context as a “protection gap”: that is, a situation where, for any number of reasons, victims of abuse are left without a remedy.

The study is an assessment as to whether the “expanding web of liability” for corporate entities referred to in the UN Guiding Principles is really working for victims of gross human rights abuses at a practical level. What do current State practice and litigation histories tell us? Are “protection gaps” a serious problem? Or do financial and practical factors, such as accessing funding and legal resources, pose the greatest difficulty for claimants and enforcement bodies? What are the consequences of differences in domestic approaches for victims? To what extent do these differences influence the availability, distribution and use of domestic remedial mechanisms? What structural or political challenges might this pose? What are the advantages and disadvantages of divergence in domestic approaches from an access to justice point of view? Is there a case for greater convergence? If so, in relation to which areas, and how might this best be achieved? What problems and challenges are likely to be encountered? Having considered these questions in light of evidence from recent case histories, the report then goes on to suggest some activities that could be undertaken to help build capacity

⁸ See Ramasastry and Thompson, n. 3 above. See also Thompson, Ramasastry and Taylor (2009) “[Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes](#)”, *Transnational Corporate Responsibility for the 21st Century*, Vol. 40 No. 4, *George Washington International Law Review*.

and stimulate new legal, policy and institutional developments at domestic level with the aim of bringing about a more effective set of domestic law responses, reducing the instances of gross human rights abuses connected with business activities and delivering real improvements to the lives of affected individuals and communities.

Methodology

This study has involved primarily desk-based research. As noted above, it has benefited from previous comparative research into corporate liability for human rights abuses; particularly studies carried out by FAFO⁹ and the International Commission of Jurists (“ICJ”).¹⁰ Existing literature on the subject of corporate liability for gross human rights abuses was reviewed which enabled the formulation of a preliminary set of hypotheses about the nature and causes of “barriers to justice” and “protection gaps”. Past and ongoing legal cases raising issues of business involvement in gross human rights were then reviewed in an attempt to establish the extent to which these theoretical issues and problems are reflected in practice. Here, the Business and Human Rights Resource Centre¹¹ was a key source of information. Over 40 past and current legal cases were subjected to a side-by-side comparison of cause of action, the substantive and procedural issues raised and the outcomes in each case (if concluded) were noted.¹² Noting the distribution of legal proceedings (most of which having been commenced in US courts), the results of individual country-specific surveys collected by FAFO for the purposes of the FAFO study (covering 14 different jurisdictions drawn from different geographic regions) were then reviewed against a pro forma set of questions prepared specifically for the purposes of this study to determine the extent to which causes of action, issues and obstacles identified in the review of legal cases were likely to be replicated in other jurisdictions.

Based on the empirical evidence referred to above, a draft report was prepared in July 2013. This report was then reviewed by a multi-stakeholder Group of Experts (see Appendix 1) and the approach, scope, methodology and key findings were then discussed at a meeting which took place in Geneva on 7 and 8 October at the Geneva Academy of International Humanitarian Law and Human Rights. Written comments on the draft report were also received from individual members of the group. This final report was then prepared to take account of the feedback received at the meeting of the Group of Experts. However, this finished report reflects the views of the author and no endorsement of its contents by any of the individual members of the Group of Experts should be assumed.

⁹ Ramasastry and Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, FAFO, 2006.

¹⁰ International Commission of Jurists, *Corporate Complicity and Legal Accountability*, Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, Geneva, 2008, (Vols 1-4) (“Corporate Complicity”), <http://www.icj.org/report-of-the-international-commission-of-jurists-expert-legal-panel-on-corporate-complicity-in-international-crimes>.

¹¹ <http://www.business-humanrights.org/>.

¹² See Appendix 2 for a table of cases studied and referred to in this report.

Chapter 1: How do businesses become implicated in gross human rights abuses?

This Chapter considers the different ways in which businesses can become involved or implicated in gross human rights abuses in practice, drawing on case studies derived from completed and ongoing legal cases to help illustrate some of the problems and complexities involved. As will be seen, corporate complicity has emerged as a key legal concept to help explain and delineate the extent to which businesses should be held responsible for the acts of third parties, such as governments, the military, other security providers, paramilitaries, contractors and joint venturers. This introductory chapter ends with a discussion about the scope of the concept of “gross human rights abuses” adopted for the purposes of this study.

1.1 Scenarios

The recent and ongoing legal cases profiled on the Business and Human Rights Resource Centre web-site¹³ provide examples of the various ways that businesses can become involved or implicated in gross human rights abuses. These cases can be broken down into the following broad types:-

- cases where companies and their managers and staff have been accused of being directly responsible for acts amounting to gross human rights abuses (see section 1.2.1 below).
- cases where governments and State authorities have engaged companies to provide goods, technology, services or other resources which are then used (it is claimed) in abusive or repressive ways (see section 1.2.2 below).
- cases where companies have been accused of providing information, or logistical or financial assistance, to human rights abusers that has, it is claimed, “caused” or “facilitated” or exacerbated the abuse. This group of cases frequently (though not always) arises out of situations where State security services have been called in to assist with the resolution of some dispute or conflict surrounding the business activities (see further section 1.2.3 below).
- cases where companies have been accused of being “complicit” in human rights abuses by virtue of having made investments in projects or joint ventures or regimes with poor human rights records or with connections to known abusers (see section 1.2.4 below).

However, as discussed further below (see sections 1.3 and 2.1.3), establishing criminal or civil liability in any specific case depends on many factors including, crucially, the presence of knowledge and/or intent within the

¹³ See <http://www.business-humanrights.org/LegalPortal/Home>.

corporation and among key staff and managers, the degree of involvement and contribution by the company and the extent to which the company's actions were the cause of the abuse. The tests for determining liability that are currently applied by domestic remedial mechanisms are discussed in more detail in Chapter 2 below (see section 2.1.3).

1.2 Case studies

1.2.1 Allegations of direct and primary responsibility for gross human rights abuses

Case study 1: Blackwater/Iraq

In October 2007, proceedings were filed in the US courts against Blackwater (a privately owned company) together with its parent company Prince Group LLC and its chairman and owner Eric Prince alleging direct liability for extra-judicial killings and war crimes following the actions of Blackwater employees in Iraq in 2007. The claim under the ATS and state tort law alleged that the defendants had acted negligently in that they had not taken proper care in hiring, screening and training employees and for maintaining a corporate culture that fostered the excessive and unnecessary use of force.

Five of the six cases were settled out of court in January 2010 and the last remaining lawsuit was settled in January 2012.

Case study 2: Nishimatsu Construction/Japan

In 1998, five Chinese nationals (and survivors of World War II) brought a claim in the Hiroshima District Court against the Nishimatsu Corporation requesting damages on the basis of the defendants' alleged conduct during World War II. It was alleged that the defendant had forcibly brought the claimants to Hiroshima and had thereafter used them as forced labour. The private tort-based claim is based on labour law violations together with allegations of forced labour.

The case was dismissed in April 2007 on the basis that the claim had been extinguished by a treaty between Japan and China signed in 1972. However, the defendant and claimant subsequently entered into a voluntary settlement, with the encouragement of the Japanese Supreme Court.

Case study 3: Nippon Steel & Sumitomo Metal Corp/Japan/South Korea

On 10 July 2013, a South Korean Court ruled that a Japanese steel making company, Nippon Steel & Sumitomo Corp, must pay compensation to four South Korean workers for the forced labour they were subjected to during Japan's 1910-1945 colonisation of Korea. The company was ordered to pay Won100m (around \$88,000) to each worker.

The ruling held that "Japan's key military supplier, Japan Iron and Steel, committed inhumane and illegal activities, mobilising labourers for war invasions. Such acts were against international rule and the constitution of Korea and Japan". (Japan Iron and Steel later became Nippon Steel, which later merged with another company to form the defendant).

The case had been challenged by the defendants on the basis that the plaintiffs' claims had been extinguished by a 1965 treaty between Japan and Korea in which Korea gave up the right to lodge new war compensation claims. However, the Supreme Court held that this did not prevent individuals from seeking compensation from the defendants.

Five similar cases are reportedly still pending in South Korea, including cases against Mitsubishi Heavy Industries and Nachi-Fujikoshi.

Source: *Financial Times*, 11th July 2013, p. 5.

Case study 4: L-3 Group/Iraq

In June 2004, proceedings were launched in the US courts by a group of Iraqi nationals against two defence contractors alleging grave human rights violations by contractors providing interpretation and interrogation services at Abu Ghraib prison in Iraq. The two defendants (CACI and Titan) were alleged to have participated in torture, war crimes, crimes against humanity, sexual assault and cruel, inhuman and degrading treatment. The claims were based on common law tort and the ATS.

The claims based on state tort law were dismissed on grounds of immunity under “combatant activities exception” and “battlefield exception”. Most of the ATS claims were dismissed because of lack of State action (hence, lack of subject-matter jurisdiction) and, most recently, because of a lack of extraterritorial jurisdiction over abuses occurring outside the US. Subsequent proceedings based on the same or similar set of facts have been largely unsuccessful, but one group action (involving 71 claimants) was settled out of court.

Case study 5: Curaçao Drydock Company/Curaçao

In August 2006, three Cuban nationals (and residents of Florida) filed proceedings in the US courts against the Curaçao Drydock Company alleging conspiracy in human trafficking and forced labour. The claim was made under the ATS, RICO rules and the applicable foreign law (i.e. negligence). In October 2008, judgment was given (in default of attendance by the defendant company) in the sum of US\$80m.

1.2.2 “Commercial supply of technology, goods and services” cases

Case study 6: Lima Holding BV: allegations of corporate complicity in alleged human rights abuses in Israel

Complaints were lodged on 5 January 2009 and 15 March 2010 with the Office of the Public Prosecutor (Rotterdam, Netherlands) against two Dutch companies and two managing directors alleging complicity in alleged war crimes in Israel by virtue of the companies’ contributions (by way of construction machinery and services) to the construction of an annexation wall and Israeli settlements in the Occupied Palestinian Territory. The complainant was Al-Haq, a NGO.

The complaint alleges complicity in war crimes contrary to Article 5 of the Dutch International Crimes Act. The complaint also alleges liability under provisions relating to crimes against humanity, including apartheid (Article 4 of the Dutch Act).

Following a criminal investigation by the Public Prosecutor (in conjunction with the National Criminal Investigation Unit), the matter was dismissed on the grounds that (a) the companies’ contribution was minor and (b) that follow up investigations would not be a good use of Dutch investigative and police resources. The Dutch authorities also noted that, practically speaking, it would be difficult to pursue the matter due to the difficulties of carrying out investigations into matters that took place in Israel and the likely non-cooperation of Israeli authorities in the matter.

Case study 7: Qosmos: allegations of complicity in human rights violations by the El-Assad regime in Syria

A complaint was filed with the Paris criminal court on 25 June 2012 by the International Federation for Human Rights and Ligue des Droits de l'Homme, two NGOs, alleging that Qosmos, a French company, had been complicit in serious human rights violations by the El-Assad regime in Syria. The complaint accuses the company of aiding and abetting serious abuses, including torture, by allegedly providing surveillance equipment which allowed the government to monitor, target, arrest and torture dissidents and suppress the opposition. An investigation was launched on 26 June 2012.

Case study 8: Jeppesen: allegations of complicity in extraordinary rendition flights

In May 2007, the American Civil Liberties Union (on behalf of five individuals) filed a suit against Jeppesen Dataplan Inc. in the US courts under the ATS alleging that, by providing the US CIA with flight plans and logistical support for aircraft used in extraordinary rendition flights, the company had aided and abetted torture and inhuman treatment.

The case was dismissed by the Court of Appeals in September 2010 on the basis of national security concerns.

Case study 9: Amesys: allegations of corporate complicity in human rights abuses under the Gadafi regime in Libya

In October 2011 the International Federation for Human Rights and the Human Rights League filed complaints in the French criminal courts against a French company, Amesys, alleging complicity in gross human rights abuses by the Gadafi regime in Libya by virtue of the company's supply of technology that was allegedly used for the surveillance of the Libyan people. According to the complaint, the technology had been used to identify individuals who were then subject to gross human rights abuses including torture. The complaint alleges that the defendant company was therefore complicit in war crimes, crimes against humanity, torture and genocide.

A judicial inquiry was opened in May 2012 by a specialised unit. Prosecutors then requested that the matter be dropped on the basis that the alleged facts did not amount to criminal acts under French law, but this request was rejected by a Paris court in January 2013. At the time of writing, the case is pending.

Case study 10: Cisco systems: allegations of complicity in alleged human rights abuses committed in China

In June 2011 two sets of proceedings were filed in the US courts against Cisco Systems, as well as individual executives Lam and Chan, alleging aiding and abetting and conspiring with the Chinese State to commit serious human rights abuses against dissident groups. The claimants were members of the Chinese Falun Gong movement (proceedings were filed by the Human Rights Law Foundation on their behalf) and three gaoled Chinese writers. The complaint alleged that the defendants had aided and abetted gross human rights abuses by supplying eavesdropping and surveillance kit known as "Golden Shield" knowing that it would be used for the purpose of identifying and arresting the complainants and subjecting them to human rights abuses. The case is pending.

1.2.3 “Financial and logistical assistance” cases (including in the context of disputes or conflict in relation to business activities)

Case study 11: Danzer Group: allegations of corporate complicity in human rights abuses in the Democratic Republic of Congo

On 25 April 2013, a complaint was lodged with a German court against a senior manager of a German-based group of companies known as Danzer alleging that the manager had, by omission, aided and abetted gross human rights abuses by the Congolese military and police against a civilian population on 2 May 2011. The complaint alleges that a local company that was at the time a subsidiary of Danzer, had provided payment, transport and logistical help to the police and military. It is alleged that vehicles owned by the subsidiary were used to transport security forces to the scene of the abuses and then villagers to prison. The complaint is reportedly based on German laws relating to the duty of care of senior corporate managers to those affected by the actions of their staff. It is claimed that the senior manager failed to give sufficient direction to the local subsidiary and its employees regarding how the local security forces should be engaged in cases of disputes with local inhabitants. The complainants are the European Centre for Constitutional and Human Rights and Global Witness. At the time of writing, the matter is pending.

Case study 12: Total: allegations of complicity in gross human rights abuses suffered in Myanmar in the course of construction of the Yadana Gas Pipeline

In April 2002, four Burmese nationals filed a complaint with the Belgian courts under the 1993 Belgian Law on universal jurisdiction (now repealed) against Total, a French company, alleging that the company was complicit in crimes against humanity such as torture and forced labour committed by the Myanmar military regime and that this abuse was related to the construction and operation of the Yadana Gas Pipeline in Myanmar. Total was accused of having provided logistic and financial and military support during the 1990s to security forces of the military government, which, it was alleged, then engaged in forced labour, deportations, murder, arbitrary executions and torture.

The case was dismissed for lack of standing as the complainants were not Belgian nationals. In 2007, following changes in the law, the Belgian federal prosecutor launched a fresh investigation but the matter was eventually dropped.

Case study 13: Shell : allegations of complicity in alleged human rights violations committed by the Nigerian authorities (“Kiobel” case)

In 2002, Esther Kiobel and others began proceedings in the US courts pursuant to the ATS alleging that members of the Shell group of companies (incorporated in the United Kingdom, the Netherlands and Nigeria) were complicit in torture, extra-judicial killing, arbitrary detention and other violations by the Nigerian government. The factual allegations against Shell included claims that Shell companies had enlisted the help of the Nigerian authorities to put down protests in a violent manner. It was alleged that Shell, through its subsidiaries, had provided transport, staging points for launching attacks and that Shell had also provided food and financial remuneration to the soldiers.

In September 2010, the Second Circuit Court of Appeals dismissed the case on jurisdictional grounds. The claimants eventually petitioned the Supreme Court in June 2011. The Supreme Court agreed to rehear arguments on jurisdiction and eventually handed down its judgment on 17 April 2013. The determination of the Supreme Court was that, applying a “presumption against extraterritoriality”, the ATS would not generally apply to cases involving foreign defendants regarding foreign conduct. In future, some proper connection with the US would be necessary. The case was dismissed.

Case study 14: Ford: allegations of complicity with 1976-83 Argentinean military regime in relation to abuse and abductions of Ford workers

Between October 2002 and February 2006, various legal proceedings (criminal and civil) were brought against Ford companies and executives in both Argentinean and US courts alleging complicity by the company and its managers in political repression, mistreatment and abductions of Ford workers during the 1976-86 military regime.

In May 2013, three former Ford Executives were indicted under Argentinean law for crimes against humanity. The individuals were accused of being complicit in the torture and mistreatment of union organisers. According to the indictment, this complicity took the form of providing names, ID numbers and home addresses to security forces and that this information was then used to identify and then arrest workers who were then detained and allegedly tortured. According to the indictment, the alleged collaboration between the managers and the regime was aimed at eliminating union resistance at Ford's Argentinean subsidiary.

Case study 15: Chiquita: allegations of complicity in gross human rights abuses alleged to have been committed by paramilitary organisations in Colombia

Between July 2007 and March 2011 a series of claims were filed in the US courts against Chiquita Brands International Inc. and Chiquita Fresh North America LLC alleging complicity in gross human rights abuses by paramilitary organisations by virtue of alleged support and "commissions" from the company to these organisations. The claim includes allegations that, in addition to providing financial support, the defendants sourced weapons for the paramilitary organisations. The claims have been consolidated and now relate to over 4,000 killings. The claims are based on the ATS, the TVPA and state tort law. The case is still pending.

Case study 16: Drummond: allegations of complicity in gross human rights abuses alleged to have been committed by paramilitary organisations in Colombia

In March 2002, the families of three deceased Colombian workers and their trade union commenced proceedings in the US courts against Drummond Company, Inc. and its subsidiary Drummond Ltd and Garry N. Drummond (the parent company's CEO) alleging that the defendants had engaged paramilitaries to kill labour leaders. In addition, the complaint alleged that the defendants had aided and abetted paramilitary activities by providing substantial assistance to the paramilitaries. The complaint pleaded that the defendants were either directly responsible (the paramilitary organisations being the defendants' agents) or that they should be liable on the basis of vicarious or "aiding and abetting" liability.

In 2007, a federal jury found in favour of the defendants. The jury held that the claims of the companies' involvement in the killings had not been proved. However criminal proceedings have been commenced in Colombia against a Colombian contractor.

Case study 17: Rio Tinto: allegations of complicity in gross human rights abuses committed by the Papua New Guinean army in Bougainville

In 2000, group of Papua New Guinean nationals (and residents of Bougainville) filed a lawsuit under the ATS against Rio Tinto plc (a company incorporated in the United Kingdom) and Rio Tinto Ltd, alleging that the companies were complicit in war crimes and crimes against humanity committed by the army during conflict in Bougainville. The complaint argued that because the defendant's subsidiary was in a joint venture with the PNG government, and because its actions (it was alleged) contributed to the conflict, the defendants should be held responsible for the human rights violations that then took place.

By October 2011, all of the claims had been dismissed with the exception of the claims relating to alleged genocide and war crimes. The decisions to date in the case were then vacated pending the decision in *Kiobel* (see case study 13 above).

Case study 18: Talisman: allegations of complicity in alleged gross human rights abuses committed by the Sudanese government in Southern Sudan

In 2001, the Presbyterian Church of Sudan (together with a number of Sudanese nationals) filed proceedings in the US courts under the ATS against Talisman Energy Inc. (a Canadian company) and the Republic of Sudan. The lawsuit alleges that Talisman had been complicit in gross human rights abuses against non-Muslim Sudanese living in the area of an oil concession held by Talisman in Southern Sudan. It was alleged that Talisman had conspired with and aided and abetted the Sudanese Government in committing genocide, crimes against humanity and war crimes.

The case was dismissed in 2009 by the Court of Appeals because of a failure to plead sufficient facts relating to aiding and abetting to justify liability.

Case study 19: Anvil Mining: allegations of complicity in gross human rights abuses by the Congolese military in Kilwa, Democratic Republic of Congo

In November 2010, proceedings were commenced in the Quebec Superior Court against Anvil Mining Ltd. (a Canadian company incorporated in the North West Territories and having its head office in Perth, Australia and a business establishment in Montreal). The complaint alleged that the company had been complicit in grave human rights abuses by the Congolese military when it tried to put down an uprising by rebels in 2004 in Kilwa, Democratic Republic of Congo ("DRC"). The complaint alleges that the defendant company had provided logistical support, including transport. It was alleged that Anvil provided trucks and drivers and chartered airplanes to speed the arrival of the Congolese army in Kilwa. The complaint further alleges that these vehicles were used by the military while they were in Kilwa (allegedly for transportation of pillaged property, people to executions and executed individuals) and that the defendant fed and paid the soldiers.

The complaint was a civil class action based on the DRC legal code (on the basis that the DRC legal code would apply under Quebec "choice of law" rules).

The case was dismissed on appeal (by the defendants) to the Quebec Court of Appeals in January 2012 on the grounds of lack of jurisdiction. The Court ruled that the plaintiff had failed to show sufficient connections with Quebec and Canada as required by the Quebec Civil Code. The Supreme Court of Canada declined to hear a further appeal.

Case study 20: Unocal: allegations of complicity in gross human rights abuses alleged to have been committed by the Myanmar military

In 1996, a group of residents of Myanmar filed a law suit in the US courts under the ATS against Unocal (a US company) and Total (a French company) alleging complicity in serious human rights abuses including forced labour, murder, torture and rape suffered by the complainants at the hands of the Myanmar military. The claims against Total were dismissed for want of personal jurisdiction but continued against Unocal. The complainants had alleged that Unocal had contributed to human rights abuses by providing maps, materials and other logistical support to the security forces.

The case was settled out of court in 2009.

Case study 21: Monterrico Metals plc: allegations of complicity in gross human rights abuses alleged to have been committed by the Peruvian police

Proceedings were commenced in the UK courts in 2009 against Monterrico Metals plc (a company incorporated in the United Kingdom) and its subsidiary, Rio Blanco Copper SA, alleging that the defendants had aided and abetted serious human rights abuses by the Peruvian police against protestors at the Rio Blanco mine. The complaint pleaded liability based on the alleged failure of the UK company to intervene in order to prevent the abuse and furthermore that the defendant had contributed to the abuses suffered by providing information to the police and further support in the form of food, logistical support, equipment (that was alleged to have subsequently been used in the abuse), access to telecommunications and that the defendants also provided vehicles which were used to transport protestors to helicopters. It was subsequently also alleged that an employee of a subsidiary had helped to orchestrate the police action with the knowledge of the parent company management.

The claim was a private tort-based claim under English common law. The main torts alleged were the tort of “trespass to the person” (i.e. assault and battery) and negligence. The case was settled in July 2011 without any admission of liability by the companies.

1.2.4 “Investment” and “doing business” cases

Case study 22: Khulumani/“apartheid reparations” lawsuits

In 2002, a group of South African nationals sued around 20 banks and corporations in the US courts alleging complicity in gross human rights abuses such as extrajudicial killings, torture and rape committed during the apartheid era in South Africa. The plaintiffs alleged that the defendants’ investments and participation in certain key industries was influential in encouraging further abuses against black South Africans and that on this basis the defendants were complicit in those abuses. In August 2013 the US Court of Appeals for the Second Circuit returned the case to the lower court and recommended dismissing the case, on the basis of US Supreme Court’s decision in *Kiobel v Shell* (see case study 13 above).

1.3 Corporate complicity: a key concept

While there are situations in which corporations have been accused of being primary perpetrators of acts amounting to gross human rights abuses (see section 1.2.1 above), most of the cases that have been prosecuted or litigated to date concern allegations of “corporate complicity” in gross human rights abuses perpetrated by others (usually governments or State authorities). The argument is that, although business enterprises may not be the primary (or “front-line”) abusers, they should nevertheless be held legally responsible on the basis that they assisted or facilitated the abuse in some material way. Theories of corporate complicity have been used as a basis for imposing legal liability on private actors in connection with offences that require State action. As was put by Judge Katzmann in the case of *Khulumani v Barclays Bank*, a case brought in the US courts under the ATS (see case study 22 above):

*“Recognizing the responsibility of private aiders and abettors merely permits private actors who substantially assist State actors to violate international law and do so for the purpose of facilitating the unlawful activity to be held accountable for their actions. It is of no moment [i.e. under US law] that a private actor could be held liable as an aider and abettor of the violation of a norm requiring State action when that same person could not be held liable as a principal”.*¹⁴

As the above case studies show, companies have been implicated in gross human rights abuses carried out by State organs or authorities (such as the police or military) where the company has allegedly requested or benefited from certain action or assistance, or has provided financial or logistical support, or has handed over information about the whereabouts of people who were subsequently subject to gross human rights abuses (see examples at section 1.2.3 above), or where a company has, in the context of a commercial arrangement, supplied goods, services, technology or other resources which have then contributed to or facilitated human rights violations (see examples at section 1.2.2 above).

Theories of corporate complicity in the wrongs of others therefore assume central importance in domestic legal responses to corporate involvement in gross human rights abuses. In the criminal law context, these revolve around concepts of “criminal conspiracy” and theories of secondary liability such as “aiding and abetting”, “accessory liability” and “incitement”. In the field of private law remedies, too, theories of secondary liability have been developed to help define the circumstances in which individuals and enterprises can be held legally responsible for the wrongful acts of third parties. The tests for liability applied by domestic remedial systems typically focus on knowledge (i.e. what the corporation “knew” at the relevant time), intent (i.e. what the corporation intended to happen) and causation (whether the actions of the

¹⁴ *Khulumani v Barclay National Bank; Ntsebeza v Daimler Chrysler Corp*, US Court of Appeals for the Second Circuit, 504 F. 3d 254 (2d Cir. 2007), per Katzman at p. 281. See further Clapham, ‘Extending International Criminal Law beyond the Individual to Corporations and Armed Opposition Groups’, (2008) 6 *Journal of International Criminal Justice*, 899 at p. 907.

corporation caused the abuses that then took place). However, there are many differences between different jurisdictions as regards the elements of the tests to be applied and the manner and extent to which the knowledge and intentions of individuals (e.g. officers, managers and other employees) can be attributed to corporate entities. These differences are discussed in more detail in Chapters 2 and 4 below. At international level, on the other hand, “[t]he weight of international criminal law jurisprudence indicates that the relevant standard for aiding and abetting is *knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime.*” (emphasis added).¹⁵

1.4 Gross human rights abuses: definitional problems and scope

The human rights impacts of business enterprises are many and varied, potentially impacting “virtually the entire spectrum of internationally recognised rights”.¹⁶ The focus of this report, however, is on the worst kinds of human rights abuses, referred to in this report as “gross human rights abuses”.

The concept of “gross human rights abuses” has thus far eluded a precise definition. As noted in a 1993 Working Paper prepared for the Sub-Commission on Prevention of Discrimination and Protection of Minorities:

“12. Although it is relatively easy to classify human rights violations, it is difficult to draw lines between the different categories, since attempts to formulate criteria by which such violations could be categorized have generally been unsuccessful.

13. One of the most difficult problems is to distinguish between individual cases and large-scale human rights violations. While defining an individual case presents no difficulties, no criteria for the definition of large-scale violations can be established while large-scale violations are made up of individual cases; it is not possible to lay down how many individual cases constitute a large-scale violation.

14. Another difficulty is in distinguishing between gross and less serious human rights violations. This cannot be done with complete precision. According to the conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, which took place between 11 and 15 March 1992, “the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic discrimination” [footnote omitted]. The conclusions state further that “violations of other human rights, including violations of economic, social and cultural rights, may also be gross and systematic in scope and nature, and

¹⁵ UN Guiding Principles, Guiding Principle 17, Commentary.

¹⁶ UN Guiding Principles, Guiding Principle 12, Commentary.

must consequently be given all due attention in connection with the right to reparation" [footnote omitted].

15. It will be fairly obvious that any list of gross human rights violations will include most large-scale violations: genocide, disappearances and the like. Torture or arbitrary and prolonged detention may be used on a single person and constitute an individual case, but genocide, slavery and slavery-like practices and arbitrary or mass executions are all large-scale human rights violations. In fact, experience shows that large-scale violations are always gross in character and gross violations of individuals' rights such as torture or arbitrary and prolonged detention, if unpunished, either lead to large-scale violations or indicate that such violations are already taking place.

16. The same may be said about systematic human rights violations. It is in theory possible for the human rights of an individual or small group of individuals to be violated systematically. If such violations continue unchecked, however, it is probably a sign that the overall human rights situation is poor. Systematic, large-scale human rights violations as a rule are gross in character. This is particularly true of systematic discrimination, as mentioned in the conclusions of the Maastricht Seminar."¹⁷

The scope of the concept of "gross human rights violations" was further considered in the context of preparatory work leading up to United Nations General Assembly Declaration 60/147 on the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted on 16 December 2005 (the "2005 Basic Principles").¹⁸ A 1993 draft provided as follows:

"Under international law, the violation of any human right gives rise to a right of reparation for the victims. Particular attention must be paid to gross violations of human rights and fundamental freedoms, which include at least the following: genocide; slavery and slavery like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender".¹⁹

The Special Rapporteur explained this approach as follows:

¹⁷ Economic and Social Council, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Definition of gross and large-scale violations or human rights as an international crime; Working Paper submitted by Mr Stanislav Chernichenko in accordance with the Sub-Commission decision 1992/109*, UN Doc. E/CN.4/Sub.2/1993/10, 8 June 1993.

¹⁸ UN Doc. A/RES/60/147.

¹⁹ Economic and Social Council, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report submitted by Mr. Theo Van Boven, Special Rapporteur*, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, at p. 56.

8. One of the determining factors for the scope of the study is that the mandate makes explicit reference to "gross violations of human rights and fundamental freedoms". While under a number of international instruments any violation of provisions of these instruments may entail a right to an appropriate remedy, the present study focuses on gross violations of human rights as distinct from other violations. No agreed definition exists of the term "gross violations of human rights". It appears that the word "gross" qualifies the term "violations" and indicates the serious character of the violations but that the word "gross" is also related to the type of human right that is being violated [footnote omitted] ...

....

12. It should be noted that virtually all examples of gross violations of human rights cited in the previous paragraphs and taken from different sources are equally covered by human rights treaties and give rise also on that basis to State responsibility on the part of the offending State party and to the obligation to provide reparations to the victims of those gross violations. Given also the indivisibility and interdependence of all human rights, gross and systematic violations of the type of human rights cited above frequently affect other human rights as well, including economic, social and cultural rights. Equally, systematic practices and policies of religious intolerance and discrimination may give rise to just entitlements to reparation on the part of the victims.

13. The scope of the present study would be unduly circumscribed if the notion of "gross violations of human rights and fundamental freedoms" would be understood in a fixed and exhaustive sense. Preference is given to an indicative or illustrative formula without, however, stretching the scope of the study so far that no generally applicable conclusions in terms of rights and responsibilities could be drawn from it. Therefore it is submitted that, while under international law the violation of any human right gives rise to a right to reparation for the victim, particular attention is paid to gross violations of human rights and fundamental freedoms which include at least the following: genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination, in particular based on race or gender."²⁰

However, the 1996 draft of the 2005 Basic Principles omits this enumeration of offences and simply refers to international law as the source of human rights norms and states that "particular attention must be paid to the prevention of gross violations of human rights and to the duty to prosecute and punish perpetrators of crimes under international law."²¹ In his 1999 report to the Sub-Commission, the independent expert, Mr. M. Cherif Bassiouni noted that:-

²⁰ Ibid, pp. 6-8.

²¹ UN Doc. E/CN.4/Sub.2/1996/17, at p. 3.

“... it would appear that the term “gross violations of human rights”, has been employed in the United Nations context not to denote a particular category of human rights violations per se, but rather to describe situations involving human rights violations by referring to the manner in which the violations may have been committed or to their severity. It may well be, then, that the term “gross violations of human rights” should be understood to qualify situations, with a view to establishing a set of facts that may figure as a basis for claims adjudication, rather than to imply a separate legal regime of reparations according to the particular rights violated.”²²

By 2000, the references to “gross violations of human rights” in the draft Basic Principles had been replaced by references to “violations of international human rights and humanitarian law norms that constitute crimes under international law” for the reason that the former term was “insufficiently precise”.²³ However, the preamble of the version adopted by the Commission on Human Rights in April 2005,²⁴ and also the version adopted by the UNGA in December 2005,²⁵ affirms that the Basic Principles are indeed directed at “gross violations of human rights law and serious violations of international humanitarian law, which, by their very grave nature, constitute an affront to human dignity”, though without further definition.

For the reasons explained in the Sub-Commission Working Papers mentioned above, this report does not seek to put forward its own definition of “gross human rights abuses”. Moreover, given that the precise definition adopted does not have a significant bearing on the survey of domestic approaches and litigation experience in subsequent chapters, this was not considered necessary for the purposes of this study. However, broad guidance on the scope of the concept of gross human rights abuses can be found in the OHCHR’s Interpretative Guide to the UNGPs, i.e.

“There is no uniform definition of gross human rights violations in international law, but the following practices would generally be included: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination. Other kinds of human rights violations, including of economic, social and cultural rights, can also count as gross violations if they are grave

²² Economic and Social Council, Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Report of the Independent Expert on the Right to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms, Mr. M. Cherif Bassiouni, submitted pursuant to Commission on Human Rights Resolution 1998/43*, UN. Doc E/CN.4/Sub.2/1999/65 at para. 85.

²³ UN. Doc. E/CN.4/2000/62, 18 January 2000, para. 8.

²⁴ Resolution 2005/35 on *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Preamble.

²⁵ See n. 19 above.

*and systematic, for example violations taking place on a large scale or targeted at particular population groups.*²⁶

This is the definition of “gross human rights abuses” adopted for the purposes of this study.

1.5 Special considerations in relation to conflict-affected and high risk areas

Gross human rights abuses can take place anywhere. But the risks are particularly great in areas of poor governance, and especially conflict-affected areas. As the commentary to the UNGPs points out “[s]ome of the worst human rights abuses involving business occur amid conflict over the control of territory, resources or a Government itself – where the human rights regime cannot be expected to function as intended.”²⁷ Business enterprises operating in these kinds of environments are at particular risk of “being complicit in gross human rights abuses committed by other actors (security forces, for example).”²⁸ Indeed, many of the real-life cases discussed in this study have arisen in conflict-affected and high-risk areas (see, for instances, case studies 1, 4, 7, 9, 11, 12, 15, and 16-20 at section 1.2 above).

Box 1: Meaning of “conflict affected” and “high risk” areas

There is no universally accepted definition. However, according to Guidance produced jointly by the UN Global Compact and the UN Principles for Responsible Investment initiative, the term could potentially encompass countries, areas or regions:

- *That are not currently experiencing high levels of armed violence, but where political and social instability prevails, and a number of factors are present that make a future outbreak of violence more likely.*
- *In which there are serious concerns about abuses of human rights and political and civil liberties, but where violent conflict is not currently present.*
- *That are currently experiencing violent conflict, including civil wars, armed insurrections, inter-State wars and other types of organized violence.*
- *That are currently in transition from violent conflict to peace (these are sometimes referred to as ‘post-conflict’; however transition contexts remain highly volatile and at risk of falling back into violent conflict).*

UN Global Compact, PRI, ‘Guidance for Responsible Investment in Conflict-Affected and High-Risk Areas’ 2010, copy available at

http://www.unglobalcompact.org/docs/issues_doc/Peace_and_Business/Guidance_RB.pdf

²⁶ OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, United Nations, 2012, HR/PUB/12/02, copy available at http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf, p. 6.

²⁷ UN Guiding Principles, Guiding Principle 7, Commentary.

²⁸ UN Guiding Principles. Guiding Principle 23, Commentary.

1.6 Conclusions

Business enterprises can be implicated in gross human rights abuses in a number of different ways; as primary perpetrators or on the basis that their activities or operational choices have contributed, in some material way, to the gross human rights abuses of third parties (usually governments or State organs or entities). Cases falling in the second category, where the business enterprise is not a primary but a secondary participant (or a conspirator or “accessory”) are often referred to as “corporate complicity cases”. As illustrated in sections 1.2.2 and 1.2.3 above, allegations of corporate complicity can emerge in a wide range of situations, including cases where companies have traded items or technology which are then applied for abusive or repressive purposes, or where a company has provided assistance (e.g. financial, technical, logistical) to third party human rights abusers.

Corporate complicity has emerged as a key concept in relation to corporate liability for gross human rights abuses. Most litigated cases against businesses involve claims of corporate complicity rather than direct or “front-line” responsibility. However, there are differences between domestic legal systems as regards the appropriate tests for corporate complicity, which mean that the nature and scope of corporate liability (both criminal and civil) can vary from jurisdiction to jurisdiction. The extent of these differences, and the potential problems they pose, are considered in more detail in Chapters 2 and 4. First, however, it is necessary to examine some of the other key concepts that govern corporate liability at domestic level. This will be covered in Chapter 2.

Chapter 2: Key concepts in domestic law responses to business involvement in gross human rights abuses

To date, international criminal law institutions, of which the International Criminal Court is the best-known example, have focused on individual criminal responsibility rather than corporate responsibility. However, the lack of corporate liability mechanisms at international level does not mean that companies involved in gross human rights abuses will necessarily escape legal liability altogether. This chapter presents an overview of the different domestic law mechanisms whereby corporate entities (as well as, or instead of, individual perpetrators) can be held legally accountable for involvement in gross human rights abuses, whether as the main perpetrator, or because of their complicity in the actions of others. As discussed further below, corporate involvement in gross human rights abuses potentially engages both public and private spheres of domestic law. Not only is there the possibility of criminal responsibility under public law (for either companies or individual officers or both, depending on the extent to which the concept of corporate criminal responsibility is recognised in the relevant jurisdiction) but there is also, in most jurisdictions, at least the theoretical possibility of access to remedy through private law claims for damages for negligence or intentional wrongs (or “torts”). Drawing on country-level data collected in the course of previous comparative studies,²⁹ the next sections consider the different legal concepts that become relevant to a determination of corporate liability, comparing different approaches in different jurisdictions. Section 2.1 below is concerned with criminal law mechanisms and section 2.2 with private law (or “tort-based”) mechanisms.

2.1 Criminal law

2.1.1 Elements of criminal responsibility under domestic law

Establishing criminal responsibility has two parts. First, it must be established that the prohibited acts were committed. Second, it must be established that the party had a “guilty state of mind”. The requisite state of mind for criminal liability depends on the way the particular offence is constituted (i.e. in legislation or under common law) but in many cases will require proof of either criminal intent, or recklessness as to whether the prohibited outcome occurred or not, and in some cases merely negligence. The high standard of proof that must be satisfied for criminal law purposes is defined in some jurisdictions as “beyond reasonable doubt”. Some offences in domestic law are framed as offences of “strict” or “absolute” liability, meaning that it is not necessary for the prosecution to prove intent or recklessness to establish liability: mere proof of the act or outcome is sufficient. However, for serious crimes (a category in which gross human rights abuses will in many cases fall), proof of criminal intent (or, at a minimum, recklessness) will almost certainly be a requirement.

²⁹ See FAFO, Business and International Crimes Project, <http://www.fafno.no/liabilities/project-descr.htm>; International Commission of Jurists, “Corporate Complicity”, n. 11 above..

2.1.2 Corporate criminal responsibility

Conceptual issues

The treatment of corporate criminal responsibility at domestic level is complex and there are many differences between jurisdictions in the kinds of organizations that can be held liable, the kinds of offences for which corporate entities can be liable, and tests used to establish liability. These variables can also inter-relate: the tests for corporate criminal liability can vary, for instance, depending on the type of offence involved.

Broadly, though, it is possible to divide domestic legal systems into two groups: those that do recognise the concept of corporate criminal liability and those that do not. Within the first group (those that do recognise corporate criminal liability to some extent) there are further variations in approach. First, there are those that recognise corporate criminal responsibility as a general principal under their domestic penal code, meaning that all offences that potentially attract individual criminal liability carry the possibility of corporate criminal responsibility as well (except for those offences for which corporate criminal liability is not a logical or physical possibility, such as incest or bigamy). Second, there are those jurisdictions that recognise corporate criminal responsibility but then create a list of exceptions. Third, there are those that recognise corporate criminal responsibility only where explicitly provided for in the relevant sections of the penal code or specific statute. See further Table 1 below.

Table 1: Variations in approaches to the concept of corporate criminal responsibility

Jurisdictions that recognise corporate criminal responsibility as a general concept (“general rule approach”)	Jurisdictions that operate a series of statutory exceptions (“opt out approach”)	Jurisdictions that provide for corporate criminal liability in relation to specific offences (“opt in approach”)
Australia Canada Netherlands United Kingdom United States South Africa Norway	France	Argentina Indonesia Japan

From the evidence available, most jurisdictions appear to recognise the possibility of corporate criminal responsibility (if not as a general concept then at least in relation to specific offences or types of offences). However some jurisdictions, for constitutional or doctrinal reasons, do not. This does not mean that corporate entities in these jurisdictions (which include Germany, Italy and Ukraine) enjoy complete impunity. Instead, corporate wrongdoing is dealt with through a system of administrative offences and penalties. In

Germany, for instance, a corporate entity can be held financially responsible for monetary penalties where an agent, representative or board member, acting in that capacity, has committed an act that results in the violation of a legal duty by the corporate entity.³⁰

“Corporate culpability”: attribution of actions, intent and negligence to corporate entities

Before a natural person can be held criminally liable for a serious criminal offence, it is usually necessary for the prosecution to prove not only that the individual engaged in prohibited behavior, but that he or she intended that behavior, or a certain outcome, or both. Corporate entities, as abstract legal constructions, can only act through human agents. Therefore, whether the relevant offences are defined as “criminal” or “administrative”, a method is needed to attribute human acts and omissions to a corporate entity, along with a test to establish whether those acts or omissions should attract criminal liability.

There are two main approaches to the question of corporate culpability. First, the “identification” method, by which the acts and intentions of corporate officers and senior managers (and, in some jurisdictions, lower level employees with specific delegated functions) are “identified” with the company to the extent that those acts and intentions are treated as having been those of the company itself. In most cases it is not necessary for these acts to have been specifically authorized. It is usually sufficient for the person to have been acting broadly within the scope of their duties and with actual or apparent authority. Some jurisdictions (e.g. Canada) add further elements to this test, such as the requirement that the actions were done at least partly to benefit the company. There are, however, difficulties with applying this test to large, decentralized commercial organizations where it can be difficult to identify an individual who fulfils all the criteria for criminal liability and whose acts can be “identified” with the company in this way. In response to this problem, some jurisdictions have developed theories that allow prosecutors and courts to “aggregate” the knowledge of a group of individuals in order to meet the relevant tests of culpability.³¹

A further difficulty with the “identification” approach is that it does not deal particularly well with managerial, organizational and systemic problems within an organization. All of the requisite elements of the offence may not be the responsibility of a specific, identifiable individual or group of individuals. Instead, the wrongdoing may have been the result of collective failures such as poor organization or communication. The Australian Criminal Code adopts a more flexible test for determining corporate fault based on an examination of “corporate culture”. Under this test, the element of “fault” necessary to establish criminal liability can be attributed to a corporation where “a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or ...[by] ... proving that

³⁰ See FAFO, Business and International Crimes Project, “Germany: Survey Questions and Responses”.

³¹ See, in the US, *United States v Bank of New England* (1987) 821 F2d 844.

the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision”.³² The Australian provisions go on to provide that the negligence of a corporation, for the purposes of ascertaining criminal liability, can be evidenced by “(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.”³³

An overview of the distribution of the different tests for corporate criminal responsibility is set out in Table 2 below.

Table 2: Approaches to the concept of corporate culpability

“Identification” theory		“Organizational” approaches (i.e. poor or negligent supervision or management)
Traditional approach	Aggregated approach	
United Kingdom Canada Japan France India South Africa Norway	United States Netherlands Norway	Australia France *United States (with respect to sentencing, see below) *United Kingdom (i.e. corporate manslaughter, see below) *Japan (see discussion on vicarious liability below). *South Africa (see discussion on vicarious liability below) Belgium.

Note: the asterisks in the third column denote cases where organizational approaches are used, not as a general rule, but for a specific regulatory purpose or in relation to only a limited range of offences.

As will be clear from Table 2 above, domestic legal systems may use a variety of approaches to the problem of establishing corporate culpability, depending on the particular offence and context.

³² See Australian Criminal Code Act, Part 2.5, Division 12, section 12.3.

³³ Ibid, section 12.3(4).

Other examples of organizational approaches to corporate criminal responsibility can be found in laws in the United Kingdom on corporate homicide³⁴ and in US Sentencing Guidelines relating to corporate offenders. According to these US guidelines, sanctions against companies should aim to achieve, in addition to punishment and deterrence, “incentives for organizations to maintain internal mechanisms for preventing, detecting and reporting criminal conduct.”³⁵ In addition, French courts have recently begun applying organizational tests of corporate liability in some criminal law contexts.³⁶

As a method of establishing corporate culpability, tests based on organization, compliance and culture have a number of advantages over “identification” theory. Not only does liability turn on more objective factors (which in many cases will be easier for the prosecution to establish), it also reflects a more preventative approach.

Vicarious liability

The way liability is attributed to a company may depend on the type of offence. For some offences, corporate entities can be held vicariously liable for the wrongful actions of its agents. This is theoretically different from the liability arising under the identification theory discussed above in that the wrongful acts are not treated as the company’s own. Instead, the company is held responsible on the basis of the employer-employee relationship. As there is no need to attribute any mental element to the company itself, this form of liability is, technically speaking, “strict” or “no fault” liability as far as the company is concerned.

The basic requirements for corporate criminal liability on this basis are that there is an employment relationship, a wrongful act has been committed by the employee, and that this wrongful act took place in the course of the employee’s employment. This last requirement can be difficult to apply in practice, especially when the employee has been acting contrary to corporate policies or the express instructions of managers. This will not necessarily absolve the company from responsibility, however, if there was, on the facts, some connection between the wrongful activity of the employee and his or her duties. On the other hand, some jurisdictions (e.g. South Africa) will allow the company to escape liability if it can be shown that the company had put in place what would appear to have been adequate precautions to guard against the wrongful activity taking place. Japanese law provides a further example of a variation of vicarious liability that merges strict liability for the acts of employees with an “organizational” approach to corporate criminal

³⁴ See Corporate Manslaughter and Corporate Homicide Act 2007, section 1, under which corporate entities can be guilty of the crime of corporate manslaughter “if the way in which its activities are managed or organised” causes a person’s death and amounts to a gross breach of a duty of care”.

³⁵ US Sentencing Guidelines Manual, para. 8B1.1.

³⁶ See Clifford Chance, *Corporate Liability in Europe*, January 2012, copy available at http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf.

responsibility. Under these rules, a company can be held automatically responsible for the acts of employees on the basis of a presumption that, for the wrongful acts to have occurred, business owners must have been negligent in their appointment and supervision of the relevant employees. The burden of proof then shifts to the corporate defendant to show that it was, in fact, not negligent and had discharged its duty of care, for instance through the exercise of due diligence, and by taking proper steps (such as giving proper instructions to employees) to guard against the wrongful acts.³⁷

Different jurisdictions make use of vicarious liability for corporate entities to different extents. In the United States, for example, companies can be vicariously liable for a wide range of offences. In the United Kingdom, on the other hand, its use tends to be confined to less serious, regulatory offences.

Interrelationship between individual and corporate liability

There are also variations between domestic legal systems as to how criminal liability is allocated between the corporate entities and the individuals involved. As discussed above, some jurisdictions will only recognise the possibility of individual criminal responsibility because, as a matter of legal doctrine, abstract legal entities cannot, of themselves, possess criminal intent. But even in the many jurisdictions where corporate criminal liability is recognised as a theoretical possibility, there are variations in the amount of emphasis placed on individual versus corporate responsibility. In Spain, for instance, a parallel prosecution of an individual and a corporate entity is more likely to be done on the basis that the individual was “acting through” the company, rather than the other way around (in other words, the individual will almost always be regarded as the main perpetrator). In Germany, as noted above, the financial liability of the corporate entity to fines under administrative offences provisions is contingent first upon a successful prosecution against a relevant individual agent or representative. Similarly, in France, the criminal liability of a corporate entity under Article 121-2 of the penal code requires, first, proof of criminal behaviour on the part of an individual, with the additional step of proof of a causal connection between the individual’s actions and the activity realised on behalf of the corporation. In other jurisdictions, such as the United Kingdom, the United States and Japan, it may be possible (depending on the offence) to proceed against a company on the basis of “identification” theories or vicarious liability without parallel prosecutions of the responsible individuals. However, in practice, this appears to be rare. On the other hand, offences based on corporate mismanagement, negligence or “corporate culture” (e.g. under Australia’s penal code provisions, or the United Kingdom’s laws on corporate manslaughter) are by definition targeted towards corporate entities rather than individuals. Belgium, Norway and the Netherlands are other examples of jurisdictions where corporate liability is “autonomous” (in that it is not contingent of proof of a separate offence by an individual agent or

³⁷ See FAFO study, Business and International Crimes Project, n. 3 above, “Japan: Survey Questions and Responses”,

representative). However, an individual may well be prosecuted alongside a corporate entity in the case of offences requiring proof of criminal intent.

2.1.3 Corporate and individual complicity

The previous Chapter introduced the concept of “corporate complicity” and explained its significance in relation to cases where the principal perpetrator is a government or organ of the State (see section 1.3 above). Theories of corporate complicity are also important in the allocation of criminal responsibility among members of corporate groups. As will be discussed in more detail in the context of private claims below, company law doctrine insists, as a general rule, upon the legal separation between a parent and its subsidiaries. Under the doctrine of separate legal personality, a parent company and its subsidiaries are treated as separate legal entities. The result is that parent companies are not automatically treated as being responsible for the acts of their subsidiaries, even subsidiaries that are wholly owned. But even if the parent may not be held responsible on the basis that it owned the subsidiary it might potentially be liable under other legal principles of accessory liability (depending on the applicable domestic law rules) if it ordered, incited, organized, assisted or facilitated the offences. In other words, offences of aiding and abetting and criminal conspiracy provide a way of allocating criminal liability to the parent in a way that respects, rather than undermines, the doctrine of separate corporate personality.

In addition, theories of accessory liability are also a basis on which individual corporate directors and officers can be held personally liable. As well as being accessories to the abusers themselves, individual directors and officers can, in some circumstances and under some legal systems, be prosecuted for aiding and abetting crimes committed by corporate entities for which they are responsible as managers.

In virtually every jurisdiction reviewed as part of this study, complicity in criminal behaviour is a criminal offence in its own right. Domestic laws on accessory liability typically cover a range of behaviours, including “soliciting” or “incitement” (where the secondary party invites or encourages the primary party to commit the crime) and “aiding and abetting” (where the secondary party facilitates the commission of the crime in some way, for example by providing equipment, means or opportunity, or assistance after the event). However, there are differences between legal systems in the elements that must be proved to establish criminal liability on this basis. As a general requirement, for example, there must be a causal relationship between the assistance and the crime itself, although different States impose different standards as to how close this causal relationship must be. In some jurisdictions, the causal relationship must be especially close – for instance the crime would not have happened “but for” the assistance by the accessory (e.g. Germany, Argentina, Norway) or the assistance must be indispensable

for the commission of the crime (e.g. Belgium). However, in other jurisdictions the causal connection can be looser.³⁸

There are also important differences between jurisdictions as regards the mental elements that must be established. Some jurisdictions have very strict requirements as to knowledge. In these jurisdictions, the accessory must not only act intentionally but must also intend the crimes that were eventually committed. In other words, the accessory must have virtually, if not exactly, the same criminal intent as the primary offender. A lesser standard of intent, applied in some jurisdictions, is that the accessory may not have had exactly the same intent as the primary offender but that he or she knows that the outcome that in fact arose was the practical certainty of his or her actions. In other jurisdictions, it is sufficient for the accessory to know that criminal acts were the likely consequences of his or her actions. A further variation in approach concerns the amount of specificity required in what the accessory could or should have foreseen. In some jurisdictions it will be necessary to show that the accessory would have foreseen the exact crimes committed. In other jurisdictions it is only necessary to show that he or she would have been able to foresee crimes of the general type committed. The position is further complicated by the fact that some jurisdictions employ different standards depending on the seriousness of the primary offence or the type of involvement (i.e. incitement versus aiding and abetting).

Table 3: Variations in domestic law approaches to the mental element required for accessory liability

Shared intent	Knowledge/intent to commit same or similar type of offence	Foreseeability of harm
United States Australia Canada Germany (aiding and abetting) Argentina South Africa	United States Netherlands Germany (incitement only) United Kingdom France India Belgium	Netherlands Germany Canada (gives rise to potential liability for manslaughter for accessories to murder)

There are also differences between jurisdictions as to whether it is possible to be criminally liable as an accessory by omission as well as by commission. In some jurisdictions (e.g. Japan) this is a possibility. However in other jurisdictions mere omissions (e.g. standing passively by while a crime occurs) is not sufficient. Instead, some positive acts are required.

In most jurisdictions it appears that accessory liability is not contingent upon a successful identification, prosecution and conviction of the principal

³⁸ e.g. United States, where the standard required is that the assistance had a substantial effect on the commission of the crime.

perpetrator. This is of significance in cases where the principal perpetrator enjoys immunity from prosecution (e.g. State immunity).

2.1.4 Issues relating to the punishment of corporate entities

Gross human rights abuses are, by definition, serious violations of legal and moral standards. Where these amount to international crimes a natural person can, upon conviction, expect a lengthy prison term. Obviously, this form of punishment is not available for corporate entities. Instead, a corporate offender is most likely to face financial penalties or “fines”. However, as a form of punishment, financial penalties have a number of limitations. First, they do not necessarily have proper deterrent value and often lack the necessary social stigma. They may, instead, be treated simply as a “cost of doing business”.³⁹ Second, the burden does not necessarily fall on those responsible, but ultimately shareholders, who may have had only limited (if any) means with which to influence the decision-making that led up to or contributed to the abuse. Third, while they may send a signal, fines frequently do not offer any prospect of compensation of victims of crime (although some jurisdictions, such as France, Norway and Germany, permit the joining of civil actions with criminal proceedings through which compensation for victims can be claimed). Fourth, apart from their deterrence value, they do not, of themselves, help prevent future occurrences of criminal behaviour.

For these reasons, some domestic legal systems have developed alternatives to fines designed specifically with the possibility of corporate defendants in mind, such as placing restrictions on the ability of the company to operate in certain economic areas, banning the company from procurement opportunities, requiring the company to publicise the conviction and penalties imposed, confiscation of property and, in extreme cases, compulsory winding up.

Under US Sentencing Guidelines, a company found guilty of a criminal offence can be put on what is effectively a probation order aimed at ensuring the prevention of future offences. Under such an order, a court can demand, as part of a company’s sentence for certain offences, submission to court of effective compliance and ethics programmes and periodic reporting on its progress in implementing that programme.⁴⁰

2.1.5 Criminal law remedies in practice

“An expanding web of liability”?

It has been noted by a number of commentators, and in the UN Guiding Principles themselves, that businesses now operate within an “expanding web of liability” in relation to gross human rights abuses.⁴¹ This is due to a combination of factors, including the growth of cross-border human rights

³⁹ For this reason, some jurisdictions (e.g. Australia, France) apply multipliers to the applicable fines where the defendant is a corporate entity rather than an individual.

⁴⁰ US Sentencing Guidelines Manual, para. 8D1.4(c).

⁴¹ See, especially, Ramasastry and Thompson, n. 3 above, p. 27.

litigation and the influence of the Rome Statute.⁴² In some cases Rome Statute implementation measures at domestic levels have resulted in the theoretical possibility of corporate criminal responsibility for involvement in international crimes, as well as liability for individuals. Harmonization of rules in other areas (e.g. bribery) has helped the concept of corporate criminal responsibility to become better established, including in domestic legal systems where the notion has traditionally been more controversial. Developing theories on parent company liability, coupled with rules permitting the exercise of extraterritorial jurisdiction in certain cases, are potentially extending the geographic reach of domestic criminal law systems yet further. The result is (it is claimed) a growing network of overlapping domestic law systems and, correspondingly, a diminishing number of “gaps” through which cases involving corporate involvement in gross human rights abuses can fall.

In practice, however, domestic criminal law systems are largely untested as a means of providing legal redress in cases where business enterprises have caused or contributed to gross human rights abuses. There are few legal regimes aimed specifically and explicitly at the problem of business involvement in gross human rights abuses (see further Table 4 below). Instead, the scope of corporate liability is governed by the content of background criminal law regimes which, as the above discussion shows, vary from jurisdiction to jurisdiction in their application to corporate entities. While many of these regimes include legal principles and rules on which a prosecution for causing or complicity in gross human rights abuses in a business context could be based, few criminal prosecutions have materialised so far.⁴³

⁴² Ibid.

⁴³ See further pp. 92-93 below.

Table 4: Variations in the levels of specificity with which domestic law regimes seek to regulate involvement in gross human rights abuses by corporate entities

Bespoke criminal law regimes	Extension of regimes applicable to individual offenders by implication, express statutory provision or statutory interpretation			General criminal law
	Yes	No	Possibly	
*France (re crimes against humanity)	United Kingdom Australia Canada India Netherlands	United States Germany Japan Argentina Spain Indonesia Ukraine Sth Africa	*United States (re war crimes) Belgium	United States Japan South Africa Norway

The role of victims and their representatives in prosecuting criminal proceedings

Five of the six criminal cases profiles in Chapter 1 above (see case studies 6, 7, 9, 11, 12 and 14) were initiated by individuals, representative bodies, or NGOs acting on behalf of victims. Most jurisdictions give victims of crime the right to initiate criminal legal investigations in one way or another (e.g. by reporting an offence to the authorities, or by making a formal request for an investigation), although there are significant variations between domestic jurisdictions in the extent to which a victim can play an active role in the investigation and prosecution of the alleged offences after that point. Jurisdictions differ in the extent to which prosecutors, in exercising their prosecutorial discretion, are accountable to victims as regards their decision-making. In some jurisdictions (e.g. United States, United Kingdom, Germany, Japan, India), this discretion is very wide and can be difficult to challenge. In other jurisdictions, prosecutors must involve and engage with victims and their representatives to a greater extent. In a few States (e.g. Argentina) victims may be joined as parties to criminal proceedings and are given the right to cross-examine defendants.

Special procedural constraints are common at domestic level in relation to prosecutions of gross human rights abuses. In the United Kingdom, Australia and Indonesia, for instance, Rome Statute implementing legislation requires the consent of the Attorney General (the main legal adviser to the government) prior to the commencement of a prosecution. In Belgium, following diplomatic issues arising from past cases involving the exercise of universal jurisdiction (see further below), the federal prosecutor is obliged to take control of cases where the defendant is not a Belgian national or resident.

Jurisdictional issues and other legal and practical problems involved in tackling human rights abuses in other States

All but one of the six criminal cases profiled in Chapter 1 (see case studies 6, 7, 9, 11, 12 and 14) concern extraterritorial human rights abuses. As these cases show, the prosecution of extraterritorial abuses raises both legal and practical challenges.

Under customary international law, States enjoy a degree of extraterritorial jurisdiction over activities taking place beyond their territorial boundaries on the basis of “objective” and “subjective” territoriality,⁴⁴ “nationality”,⁴⁵ passive personality,⁴⁶ the “protective” principle⁴⁷ and the “universality” principle. The latter has particular relevance for cases involving gross human rights abuses. The “universality principle” refers to the international law doctrine that gives States the right to assert jurisdiction over certain very serious violations (and the perpetrators of those violations) wherever in the world those crimes have taken place. Many of the human rights abuses that are the focus of this report – war crimes, crimes against humanity and genocide – are arguably subject to universal jurisdiction as a matter of customary international law.

Many jurisdictions have explicitly criminalized Rome Statute offences of genocide, war crimes and crimes against humanity. Moreover, as the FAFO study shows, many of these domestic offences have the potential to be applied extraterritorially, most typically on the basis of the nationality of the offender or on the basis of “universal jurisdiction”. In practice, however, in most (if not all) jurisdictions the defendant must be present in the jurisdiction for a prosecution to proceed. This variation is sometimes referred to as “restricted” or “territorial” universality.

The additional requirement of “presence” raises the interesting issue of when a corporation might be regarded as being present in the jurisdiction for the purpose of a prosecution based on universal jurisdiction. Of the five extraterritorial case studies profiled (see case studies 6, 7, 9, 11 and 12), four of the criminal complaints appear to be based on nationality jurisdiction (supplied by the fact that the forum State is the place of incorporation) as well as (arguably) subjective territoriality to the extent that the alleged criminal offences could be said to have been commenced in or directed from the territory of the forum State. Only case study 12 (Total/Myanmar) appears to

⁴⁴ The principle of subjective territoriality gives each State the right to take jurisdiction over a course of conduct that was commenced in that State and completed in another. The principle of objective territoriality gives each State the right to take jurisdiction over a course of conduct that was begun in another State and completed within its own territory. More controversially, this has been extended in some legal contexts to acts in another State that have an effect in the regulating State (the “effects” doctrine).

⁴⁵ Under the nationality principle, States may exercise jurisdiction over their own nationals, wherever they are in the world.

⁴⁶ This principle, also controversial in practice, gives a State the right to assert jurisdiction over actors and conduct abroad where there has been an injury to a national of that State.

⁴⁷ The protective principle gives a State the right to take extraterritorial jurisdiction over actors or conduct abroad that affect its vital interests.

have relied on primarily universal jurisdiction under a piece of legislation that is now repealed.⁴⁸

The practical, investigative and evidential challenges involved in prosecuting an extraterritorial criminal case, like the ones profiled above, should not be underestimated. Case study 6 (Lima/Israel) illustrates some of the difficulties. In that case, the authorities reportedly initially rejected the complaint partly on the basis that it involved overseas activities that would be difficult to investigate, especially without the cooperation or support of the authorities of the relevant State. In many jurisdictions, prosecutors have wide discretion as to whether or not to pursue a matter, and availability of resources (both investigative and prosecutorial) must surely be a relevant consideration in deciding whether or not to proceed. As with other areas of criminal law, extraterritorial crimes can be extremely difficult to investigate and enforce in practice, without practical support from other affected States.⁴⁹

2.2 Private law claims for damages

2.2.1 Elements of legal liability

In addition to criminal law proceedings, most jurisdictions provide for the possibility of private claims for compensation for wrongful behaviour. While these kinds of claims are not in most cases aimed at gross human rights abuses specifically, they are a potential means of obtaining legal redress, provided the behaviour complained of falls within the relevant domestic law tests for liability.

The definition of wrongful behaviour employed in each domestic system is therefore key. In both common law and civil law jurisdictions, behaviour can be “wrongful” based either on the intent of the perpetrator or because of negligence. “Intentional” torts in common law systems (United States, United Kingdom, Australia, Canada, New Zealand) include assault, battery, and false imprisonment. Additional categories of intentional tort recognised in the United States include “wrongful death” and “intentional infliction of emotional distress”.

There are overlaps between intentional torts and crimes under domestic penal codes. Many jurisdictions permit parallel civil and criminal proceedings arising from the same wrongful behaviour and, because of different standards of

⁴⁸ Belgium’s 1993 Act Concerning Punishment for Grave Breaches of International Humanitarian Law has proved extremely controversial. Following amendments in 1999, the legislation provided for universal jurisdiction over crimes against humanity, genocide and war crimes and gave victims the right to initiate complaints. In 2003, the Act was substantially amended and then repealed in 2003 in favour of new laws generally requiring there to be a greater connection (e.g. nationality of the offender or the victim) between the alleged crimes and Belgium. Cases where neither the victims nor the perpetrators were Belgian nationals would only be allowed to proceed where the alternative jurisdiction did not have the institutions adequate to allow for a fair trial.

⁴⁹ Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas*, A Working Paper of the Harvard Corporate Social Responsibility Initiative, Working Paper 59, June 2012, p, 142.

proof (beyond reasonable doubt in criminal cases and “balance of probabilities” in civil cases) it is not unusual for a private law claimant to succeed in a tort-based case despite a criminal prosecution being unsuccessful. In some jurisdictions (e.g. Germany, Japan), the requisite element of “wrongfulness” or “illegality” is supplied directly by the content of the domestic penal code or other provisions designed to protect legal rights and private interests. In a number of civil law jurisdictions (Belgium, France and Ukraine), victims can join their claims for civil recovery to criminal proceedings.

In both civil and common law jurisdictions, findings of negligence turn on the questions of whether the damage suffered by the claimant was “reasonably foreseeable” to the defendant and, if so, whether the defendant had acted in a reasonable way given the risks (e.g. whether all steps that could reasonably have been taken to avoid the risks were in fact taken). In common law jurisdictions, these ideas find expression as duties and standards of care. To make out a successful claim for negligence, the claimant must show first, that there was a duty of care; second, that this duty of care was breached; third, that the breach of duty resulted in damage or loss to the claimant and, finally, the damage suffered was not too remote to justify compensation in the circumstances.

Where the defendant is a corporation rather than a natural person, acts and knowledge (necessary to establish negligence) and intent (necessary to prove state of mind for an intentional tort) can be imputed to the corporate body in much the same way as in criminal cases. This means that, in most jurisdictions, a finding of negligence will typically depend upon what was known and done by the company’s “directing mind and will” (i.e. senior managers and board members).

Proving who knew what and when in a corporate organizational structure can be very challenging for claimants (especially in “non-contractual” or personal injury cases) and is often cited as a significant obstacle to their ability to successfully prosecute a private law claim (see further section 4.1.1 below). In some cases, the burden of proof may be reversed such that, instead of placing the burden on the claimant to prove that there was negligence, the burden falls instead on the defendant to prove absence of negligence. In common law jurisdictions, for instance, the claimant may be able to rely on a doctrine known as *res ipsa loquitur* (or “the facts speak for themselves”). This doctrine allows negligence to be inferred from the relevant facts, without the need for the claimant to lead evidence relating to what the relevant actors did and did not know at material times. In a limited range of cases, tort-based liability may even be “strict”, meaning that liability flows directly from an act and outcome, without the need to prove any negligence on the defendant’s part. In common law systems, the rule in *Rylands v Fletcher* has been used to create a body of law whereby defendants may be held strictly liable for environmental damage arising from “ultrahazardous activities”. In the United States this has been used fairly extensively. In other common law jurisdictions, however its use has been much restricted (United Kingdom) or even abolished altogether (Australia).

2.2.2 Gross human rights abuses as torts

With the exception of the United States (see further discussion below), no State has yet developed a civil recovery regime specifically for gross human rights abuses. Instead, claimants wishing to use private law remedies as a way of gaining redress for gross human rights abuses must bring their claim within the parameters of established bases of liability under domestic law. Alternatively, as noted above, victims may, in some civil law jurisdictions, join criminal proceedings as *parties civiles*.⁵⁰

In many cases, framing gross human rights abuses in tort law terms is not overly difficult, at least at a conceptual level. The crime of torture, for instance, could be framed in terms of the intentional torts of “assault” or “battery”. Other crimes against humanity, such as enslavement or severe deprivation of liberty, could fall within the tort of “false imprisonment”. In the United States, as noted above, there are additional heads of liability that are potentially relevant to the crime of genocide, such as “wrongful death” and “intentional infliction of emotional distress”.

On the other hand, there are a number of gross human rights abuses that do not fit so easily into established categories of tort-based liability. The crime of apartheid, for instance, does not have an obvious analogy in tort law (although it may be possible to frame a cause of action based on its psychological and physical effects). It is also questionable whether the intentional torts of “assault” and “battery” really convey the gravity and level of condemnation that is appropriate to the crime of torture. It is also relevant to note in this context that many jurisdictions do not provide for punitive damages in private, tort-based cases, on the basis that compensation is intended to be compensatory, not punitive.

However, it is possible that in some jurisdictions (e.g. Netherlands, Japan, South Africa), the fact that an act amounts to a violation of international law can itself provide the element of “illegality” on which to base a private law claim. In the Netherlands (a “monist” legal system) civil law suits can be used to enforce human rights of horizontal effect, such as labor laws and also (arguably) internationally recognized human rights. In Japan, it is arguable that violations of international law could satisfy the required element of “illegality” (or “infringement of rights”) necessary for the establishment of a “tort” under the Japanese Civil Code, although this is untested.

2.2.3 The allocation of liability within corporate groups

The doctrine of separate corporate personality, discussed above,⁵¹ means that one member of a corporate group will not automatically be held legally responsible for the acts or omissions of another. A parent company, for instance, does not necessarily owe a duty of care to those affected by the activities of its subsidiaries. And even where a duty of care is found to exist, a

⁵⁰ See p.42 above.

⁵¹ See p. 38 above.

breach of a duty by a subsidiary is not necessarily attributable to a parent company. Instead, the behavior of each company within the corporate group is individually assessed against the relevant legal tests.

However, there have been cases under English and Australian law where parent companies have indeed been held, on the particular facts of the case, to have owed a duty of care to employees of its subsidiaries.⁵² This may be the case where the parent company is particularly involved in the activities of the subsidiary, to an extent greater than what would normally be expected in a parent/subsidiary relationship. Factors that have been deemed to be material in past cases include the involvement of parent company executives on the boards of subsidiaries. A finding of parent company liability based on the existence of a separate duty of care does not, technically speaking, amount to a “piercing of the corporate veil”. Instead, the parent is held liable on the basis of its own involvement in the circumstances that led up to the relevant damage or injury.

Domestic legal systems do permit the “piercing of the corporate veil” in limited circumstances with the result that other companies in a corporate group (usually a parent company) can be held responsible for the acts of subsidiaries. In common law systems, this may be done where the company is a “sham”, or where there has been “abuse of the corporate form” to evade a legal liability. On the other hand, using the corporate form as a way of managing and allocating commercial risk is regarded as legitimate, and not of itself grounds for piercing the corporate veil. In the United States, doctrines of “alter ego” and “vicarious liability” have been accepted as a basis for imposing liability on parent companies in cases brought under the Alien Tort Statute (see further below), at least at the preliminary stages of proceedings. The result is that some United States courts seem less rigid on the issue of “separate corporate personality” than courts of other common law jurisdictions. Courts in the United Kingdom have taken a stricter approach, and have refused to apply theories of vicarious liability beyond the employer-employee context.

Attempts to persuade domestic law courts to hold parent companies liable on the basis of “enterprise theory” have been largely unsuccessful. “Enterprise theory” essentially argues that members of integrated corporate groups should be jointly and severally liable for injury and damage arising from the activities of the members of the group, on the basis that they are, in reality, a “single economic enterprise”, under common management. Domestic courts have tended to reject these arguments on the basis that they undermine basic

⁵² Australia: See *CSR v Wren* (1997) 44 NSWLR 463; [1998] Aust Tort Rep 81-461. See also *CSR Ltd. v Young* [1998] Aust Tort Rep 81-468, 64952. United Kingdom: See *Chandler v Cape plc* [2012] EWCA Civ 525. See also the recent decision of the Ontario Superior Court of Justice in *Choc v Hudbay Minerals Inc.* delivered on 22 July 2013 (unreported, copy on file with the author).

tenets of company law. However, there is some domestic law jurisprudence in support of the idea, arising from cases in the United Kingdom and India.⁵³

2.2.4 Liability for the actions of third parties

In some circumstances, a person (natural or legal) may be held legally responsible for a tort even though the actions of some other party may have been a more direct cause of the damage or injury. As with criminal responsibility, discussed in section 2.1 above, this is significant because, while businesses may become directly involved in gross human rights abuses, they are more likely in practice to become implicated through their relationships with other abusers (often State authorities, police and military). It is also significant, in light of the discussion on the doctrine of separate corporate personality above, as a potential alternative source of parent company liability. It provides a potential basis on which parent companies can be held liable for torts, even though the actions of the subsidiary may have the closest causal relationship with the damage or injury suffered.

In some domestic jurisdictions, theories of secondary liability, similar to concepts of accessory liability developed in the context of criminal law, have been applied to tort-based cases. In some common law jurisdictions, (United Kingdom, United States, Australia, Canada) individuals and companies can be held responsible as joint tortfeasors with another party or accessories to a tort based on that person's "assistance", "procurement", "encouragement", or "knowing contribution" to a tort. Similarly, in civil law jurisdictions (e.g. France), it is possible for a person to be held liable in a private law action for damages as an "accessory", on the basis of his or her assistance or incitement to the commission of a tort.

Box 2: The mental element for liability for aiding and abetting liability under the Alien Tort Statute (United States)

In the United States, a line of case law on corporate complicity in torts has developed under the Alien Tort Statute ("ATS"). Theories of "aiding and abetting" have assumed particular importance in ATS-based cases because of the requirement of "State action" for subject matter jurisdiction in relation to most types of violations. As regards the mental element necessary for liability, different tests have been favoured by different courts; the "knowledge" test and the "purpose" test. Under the "knowledge" test the claimant must establish that there was "knowing practical assistance, encouragement or moral support which has a substantial effect on the perpetration of the crime" (*Doe v Unocal*). Under the stricter "purpose" test, the claimant must establish "practical assistance to the principal which has a substantial effect on the perpetration of the crime" AND that the defendant provides this "with the purpose of facilitating the commission of that crime". (*Khulumani v Barclays Bank and Others*).

Outside the jurisprudence under the ATS, however, it appears more usual for a claimant to construct a case against a parent company on the basis of its own negligence, for instance, in engaging with the primary wrongdoer in the

⁵³ See Judge Seth in *Union Carbide v Union of India*, Decision of the Madhya Pradesh High Court at Jabalpur, Civil Revision No. 26 of 88, 4 April 1988. See also *Amoco Cadiz* [1984] 2 Lloyd's Rep 304, 338.

first place or in failing to direct and supervise the primary wrongdoer effectively. This latter theory of liability (based on supervision) necessarily assumes a relationship of control between the defendant company and the primary wrongdoer. In other words, the defendant company's responsibilities with respect to the behavior of the primary wrongdoer derive from the ability of the former to control the behavior of the latter.

2.2.5 Private law remedies in practice: recurring issues and problems

Jurisdiction

Under the principle of territorial sovereignty, domestic courts have jurisdiction over wrongs committed, and damage and injury occurring, within the territorial boundaries of their own State. Furthermore, under international human rights law, each State has a duty to protect against human rights violations taking place within its own territorial boundaries, which includes ensuring access to remedy. As discussed further in Chapter 3 below, the UN Guiding Principles refer to this group of related customary obligations as the State's "duty to protect".

However, in almost all of the cases profiled in Chapter 1 above, proceedings were commenced in a court located in a different State from that where the respective human rights abuses were alleged to have been committed, and in many cases in a different State from where damage or injury was actually suffered as well. There are many reasons why claimants might favour an alternative jurisdiction over the one with the closest territorial connections to the claim, including concerns about lack of impartiality or the capacity of the local courts to hear the claim in a timely fashion. Alternative jurisdictions may also be more advantageous to claimants in terms of sources of funding, access to public interest lawyers and *pro bono* help, procedural advantages and the prospect of greater damages awards. These practical, financial and procedural considerations will be discussed in more detail in Chapter 4 below. However, it is worth noting here that, over the past two decades, the development of case law concerning the ATS (particularly as far as its geographic scope and subject matter is concerned) has played a large role in steering cases concerning corporate complicity in gross human rights abuses towards the United States courts and away from other potential forum States.

Where one or more of the defendants is a national (including a corporate national) of the forum State, the courts of that State will almost always enjoy personal jurisdiction over the defendant "as of right". In some States (notably the United States), courts may also take jurisdiction over cases involving foreign-incorporated defendants where the foreign company has sufficient contacts with the State (e.g. on the basis of "doing business" in that State). Foreign companies may also be joined as defendants in cases where a court already has jurisdiction where they are a "necessary and proper party" to the claim.

A number of civil law States (e.g. Argentina, France, Germany, Canada (Quebec)) also recognise a doctrine of "forum of necessity" (*forum necessitatis*)

under which the courts can take jurisdiction over a matter where it appears that there is no other forum available to victims. This was one basis of jurisdiction pleaded in the Anvil case (see case study 19, p. 23 above) although ultimately rejected by the Quebec Court of Appeal in that case.

There are variations between States, not just in the rules for *taking* jurisdiction over foreign or cross-border cases, but also in the extent to which courts, having accepted jurisdiction in principle, will then *retain* jurisdiction and see a case through to its conclusion. In common law States (e.g. United States, Australia, Canada, New Zealand) the defendant may apply for the proceedings to be stayed on the basis that it is not the appropriate or most convenient forum for the matter (*forum non conveniens*). Until recently, this doctrine was also applied in the United Kingdom, however its application has been greatly reduced as a result of the application of EU-wide jurisdictional rules. A number of ATS-based cases have been challenged on grounds of *forum non conveniens*, including the Curaçao Drydock Company (see case study 5, p. 19 above). In that case, the motion to dismiss was rejected as the court was satisfied that the claimants could not safely return to the alternative jurisdiction.

Of the 30 or so private law cases that form the sample group of cases for the purposes of this study,⁵⁴ many have been challenged on jurisdictional grounds, and several have been dismissed on this basis (see, for example, case studies 13 and 19, p. 20 and p. 22 above).

The recent decision of the US Supreme Court in the ATS-based case of *Kiobel v Shell* (see case study 13 above),⁵⁵ will bring a halt to a number of existing claims under the ATS, and will also curtail the ability of non-US claimants to bring cases involving conduct taking place outside the United States in future. However, the decision possibly leaves the door open for some cases involving US companies as defendants.

The “corporate veil”

Of the 17 case studies profiled in Chapter 1 that involve private law claims (see case studies 1-5, 8, 10, 13-23), at least 10 involve proceedings in which claimants have sought to join parent companies as defendants to the proceedings, as well as subsidiaries. In some cases, this decision may have been taken for strategic reasons (e.g. where giving prominence to the parent’s involvement in the matter had the potential to help strengthen the claimant’s case relating to the jurisdiction of his or her preferred court, or to perhaps help with arguments relating to the applicable choice of law). In some cases this may be because the subsidiary only has limited assets – meaning that, in the event of a successful claim, financial recovery against a parent company is more likely.

⁵⁴ See Appendix 2 below.

⁵⁵ The case is discussed in more detail at pp. 96-97 below.

Whatever the reasons for joining a parent company, persuading a court to hold a parent company legally responsible for the activities of its subsidiaries can be difficult in practice. In the various cases profiled above, claimants have relied on theories of vicarious liability, “alter ego” doctrine, “enterprise theory” and secondary liability concepts such as “aiding and abetting” and “conspiracy” (or a combination of these) in an attempt to establish that parent companies (and also, in some cases, owners and senior managers) should be liable for gross human rights abuses in addition to, or in place of, their subsidiaries. In some cases, claimants have focussed on the way that parent companies have managed the subsidiary, arguing that their involvement in day-to-day management of the subsidiary (and that of parent company executives) was sufficient to justify a finding that the parent company was liable on the basis of its own actions, or for the court to ignore the corporate veil altogether.

But there is still uncertainty about the point at which a parent company’s involvement in the activities of a subsidiary crosses the line of what is considered a typical parent-subsidiary relationship and becomes so close as to justify a finding of liability against the parent itself. By and large, most domestic courts exercise caution, concerned about the implications of findings of parent company liability for the company law doctrine of separate corporate personality. From the jurisprudence that has emerged from the ATS cases so far, it would appear that the United States courts are more liberal than the courts of many other jurisdictions as regards the application of theories of “vicarious liability” and “alter ego” doctrine to the parent-subsidiary relationship. The result is that it may be easier for claimants to establish parent company liability in the US courts than elsewhere. However, as many of these cases either settle out of court or are dismissed on other grounds, there are still few judicial determinations on this issue.

Choice of law

Domestic courts will not necessarily apply their own law to torts committed in other jurisdictions. On the contrary, the courts of common law countries (e.g. Australia and Canada) will generally determine the legal liabilities between the parties in accordance with the law of the place where the injury was sustained (i.e. *lex loci*) rather than their own domestic law.

Within the EU, choice of law rules for foreign torts are governed by a Council Regulation known as “Rome II”. In relation to torts, the general rule is that liability should be governed by the “law of the country in which the damage occurs” unless there are very strong reasons for applying the law of another country. This means that, even within the context of the harmonized regime, there are still grey areas as to when the general rule should be displaced. This is reflected in pleadings in which it is not unusual to see the law of the forum State and foreign law pleaded in the alternative. In other cases (see case study 19 above, p. 22) it is assumed in the pleadings that foreign law will apply to determine the substantive issues of the case. It is possible that, in a case involving foreign gross human rights abuses, a court could decide to apply the law of the forum State on public policy grounds (e.g. if the foreign

law supplied a basis on which a defendant might escape liability). However, this is only speculative, given the lack of case law on this point.

ATS cases fall into a different category. Because of the nature of this particular cause of action, some courts have referred to international rather than national standards to determine whether they have subject matter jurisdiction in any given case and the standards that should be used to determine liability. Issues have arisen in a series of cases as to whether liability for aiding and abetting should be governed by domestic law or international law standards. Now, the case law appears to favour the application of an international standard, although different courts have arrived at different formulations as to what the elements of that standard might be (see Box 2, p. 47 above).

State immunity and “non-justiciable political question”

Those seeking to hold companies legally responsible for involvement in abuses committed by the authorities of foreign States will frequently have to deal with arguments that the matter is covered by sovereign immunity or that the court should decline to exercise jurisdiction on the basis that the case concerns a “non-justiciable political question.

The doctrine of “non-justiciable political question” essentially directs the court to decline jurisdiction in a case that raises issues which are constitutionally assigned to another branch of government”. Legal argument often centres on the potential for inconsistencies in approach between the executive and the judiciary in relation to the matter, usually in the context of domestic foreign policy. In theory, the circumstances in which a defendant can rely on the doctrine of non-justiciable political question are quite limited. Nevertheless, many of the ATS-based cases profiled above have been challenged on this basis (see, for instance, Drummond, case study 16, p. 21 above) and the doctrine has been relied on to strike out claims on a number of occasions (see, for example Rio Tinto, case study 17, p. 21 above, although in that case the claims were subsequently reinstated on appeal).

State immunity is a concept derived from international law and means, in essence, that the authorities or instrumentalities of foreign States are generally immune from process in domestic courts, at least as far as their governmental acts are concerned. Domestic approaches to the question of sovereign immunity are typically regulated by legislation. A consequence of sovereign immunity is that, in the case a joint venture between a private company and a State-owned entity, it may only be possible to proceed against the private entity. In *Doe v Unocal*, for instance (see case study 20, p. 22 above) two US courts held (at first instance and again on appeal) that the Burmese military and the State Oil and Gas Enterprise could not be made subject to ATS-based claims. An ATS-based claim brought by Holocaust survivors against the French State-owned train company SNCF was also dismissed on this basis.

Exhaustion of local remedies

Claimants are not normally required to “exhaust local remedies” in their own jurisdiction before making a private law claim in an alternative (i.e. foreign) jurisdiction.⁵⁶ All that is required is for the claimant to establish that his or her chosen court has jurisdiction over the matter.

The ATS is silent on the question of whether there is an “exhaustion of remedies” requirement in relation to “torts in violation of the laws of nations”. There is, however, an express requirement to exhaust local remedies under the TVPA. The inconsistency has proven problematic in cases that fall under both the ATS and the Torture Victims Protection Act (the “TVPA”), and it has been used in support of legal arguments that a similar requirement should also be implied into the ATS.

There is some judicial support for the idea of an exhaustion of local remedies requirement in ATS-based cases in the judgment of the US Supreme Court in *Sosa v Alvarez-Machain*.⁵⁷ In this judgment, the Court suggested that such a requirement might be a useful check on future use of the ATS.⁵⁸ However, the issue has not been finally resolved. In the case of *Sarei v Rio Tinto*⁵⁹ (see case study 17, p. 21 above), the Ninth Circuit majority considered that the exhaustion requirement could be implied as a matter of judicial discretion in cases where the connections with the United States were weak. It remains to be seen what scope will be given to this decision following the Supreme Court’s judgment in *Kiobel*.⁶⁰

2.3 Conclusions

Domestic law on business involvement in gross human rights abuses is in an undeveloped state. While the basic components of an effective legal response – concepts of corporate liability, tests for corporate culpability, prosecution mechanisms, private law recovery procedures and sanctions – are present in many domestic legal systems, States are not engaging with the problem of corporate involvement in gross human rights abuses at all proactively. As a consequence of implementation of the Rome Statute at domestic level, domestic penal codes have been expanded and amended to encompass international crimes. However, these are aimed primarily at individual offenders. While there are a number of jurisdictions where the prosecution of corporate entities for gross human rights abuses is at least a theoretical possibility, criminal investigations of corporate entities have been formally commenced in only a handful of cases. The involvement of civil society organizations seems a key factor in whether a matter is brought to the attention of law enforcement authorities or not.

⁵⁶The principle of “exhaustion of local remedies” derives from the international law proposition that, prior to accessing international tribunals, claimants should first seek to make use of such local remedies as may be available to them.

⁵⁷ 542 U.S. 692 (2004).

⁵⁸ *Ibid.*, p. 733, n. 21.

⁵⁹ 550 F.3d 822 (9th Cir. 2008) (en banc).

⁶⁰ See further discussion at pp. 95-96 below.

In the absence of causes of action tailored specifically to gross human rights abuses (with the exception of the ATS, see further below), those who wish to pursue a private remedy against corporate abusers must look to the law of tort (or “delict” in civil law jurisdictions). However, while many gross human rights abuses could theoretically form the basis of a plausible tort-based claim, the coverage is far from comprehensive. Existing tort law concepts and categorisations do not readily translate to cases of apartheid and slavery, for instance. In addition, they do not adequately describe the kinds and levels of abuse involved. It is questionable whether categorising torture as an “assault”, genocide as “murder” or enforced disappearance as “false imprisonment”, for instance, is an adequate reflection of the gravity of these abuses.

As far as domestic law responses to gross human rights abuses are concerned, the United States is exceptional. In cases involving US companies, victims have the possible option of seeking private law redress under the ATS. However, the United States courts seem to be taking an increasingly restrictive approach to the scope of the ATS. This development, along with other possible legal trends will be discussed in more detail in Chapter 4. But before considering the performance of domestic judicial mechanisms in more detail, it is worth revisiting the content of the State’s duty to protect as it relates to prevention, detection and remediation of business involvement in gross human rights abuses. This is the focus of the next Chapter.

Chapter 3: Domestic law responses to business involvement in gross human rights abuses: the international standards

This Chapter examines the content of the State's duty to protect against gross human rights abuses by business enterprises, particularly as it concerns access to remedy. It focuses on the provisions of the UN Guiding Principles and the UNGA's 2005 Resolution on *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law* (the "2005 Basic Principles").⁶¹ While both of these instruments are technically non-binding, their provisions do contain restatements of existing international law requirements (typically indicated in the UN Guiding Principles by the words "States *shall*", or "States *must*", as opposed to "States *should*"). However the policy statements and recommendations contained in these documents are also highly significant as evidence of an emerging international consensus regarding what is expected of States. It is worth recalling that the UN Guiding Principles were unanimously endorsed by the Human Rights Council in June 2011 and have since received wide recognition and support from many States and international institutions. In addition, key elements of the UN Guiding Principles have been incorporated in a number of other international instruments and standards, including the OECD Guidelines for Multinational Enterprises and the International Finance Corporation Sustainability Principles and Performance Standards. The level of international support for the UN Guiding Principles is also evident from the work of regional organizations. The European Commission has urged all EU Member States to produce "action plans" setting out how they propose to implement the UNGPs within their own jurisdictions, and ASEAN and the African Union are also reported to be exploring ways to align their own programmes with the UN Guiding Principles.

3.1 The State's "duty to protect"

The UN Guiding Principles stress, first and foremost, the duty of States under international law to protect against human rights abuses within their own territory, which includes the responsibility to protect against abuses by third parties (including business enterprises).⁶² Fundamentally, "States may breach their international human rights obligations where such abuse can be attributed to them, or where they fail to take appropriate steps to prevent, investigate, punish and redress private actors' abuse".⁶³ Prevention of abuse includes enforcing laws and "periodically ... assess[ing] the adequacy of such laws and to address any gaps".⁶⁴ The accompanying commentary speaks of the importance of being aware of and responding to "evolving circumstances".

⁶¹ See n. 19 above.

⁶² UN Guiding Principles, Guiding Principle 1.

⁶³ UN Guiding Principles, Guiding Principle 1, Commentary.

⁶⁴ UN Guiding Principles, Guiding Principle 3.

3.2 Extraterritorial aspects of the State “duty to protect”

Where business enterprises are involved in cross border economic activities – whether as an investor, a buyer, or seller, or through other contracting arrangements – questions arise as to the extent to which the State in which the relevant business enterprise is domiciled (i.e. the home State”) can or should take a regulatory interest in the human rights impacts arising from those investments or transactions. The position adopted in the Guiding Principles is that “States are not [at present] generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction”. However, according to the UN Guiding Principles, home States should nevertheless “set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.”⁶⁵

Because “the risk of gross human rights abuses is heightened in conflict-affected areas”, the UN Guiding Principles recommend that States take additional steps to “ensure that business enterprises operating in those contexts are not involved with such abuses”.⁶⁶ The Commentary goes on to explain:

“In conflicted-affected areas, the “host” State may be unable to protect human rights adequately due to a lack of effective control. Where transnational corporations are involved, their “home” States therefore have roles to play in assisting both those corporations and host States to ensure that businesses are not involved with human rights abuse....”⁶⁷

To this end, States should evaluate their own enforcement capabilities and be prepared to take steps to improve them if they are found wanting:

“States ... should review whether their policies, legislation, regulations and enforcement measures effectively address this heightened risk [i.e. of being involved with gross abuses of human rights in conflict-affected areas], including through provisions for human rights due diligence by business. Where they identify gaps, States should take appropriate steps to address them. This may include exploring civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses. Moreover, States should consider multilateral approaches to prevent and address such acts, as well as support effective collective initiatives.” (emphasis added).

⁶⁵ UN Guiding Principles, Guiding Principle 2.

⁶⁶ UN Guiding Principles, Guiding Principle 7.

⁶⁷ UN Guiding Principles, Guiding Principle 7, Commentary.

3.3 The corporate responsibility to respect

The corporate responsibility to respect:

*“is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States’ abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights”.*⁶⁸

In order to meet this responsibility, businesses need to properly analyse and understand their human rights impacts through due diligence⁶⁹ which is likely to include drawing on external expertise and the results of stakeholder consultation.⁷⁰ Having analysed and understood their potential human rights impacts, businesses should take the necessary steps to prevent and minimise them.⁷¹

While “all business enterprises have the same responsibility to respect human rights wherever they operate”, some operating environments (such as conflict-affected areas) carry greater risks of being involved with gross human rights abuses than others. According to the UN Guiding Principles, “[b]usiness enterprises should treat this risk as a legal compliance issue, given the expanding web of potential corporate legal liability arising from extraterritorial civil claims, and from the incorporation of provisions of the Rome Statute of the International Criminal Court in jurisdictions that provide for corporate criminal liability”.⁷²

To the extent that prioritisation of effort is necessary, business enterprises should, “in the absence of specific legal guidance ... begin with those human rights impacts that would be most severe, recognising that a delayed response may affect remediability”.⁷³

3.4 Access to remedy

3.4.1 General principles

The right of access to remedy for victims of violations of international human rights law is recognised in numerous international human rights instruments and is recognised as part of States’ customary obligations. The UN Guiding Principles set out the basic legal obligations of all States as follows:

“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

⁶⁸ UN Guiding Principles, Guiding Principle 11, Commentary.

⁶⁹ UN Guiding Principles, Guiding Principle 17.

⁷⁰ UN Guiding Principles, Guiding Principle 18.

⁷¹ UN Guiding Principles, Guiding Principle 13.

⁷² UN Guiding Principles, Guiding Principle 23, Commentary.

⁷³ UN Guiding Principles, Guiding Principle 24, Commentary.

their territory and/or jurisdiction those affected have access to effective remedy”.⁷⁴

Similarly, the 2005 Basic Principles call on all States to “*ensure that their domestic law is consistent with their international legal obligations by:*

(a) Incorporating norms of international human rights law and international humanitarian law into their domestic law, or otherwise implementing them in their domestic legal system;

(b) Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice;

(c) Making available adequate, effective, prompt and appropriate remedies, including reparation...;

(d) Ensuring that their domestic law provides at least the same level of protection for victims as that required by their international obligations.”⁷⁵

3.4.2 Mechanisms

The UN Guiding Principles encompass both judicial and non-judicial processes. Judicial processes are processes that are made available through a State’s judicial system and can refer both to private claims for remedies for personal injury or loss and to criminal law processes. Remedies sought will often include, but are not necessarily limited to, financial compensation. In the words of the UN Guiding Principles, “[e]ffective judicial mechanisms are at the core of ensuring access to remedy”.⁷⁶ “Non-judicial” processes, on the other hand, refer to dispute resolution mechanisms that operate outside the domestic judicial system, such as ombudsmen services and mediation.

In addition, the UN Guiding Principles distinguish between “State-based” and “non-State-based” mechanisms. State-based mechanisms have some official status within the domestic legal system and “may be administered by a branch or agency of the State or by an independent body on a statutory or constitutional basis”.⁷⁷ State-based mechanisms include judicial processes but may also refer to other statutory dispute resolution bodies. Non-State-based mechanisms are private in nature and include company-based grievance mechanisms designed to help facilitate quick resolutions of disputes for instance at site or project level. The Guiding Principles include guidance as to what will constitute an “effective” non-judicial grievance mechanism that include criteria relating to accessibility, transparency, fairness and compatibility with internationally recognized human rights standards.⁷⁸

⁷⁴ UN Guiding Principles, Guiding Principle 25.

⁷⁵ 2005 Basic Principles, n. 19 above, Article I, para. 2.

⁷⁶ UN Guiding Principles, Guiding Principle 26, Commentary.

⁷⁷ UN Guiding Principles, Guiding Principle 25, Commentary.

⁷⁸ See UN Guiding Principles, Guiding Principle 31.

3.4.3 Standards of conduct for domestic judicial mechanisms

The 2005 Basic Principles speak of the need to “investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, to take action against those allegedly responsible in accordance with domestic and international law”.⁷⁹ In addition, States must “[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice ... irrespective of who may ultimately be the bearer of responsibility for the violation”.⁸⁰ This is echoed in the Commentary to the UN Guiding Principles, which states that “[p]rocedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.”⁸¹ The 2005 Basic Principles confirm that part of ensuring access to remedy is ensuring that victims and their representatives have “[a]ccess to relevant information concerning violations and reparation mechanisms”.⁸² This includes, according to the UN Guiding Principles, “facilitation” by States of public awareness and understanding of [grievance] mechanisms, how they can be accessed, and any support (financial or expert) for doing so.”⁸³ In addition, according to the 2005 Basic Principles, victims and their representatives “should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.”⁸⁴

3.4.4 Treatment of victims

According to the 2005 Basic Principles:-

*“Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation.”*⁸⁵

In addition, States should

“Take measures to minimize the inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation, as well

⁷⁹ 2005 Basic Principles, n. 19 above, Part II, para. 3(b).

⁸⁰ Ibid, Part II, para. 3(c).

⁸¹ UN Guiding Principles, Guiding Principles 25, Commentary. See also Guiding Principle 26, Commentary.

⁸² 2005 Basic Principles, n. 19 above, Part VII. See also Part VIII, para. 12(a).

⁸³ UN Guiding Principles, Guiding Principles 25, Commentary.

⁸⁴ 2005 Basic Principles, n. 19 above, Part X.

⁸⁵ Ibid, Part VII.

*as that of their families and witnesses, before, during and after judicial, administrative, or other proceedings that affect the interests of victims*⁸⁶

3.4.5 Avoiding and dismantling barriers to remedy

As part of their striving to meet their duty to protect, States should, according to the UN Guiding Principles:

“take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy”.⁸⁷

The Commentary goes on to say that:

“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. They should also ensure that the provision of justice is not prevented by corruption of the judicial process, that courts are independent of economic or political pressures from other State agents and from business actors, and that legitimate and peaceful activities of human rights defenders are not obstructed”.⁸⁸

However, as the next Chapter will show, there are difficulties in interpreting and applying these principles in practice, especially in relation to abuses taking place outside territorial boundaries. Leaving aside for now the difficulties in determining what amounts to a “barrier” in practice (see further section 4.1.3 below), different States have different standards for assessing what is a “legitimate case”, whether or not there are indeed alternative sources of effective remedy, and whether it is appropriate, in all the circumstances, to take jurisdiction over the particular case. Some States have much more flexible rules on extraterritorial jurisdiction than others, which inevitably raises the question as to whether those with very restrictive rules are meeting their “duty to protect” under the Guiding Principles.

On the other hand, not all of the procedural steps a claimant is required to go through can necessarily be regarded as a “barrier” to effective remedy. As part of ensuring access to remedy, States will also have responsibilities to ensure that judicial resources (never unlimited) are well deployed. Some variation between States is obviously to be expected, which will be influenced by legal culture, resources and the structure of the domestic judicial system and there are no clear criteria as yet to help determine the point at which procedural hurdle designed to ensure that a claim is a “legitimate case” (and an appropriate one to be decided in that forum) actually becomes a “barrier” to effective remedy under the terms of the UN Guiding Principles.

⁸⁶ Ibid, Part VIII, para. 12(b).

⁸⁷ UN Guiding Principles, Guiding Principle 26.

⁸⁸ UN Guiding Principles, Guiding Principle 26, Commentary.

The UN Guiding Principles highlight a number of possible practical and procedural barriers to remedy (see Box 3 below), which are discussed further in the next Chapter in light of the State practice and litigation experiences reviewed as part of this study. A serious barrier to remedy concerns the costs to litigants of bringing private law (i.e. “tort-based”) claims. As will be seen in the next Chapter, there are significant variations between jurisdictions in terms of the amount of financial support from the State that is available to claimants and also in relation to the extent to which claimants can reduce their legal costs through use of pro bono legal services, contingency fee arrangements or market-based mechanisms such as litigation insurance and legal fee structures, or by aggregating claims through class actions. As the discussion in the next Chapter shows, financial risks to litigants on both sides are compounded by the uncertainty that still surrounds key issues regarding the nature and scope of corporate liability for gross human rights abuses, such as parent company liability and the extent to which corporate entities can and should be held responsible for the acts of individual corporate officers, employees and third parties. This lack of clarity increases the risk of legal gamesmanship on both sides, which could ultimately limit the effectiveness of strategies aimed at improving access to remedy. As part of the corporate responsibility to respect, the UN Guiding Principles suggest that business enterprises do not “undermine States’ abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes.”⁸⁹ The implication is that managers should think carefully about litigation strategies, which should not be at odds with the business enterprise’s overarching policies on business and human rights. While it is rarely easy to determine the point at which a particular litigation strategy undermines access to remedy in practice, greater clarity on key issues should help to expedite the determination of legitimate claims, as well as deterring unmeritorious cases.

3.4.6 Limitations periods

Limitation periods are addressed in the 2005 Basic Principles, which confirm that, where provided for under an applicable treaty, “or contained in other legal obligations”, statutes of limitations “should not apply to gross violations of international human rights law and serious violations of international humanitarian law” which amount to crimes under international law. In relation to other gross violations, that do not constitute crimes under international law, domestic statutes of limitations, “including those time limitations applicable to civil claims and other procedures” should not be “unduly restrictive”.⁹⁰

⁸⁹ UN Guiding Principles, Guiding Principle 11, Commentary.

⁹⁰ 2005 Basic Principles, n. 19 above, Part IV.

Box 3: Legal, practical and procedural barriers identified in the UN Guiding Principles

Legal barriers that can prevent legitimate cases involving business-related human rights abuse from being addressed can arise where, for example:

- *The way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability;*
- *Where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim;*
- *Where certain groups, such as indigenous peoples and migrants, are excluded from the same level of legal protection of their human rights that applies to the wider population.*

Practical and procedural barriers to accessing judicial remedy can arise where, for example:

- *The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through government support, 'market-based' mechanisms (such as litigation insurance and legal fee structures), or other means;*
- *Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;*
- *There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants;*
- *State prosecutors lack adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights-related crimes.*

UN Guiding Principles, Principle 26, Commentary.

3.4.7 Remedies and sanctions

According to the 2005 Basic Principles, victims of gross human rights abuses should have access to remedies that are “adequate, effective and prompt”⁹¹ and receive reparations that are “proportional to the gravity of the violations and the harm suffered”.⁹² Under the UN Guiding Principles, an “effective remedy” is not limited to financial compensation but can potentially take a number of other substantive forms, such as apologies, restitution, rehabilitation, and punitive sanctions, as well as measures to prevent future harm such as injunctions and guarantees of non-repetition.⁹³ However, the overarching aim should be “to counteract or make good any human rights harms that have occurred”.⁹⁴ As will be seen in the next Chapter, domestic law remedies for corporate involvement in gross human rights abuses tend to be confined to financial compensation and fines, although some jurisdictions

⁹¹ 2005 Basic Principles, n. 19 above, Part VII, para. 11(b). Note that elsewhere in the UNGA Basic Principles the standard of reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law is said to be “full and effective”, see Part IX, para. 18.

⁹² Ibid, Part IX, para. 15.

⁹³ See also 2005 Basic Principles, n. 19 above, Part IX, paras. 19-23.

⁹⁴ UN Guiding Principles, Guiding Principle 25, Commentary.

have other potential sanctions available to them in cases where corporations have been convicted of serious crimes, such as bans on future involvement in certain economic activities, or compulsory winding up. A comparison of different State approaches helps to clarify the different options open to States as regards possible remedies for corporate involvement in gross human rights abuses, and their workability in different contexts.

State obligations to ensure access to justice include obligations to ensure enforcement of domestic judgements and awards. In the words of the 2005 Basic Principles:

“States shall, with respect to claims by victims, enforce domestic judgments for reparation against individuals or entities liable for the harm suffered and endeavour to enforce valid foreign legal judgments for reparation in accordance with domestic law and international legal obligations. To that end, States should provide under their domestic laws effective mechanisms for the enforcement of reparation judgments.”⁹⁵

3.5 Conclusions

Ensuring access to remedy is part of the customary human rights obligations of States and is a key component of the State’s “duty to protect”. As the UN Guiding Principles put it, “[u]nless States take appropriate steps to investigate, punish and redress business-related human rights abuses when they do occur, the State duty to protect can be rendered weak or even meaningless.” Thanks to further guidance in soft law instruments, notably the UN Guiding Principles and the 2005 Basic Principles, the content of States’ obligations to ensure access to remedy is becoming clearer. Although these instruments are technically non-binding, their provisions include restatements of existing international law obligations. At the very least, they are evidence of an emerging consensus concerning the steps that States should now be taking, and the areas that need to be prioritised for action, in order to meet their responsibilities towards victims in cases where businesses are implicated or involved in gross human rights abuses. These priority areas include access to legal counsel and litigation funding, treatment of victims, addressing jurisdictional and substantive hurdles, creating more opportunities for joining and aggregating claims, dealing with problems of corruption, inefficiency and delay, disseminating information about how people can enforce their rights and international cooperation in relation to investigation and enforcement. The next Chapter examines how well domestic judicial mechanisms are working for affected individuals and communities in practice.

⁹⁵ 2005 Basic Principles, n. 19 above, Part IX, para. 17.

Chapter 4: Domestic law responses to business involvement in gross human rights abuses: the reality

In the previous Chapter it was argued that there is an emerging international consensus with respect to the steps that home and host States should be taking to ensure access to justice in cases of business involvement in gross human rights abuses. While not all of these can yet be said to have the status of international legal requirements, they do provide us with a standard, the core elements of which are already widely supported and endorsed, against which progress at domestic level can be judged. As the discussion in Chapter 2 shows, there are legal theories and mechanisms at domestic level that make civil or criminal liability at least a theoretical possibility in many cases. The idea of an “expanding web of liability” for companies was explored against the background of applicable domestic law principles and regimes.

This Chapter examines the evidence from recent and ongoing attempts to hold companies legally accountable for their alleged involvement in gross human rights abuses and considers what these cases tell us about the capacity of the existing system of domestic judicial mechanisms to deliver justice for victims. The various kinds of obstacles victims and their representatives commonly encounter – legal, procedural, financial and practical – have been extensively analysed and documented in previous work, including work connected with the mandate of the SRSG. The fact that so few of the cases reviewed for the purpose of this study have resulted in prosecution or financial settlements for claimants provides some indication of the difficulties involved in successfully pursuing a claim or criminal complaint, although this study passes no judgments on the merits of individual cases.

This Chapter begins by reiterating the key barriers that have been identified so far by showing, with the help of examples of State practice from different jurisdictions, the ways in which these barriers are shaped and influenced by local legal conditions and domestic policy choices. However, it is also noted that the concept of “barriers” has limitations as an analytical tool due to a lack of consensus on the detail of the baseline standards that domestic judicial mechanisms should be operating to in practice. As a result, care should be taken prior to labelling features of domestic legal systems as such.

This Chapter then returns to the theme of variations or “divergence” between different legal systems and the implications of these differences in legal standards and approaches for justice outcomes. It is argued that differences between domestic legal systems in certain key respects not only perpetuate some barriers to remedy they are also helping to create new ones, by distorting patterns of distribution and use of domestic remedial mechanisms, significantly adding to legal uncertainty for both victims and companies, and hampering prospects for international cooperation.

4.1 Serious, numerous and widespread barriers to accessing remedy

The issue of barriers to accessing legal remedies in human rights cases against business enterprises was examined as part of the SRSG's mandate and was the subject of numerous studies and discussion papers.⁹⁶ Time and space does not permit an exhaustive itemisation and analysis of barriers to justice here. The aim instead is to reiterate the main themes that have emerged from the previous work, as a reminder of the key barriers to justice that have already been identified, and in a way that gives some indication of the variations in barriers from jurisdiction to jurisdiction. As will be seen, these barriers vary in both type and severity with the result that some jurisdictions appear more promising as venues in which to seek remedies for gross human rights abuses in a business context than others. This should not be surprising. Differences in domestic conditions are to be expected and in many cases reflect variations in background legal systems, legal culture and traditions, levels of social and political stability and economic development. However, as discussed in sections 4.2 to 4.5 below, these differences also pose challenges to future efforts to improve access to remedy at domestic level.

Box 4: Summary of legal, procedural, practical and financial issues previously identified as potential barriers to justice

Legal and Procedural

- *Complexity of corporate structures and the doctrine of separate corporate personality;
- *Jurisdictional rules and *forum non conveniens*;
- *Sovereign immunity and related doctrines;
- *Difficulties in attributing negligence and intent to a corporate entity;
- *Rules of standing (private law cases);
- *Exercise of prosecutorial discretion to decline to act (public law/criminal cases);
- *Gaps in legal coverage (i.e. lack of relevant criminal offences or causes of action);
- *Statutes of limitations; and
- *Choice of law rules that would deny effective remedy.

Practical and financial

- *Limited availability (or non-availability) of legal aid or other viable funding options;
- *"Loser pays" rules;
- *Lack of access to suitably qualified and experienced legal counsel;
- *Non-availability of collective action arrangements;
- *Corruption and political interference;
- *Fear of reprisals, intimidation of witnesses;
- *Lack of resources within prosecution bodies;
- *Difficulties accessing the information necessary to prove a claim or complaint;
- *Insufficiency of damages and enforcement problems.

⁹⁶ See, in particular, Oxford Pro Bono Publico, *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse: A Comparative Submission Prepared for Professor John Ruggie*, 3 November 2008, copy available at <http://www.reports-and-materials.org/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-08.pdf>; Taylor, Thompson and Ramasastry, *Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses*, 2010, copy available at <http://shiftproject.org/sites/default/files/20165.pdf>.

4.1.1 Legal and procedural barriers

Complexity of corporate structures and the doctrine of separate corporate personality

Identifying the appropriate entity or entities against which to lodge a private law claim is a problem in relation to claims involving large transnational groups of companies. Affected individuals and communities have encountered particular difficulties in trying to establish the liability of parent companies. As a 2010 study puts it:

“The transnational nature of large corporate groups, especially when coupled with a lack of transparency as to the ultimate ownership or control of companies, poses significant challenges in gathering evidence, both for public prosecutions as well as private civil action. In some cases, a business entity operating in a particular country may be owned by a number of other foreign businesses, none of which has majority control. The corporate shareholders, parents or investors may be domiciled in numerous countries.

It is often difficult to identify the particular business entity involved in an alleged violation. Even assuming that one can identify the particular entity, the use of intermediary holding companies, joint ventures, agency arrangements and the like, often protected by confidentiality arrangements, makes it difficult or impossible to establish a connection between the entity and its parent ownership.”⁹⁷

Yet establishing a connection, not only between the entity and its parent company but between the parent company and the violation, and being able to prove the relevant facts to the applicable evidential standard, is just what claimants need to be able to do if they want to make out their claim. As discussed in Chapter 2 above (see sections 2.1.3 and 2.2.3), the doctrine of separate corporate personality (an influential doctrine of company law applied in many if not all jurisdictions) means that parent companies will not automatically be held legally responsible for the acts of subsidiaries, merely because of the fact of ownership or control. Instead, the claimant or complainant must show either that there is a legally recognised reason to “pierce the corporate veil”, or that the parent company should be held responsible in its own right.⁹⁸ In practice, it can be difficult to establish a parent company’s duty of care in cases where subsidiaries are more directly involved. Because of judicial concerns not to undermine the company law

⁹⁷ Taylor, Thompson and Ramasastry, n. 96 above, pp. 10-11.

⁹⁸ e.g. In the private law context, on the basis that the parent company was negligent in its own right, on the basis that it owed a separate duty of care to those affected by the activities of its subsidiaries and failed to discharge that duty or, in the public/criminal law context, on the basis that the parent company aided and abetted, incited or conspired in, the unlawful acts of the subsidiary.

doctrine, courts only seem prepared to recognise the possibility of parent company liability in limited circumstances.⁹⁹

As Table 5 (below) shows, there are variations between key home States for multinationals as to the extent to which courts will be prepared to hold a parent company liable for the human rights impacts of other members of the corporate group. Note also, that there are variations between jurisdictions in the tests used to determine liability for the acts of third parties based on the idea of corporate complicity.¹⁰⁰

Table 5: Variations in approaches of key multinational “home States” to the question of parent company liability for the activities carried out by other group members

State	Under civil (“private”) law	Under criminal law
United States	Parent company liability could possibly be based on direct liability (on the basis that the parent company itself owed the victims a duty of care) or secondary theories of liability (e.g. aiding and abetting a tort, civil conspiracy), vicarious liability, agency theories or theories that permit the piercing of the corporate veil (e.g. alter ego theory).	Parent company liability could possibly be based on accessory liability or laws relating to criminal conspiracy.
United Kingdom	Parent may be directly responsible on the basis of control and oversight of the subsidiary. Parent may also be liable on the basis of secondary theories of liability (e.g. aiding and abetting a tort). It is possible in very exceptional cases to “pierce the corporate veil” where there has been an abuse of the corporate form (or it is a “sham” or “facade”).	Parent company liability could possibly be based on accessory liability or laws relating to criminal conspiracy.
France	Possible developing theory of parent company liability where there is a high degree of involvement by the parent in the running of the subsidiary.	Parent company liability could possibly be based on accessory liability or laws relating to criminal conspiracy.

⁹⁹ Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge University Press, 2006), pp. 215-240.

¹⁰⁰ See discussion above at section 1.3 and section 2.1.3.

Germany	Parent may be directly responsible on the basis of control and oversight of the subsidiary. In addition, German company law allows piercing of the corporate veil in some circumstances where there is mixing of assets.	Not applicable. Any criminal action would need to be pursued against individual officers and executives, presumably on theories of aiding and abetting and conspiracy.
Japan	Parent could conceivably be directly responsible on the basis of control and oversight of the subsidiary. Also, it is possible to “pierce the corporate veil” where there has been an abuse of the corporate form (or it is a “sham” or “facade”).	Possibly, as a principal, through Japanese law theory of “indirect principal” (or “acting through”) another party. Also, on basis of general law theories of aiding and abetting and corporate conspiracy.

Sovereign immunity, “act of State” and “political question”

Objections to lawsuits based on doctrines of sovereign immunity, “act of State” and “political question” are frequently encountered by claimants in ATS-based cases raising issues of business involvement in gross human rights abuses.

The doctrine of sovereign immunity derives from international law principles relating to sovereign equality. The basic rule is that one State cannot sit in judgment of the acts of another. The consequence is that States and their agencies and instrumentalities will be immune from suit in the courts of another State. However, most States now apply a modified version of the doctrine which allows a number of statutory exceptions to sovereign immunity, including exceptions to do with commercial acts. In other words, State authorities, agencies and instrumentalities may not be able to plead sovereign immunity in relation to commercial transactions. China is an exception, in which the doctrine of absolute immunity is still applied. The other key home States reviewed as part of this study each apply a version of “restricted immunity”. However, there are still subtleties in how the statutory exceptions to sovereign immunity are interpreted. United States courts have, on occasion extended sovereign immunity to contractors of foreign States. However this has been controversial.

A related doctrine is that of “act of State”. This doctrine obliges States to refrain from sitting in judgment on the acts of other States of a governmental character done in their own territories. This has been raised in a number of ATS cases but it has not proved a significant obstacle to claims in practice; mainly because of the reason that the doctrine, as applied by the United States courts, only extends to acts that are public, valid and official. As noted in Chapter 2 above, a greater difficulty for claimants in ATS cases in practice has been the doctrine of “non-justiciable political question” under which the

courts will decline jurisdiction over matters that raise issues properly dealt with by the political branches of government (i.e. the executive).

Extraterritorial jurisdiction

In cases where local redress mechanisms do not offer a realistic prospect of remedy, claimants will frequently look to the legal systems of the “home State” of the business enterprise allegedly involved in the abuse.¹⁰¹ However, establishing the jurisdiction of a preferred domestic judicial mechanism can be a significant obstacle in relation to cases where the alleged human rights abuses took place, or the damage arose, in another jurisdiction.¹⁰² It can also be a significant source of delay to legal proceedings.

The rules on the use of extraterritorial jurisdiction are generally more flexible in the private law sphere than in the public (or criminal) law sphere. Extraterritorial criminal law jurisdiction is constrained by rules of public international law designed to ensure respect for territorial sovereignty. Under these rules, States wishing to assert extraterritorial jurisdiction must be able to justify its use in the circumstances against one or more permissive principles (e.g. active nationality principle, passive personality principles or universality, see pp. 42-43 above). On the other hand, the exercise of jurisdiction in the private law sphere tends to be governed by domestic law principles that take account of the “connecting factors” that exist between the claim and the forum State. Most (if not all) States appear to consider that they have jurisdiction as of right over cases involving defendants incorporated under their own laws. However, in some common law States (e.g. the United States, Australia, New Zealand and Canada) the courts may choose not to exercise this jurisdiction if they are satisfied that there exists another more “convenient” forum. In the United Kingdom, the scope of the doctrine has been greatly reduced because of the operation of EU law. The doctrine of *forum non conveniens* is not recognized in civil law States.

In the criminal law sphere, even though universal jurisdiction may be invoked in relation to some offences, States typically require the suspect (if only as a practical matter) to be present in the jurisdiction before commencing proceedings. This is sometimes referred to as “territorialized universality”. However, some jurisdictions impose “double criminality” type provisions as well.¹⁰³

¹⁰¹ See further discussion at section 4.2.1 below.

¹⁰² For a discussion of possible bases of jurisdiction in these cases see International Law Association, *Sofia Conference (2012): International Civil Litigation and the Interests of the Public*, copy available from www.ila-hq.org. For a discussion of the State practice of EU Member States see University of Edinburgh, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*, 2010, copy available at <http://ec.europa.eu/enterprise/policies/sustainable-business/files/business-human-rights/101025_ec_study_final_report_en.pdf>

¹⁰³ Under France’s Rome Statute implementing legislation, for instance, the courts will only take jurisdiction over a resident who has committed crimes abroad, if the conduct is punishable under the laws of the State where the crime is committed, or where the relevant State is party to the Rome Statute, or where the suspect is a national of a Rome Statute State

As Table 6 below shows, the extent to which establishing jurisdiction poses a barrier to claimants in human rights cases varies considerably between key home States for multinationals.

Table 6: Variations in the extent to which domestic law enforcement authorities and courts will assert jurisdiction over extraterritorial cases

State	Under civil (“private”) law	Under criminal law
United States	Yes, if the claimant can establish “minimum contacts” between the defendant and the jurisdiction. The defendant need not be incorporated in the jurisdiction. “Doing business” in the jurisdiction may be sufficient. However, the claim may be dismissed for reasons of <i>forum non conveniens</i> . The Supreme Court has ruled that jurisdiction will no longer be exercised over cases under the ATS brought by foreign litigants against foreign companies involving foreign abuses.	[Note: It is not certain that companies may be prosecuted in the United States for gross human rights abuses amounting to international crimes. The criminal offences (of genocide, war crimes and torture) seem geared towards individual defendants]. Yes, for individuals, based on nationality jurisdiction (genocide, war crimes, torture), passive personality (war crimes, where the victim is a member of US armed forces) and “territorialized universality” (torture, where the perpetrator is found in the United States).
United Kingdom	Yes, if at least one of the defendants is incorporated in the United Kingdom. Because of EU-wide rules on jurisdiction, the doctrine of <i>forum non conveniens</i> only applies in a very limited range of circumstances.	Yes, based on nationality jurisdiction (genocide, crimes against humanity, including torture and war crimes), residence of the offender (genocide, crimes against humanity, including torture and war crimes), universal jurisdiction (torture) and territorial jurisdiction (acts taking place in the United Kingdom and completed elsewhere and vice versa). However, for practical reasons, a physical arrest must be able to take place within the United Kingdom for proceedings to commence.

party, and where no international or national jurisdiction requires the surrender and extradition of the person concerned. See ICRC, ‘National Implementation of International Humanitarian Law: Biannual Update on National Legislation and Case Law, July to December 2010’, 2011, copy available at <http://www.icrc.org/eng/assets/files/review/2011/irrc-881-national-imp-july-dec-ih.pdf>.

<p>France</p>	<p>Yes, if at least one of the defendants has its “seat” in France.</p>	<p>Yes, based on nationality jurisdiction, passive personality jurisdiction and universal jurisdiction (torture, crimes against humanity). However, as a practical matter it will usually be necessary for the offender to be present in the jurisdiction before criminal proceedings can commence. Note also, that in the case of crimes by legal entities, there may not be corporate liability unless the act is criminalized in the State where the abuse takes place, <i>and</i> the concept of corporate criminal liability is recognised in that jurisdiction.</p>
<p>Germany</p>	<p>Yes, if at least one of the defendants has its “seat” in Germany.</p>	<p>[No concept of corporate criminal liability. However, individual officers and executives may be subject to prosecution based on their own acts].</p> <p>Yes, for individuals based on nationality jurisdiction, passive personality, and universal jurisdiction (genocide, crimes against humanity, war crimes). However, as a practical matter it will usually be necessary for the offender to be present in the jurisdiction before criminal proceedings can commence.</p>
<p>Japan</p>	<p>Yes, if at least one of the defendants is domiciled in Japan. However, jurisdiction may be declined if holding the proceedings in Japan would not be fair to the parties and seems contrary to the need for a just and speedy trial.</p>	<p>[Note that liability under Japanese law for gross human rights abuses amounting to international crimes seems confined to individuals].</p> <p>Yes, in relation to individual officers and executives based on nationality and territorial jurisdiction (acts taking place in Japan and completed elsewhere and vice versa).</p>

Non-applicability of criminal law provisions to corporate entities in some jurisdictions

As noted in Chapter 2 above, there are variations in the extent to which different jurisdictions accept the possibility of corporate criminal liability for gross human rights abuses. In some jurisdictions, such as Germany and Russia, criminal prosecutions of corporations (as opposed to individual managers and executives) cannot take place.¹⁰⁴ This in itself may not be a significant barrier to justice if there are other ways of holding corporations accountable in a manner that reflects the gravity of the offences.¹⁰⁵ On the other hand, this study did not uncover any examples of State practice to demonstrate how, in practice, this kind of indirect sanctioning might be applied to human rights cases.

Table 7 below gives a sense of the variation that exists as between five key home States for multinationals in relation to the concept of corporate liability. As will be seen, there is more divergence in the criminal sphere than the civil sphere. There is also variation between States as to whether they are prepared to prosecute nationals and residents (e.g. United Kingdom and France) or just nationals (e.g. United States). In the private law sphere, corporate liability is a possibility in all of the jurisdictions listed in the table above, however there are variations in practice. In Japan, for instance, where there is a strong cultural emphasis on individual responsibility, civil claims against individuals are likely to be favoured, even where there is a potential cause of action against a company too.

Table 7: Variations in whether legal proceedings may be commenced against corporations, individuals or both

State	Under civil (“private”) law	Under criminal law
United States	Corporate entities and individuals	Individuals and possibly corporate entities too (though this is not certain).
United Kingdom	Corporate entities and individuals	Corporate entities and individuals
France	Corporate entities and individuals	Corporate entities and individuals
Germany	Corporate entities and individuals	Individuals only
Japan	Arguably, corporate entities and individuals	Individuals only

¹⁰⁴ See the discussion at section 2.1.2 above. On criminal liability under Russian law, see Oxford Pro Bono Publico, n. 97 above.

¹⁰⁵ See, in relation to Germany for instance, n. 31 above and accompanying text.

Attributing “negligence” and criminal intent to a corporation

As discussed in Chapter 2 above, there are similarities between criminal law and private (i.e. “tort-based”) law in the methods of attribution of the elements needed to prove culpability (i.e. acts plus negligence or intent). It is important to remember, however, that in private law cases choice of law rules are likely to lead to the application of the law of the place where the abuse or damage occurred to determine substantive issues rather than the law of the forum State (see further the discussion immediately below).

Most of the jurisdictions reviewed as part of this study appear to follow the “identification” approach under which the acts and intentions or negligence of senior managers may be imputed to the company for the purposes of establishing corporate liability. However, proving corporate “intent” can present a significant evidential stumbling block for claimants. As discussed in Chapter 2 above,¹⁰⁶ some jurisdictions (e.g. United States and Germany) may apply an “aggregated approach” whereby the knowledge of senior managers can be aggregated together (i.e. it is not necessary to identify one individual who carried out the relevant actions and knew all the relevant facts). None of the States in the sample group below has gone as far as Australia, however, in terms of prescribing an “organizational” test of liability. Nevertheless, there are signs of support for “organizational” approaches to corporate liability in United Kingdom legislation on corporate manslaughter (which draws from concepts of negligence law), in United States sentencing guidelines and in French case law.

Table 8: Variations in the methods used to attribute elements necessary to establish corporate liability (acts and intentions) to corporate entities

State	Under civil (“private”) law	Under criminal law
United States	<p>Vicarious liability for acts of employees carried out within the scope of their employment</p> <p>“Identification” of acts of corporate officers and senior managers as acts of the company itself.</p> <p>Negligence may be inferred in some cases.</p>	<p>Vicarious liability for acts of employees carried out within the scope of their employment</p> <p>“Identification” of acts of corporate officers and senior managers as acts of the company itself (in some circumstances the knowledge of a group of managers can be aggregated for the purposes of establishing corporate knowledge).</p>

¹⁰⁶ See section 2.1.2 above.

<p>United Kingdom</p>	<p>“Identification” of acts of corporate officers and senior managers as acts of the company itself.</p> <p>Vicarious liability for acts of employees carried out within the scope of their employment.</p> <p>Negligence may be inferred in some cases.</p>	<p>“Identification” of acts of corporate officers and senior managers as acts of the company itself.</p>
<p>France</p>	<p>“Identification” of acts of directors as acts of the company itself.</p>	<p>Liability for criminal offences committed on the company’s behalf (including for the company’s benefit) by its representatives.</p> <p>Liability for acts of employees acting on the company’s behalf through explicitly delegated powers.</p> <p>Possible liability on the basis of “negligence resulting from careless and/or defective organization of the company, even if the fault cannot be attributed to a representative or an employee to whom the corporate entity has delegated functions.”</p>
<p>Germany</p>	<p>Wrongful acts of executive officers or directors may be imputed to a corporation, leading to the possibility of joint and several liability of corporation and relevant executive officers and directors.</p> <p>Vicarious liability for acts of employees in some cases.</p>	<p>No corporate criminal liability under German law, but company can be liable to sanctions if a senior representative or employee commits an offence which enriches the company or which violates any legal obligations of the company.</p>
<p>Japan</p>	<p>Vicarious liability for acts of employees when misconduct was committed in scope of employment.</p> <p>Negligence can be inferred in some cases.</p> <p>Strict liability at enterprise level in certain specific contexts.</p>	<p>No general concept of corporate criminal liability in Japan. However, in specific cases an offence committed by a representative, agent or employee of a company can result in sanctions being levied against the company.</p> <p>In cases of offences committed by employees, liability can be based on a rebuttable presumption of negligent appointment and/or supervision.</p>

<p>China</p>	<p>Vicarious liability for acts of employees in the execution of work duties.</p> <p>Strict liability at enterprise level in certain specific contexts.</p>	<p>Liability for decisions made by the unit collectively (through agencies authorised to act on the unit's behalf including the board of directors) and persons in a position of responsibility. However, corporate liability is subject to an "illicit benefit" test. There must have been some illicit benefit to the company as a result of the illegal conduct.</p>
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Additional source materials: Allens Arthur Robinson, *'Corporate Culture' as a Basis for the Criminal Liability of Corporations*, February 2008; Clifford Chance, *Corporate Liability in Europe*, January 2012, copy available at

http://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf.

In private law cases, choice of law rules that tend to favour the law of the place where the damage occurred or the law of the jurisdiction in which the abuses took place

Choice of law rules can pose a potential barrier to remedy where a defendant is being sued in a jurisdiction other than that where the damage occurred or the alleged abuse took place. This is potentially significant in so-called "parent liability" cases where a claimant seeks to establish the legal liability of a parent company by suing that parent company in its home jurisdiction. As noted above,¹⁰⁷ domestic courts will not necessarily apply their own law to determine substantive liability issues in private ("tort-based") law cases. Instead, under conflicts of law rules, the law applied to determine substantive rights and responsibilities will frequently be either the place where the damage occurred, or the place where the abuse occurred. There are no special rules for human rights cases, although US courts have looked to international law for guidance on substantive law issues in ATS-based cases.¹⁰⁸

The choice of law may not make a material difference in cases where the law of the host State and the home State is substantially the same, and where the same or similar facts must be proved in order to establish liability.¹⁰⁹ However, it can be critical where the application of foreign law would bar the claim, for instance under rules relating to statutory workers compensation schemes or on limitation grounds.¹¹⁰ In these circumstances, claimants will seek to invoke "public policy" exceptions to choice of law rules, where possible, which would permit the application of the law of the forum in exceptional cases where the application of the foreign law would be contrary to public policy, which would arguably include cases where to apply the

¹⁰⁷ See p. 51.

¹⁰⁸ See International Law Association, n. 103 above, p. 22.

¹⁰⁹ See Meeran, 'Tort Litigation Against Multinational Companies for Violation of Human Rights', (2011) 3 *City University of Hong Kong Law Review*, pp. 1-41 at p. 15.

¹¹⁰ *Ibid*, p. 16.

foreign law would result in a manifest breach of human rights.¹¹¹ Therefore, while choice of law rules may add procedural complexity, they may not necessarily be the serious barrier to remedy that they first appear. (However, see pp. 86-88 below on the potential influence of choice of law rules on the question of quantum of damages).

Rules that place restrictions on the ability of individual victims, their representatives and other organizations (e.g. NGOs) to initiate and participate in legal proceedings

Pursuing a tort-based claim is a private matter for the claimant. However, when these are pursued as class or collective actions a claimant's ability to influence the conduct of proceedings may be limited in practice. There are also domestic variations in the extent to which representative organizations and NGOs may file proceedings on victims' behalf. US courts have allowed organizations (such as trades unions and a church) to file claims under the ATS on behalf of others. However, in other jurisdictions this practice is more restricted. In France, Germany and the United Kingdom, associations and representative groups only have standing in relation to a limited range of causes of action (such as environmental claims and claims under consumer or competition law).

In the criminal law sphere, individuals do not normally have a great deal of say over how a prosecution is conducted. In this respect, France is a possible exception, where victims of crimes can become a *partie civile*. A *partie civile* has rights to be consulted in the course of the investigation, and the right to make submissions as to liability and sentencing. However, the decision as to whether or not to pursue an *action civile* is still at the French prosecutors' discretion and concerns have been raised about a possible lack of transparency "in explaining why a case does not move forward".¹¹²

A more limited version of victim involvement in criminal proceedings can be found in the United Kingdom, where victims of serious crimes (or their families) may make a "victim impact statement" to the court prior to sentencing.

Prosecutions are normally at the discretion of prosecuting authorities, though there are likely to be some rights of appeal in the event that a prosecutor declines to pursue a case. In the case of prosecutions for international crimes there may be additional procedural requirements. In the United Kingdom and the United States, for instance, the consent of the Attorney General is needed before charges can be laid.

¹¹¹ See University of Edinburgh, n. 103 above, p. 73.

¹¹² Taylor, Thompson and Ramasastry, n. 96 above, p. 19.

Table 9: Variations in domestic law approaches to legal standing and participation among multinational “home States”

State	Persons who may commence proceedings under civil (“private”) law	Persons who may commence proceedings under criminal law
United States	<p>Individuals who have been harmed by the negligence or intentional actions of another.</p> <p>Representatives and relatives may be entitled to bring an action on behalf of a deceased person under general tort law, the ATS and the TVPA.</p> <p>Organizations may have standing to sue under the ATS when their individual members would have standing in their own right and the issues being litigated are relevant to the organization’s purpose.</p>	<p>A victim of a crime can lodge a criminal complaint with the relevant police or prosecuting authorities. After an investigation the relevant state or federal prosecutor’s office takes responsibility for the conduct of the matter. The prosecutor has considerable discretion as to whether to proceed or drop the case, which may be influenced by resourcing considerations or policy directions from the Department of Justice. Special notification, consultation and approval procedures apply in the case of prosecutions for war crimes, genocide and torture. Prosecutions of these crimes require the approval of the US Attorney General’s office.</p>
United Kingdom	<p>Individuals who have been harmed by the negligence or intentional actions of another. In cases where a death gives rise to a cause of action, the deceased’s estate or the dependants should have standing to sue.</p>	<p>Any person may report a crime to the police. If there is sufficient evidence, the matter is referred to the Crown Prosecution Service. All prosecutions of offences of war crimes, crimes against humanity and genocide require the consent of the Attorney General. Private criminal prosecutions are possible in the United Kingdom, but not of “Rome Statute” offences.</p>

<p>France</p>	<p>Individuals who have been harmed by the negligence or intentional actions of another</p> <p>Organizations only have standing to sue on claimants' behalf in limited circumstances and in a limited range of cases (consumer, competition, labour and environmental cases).</p>	<p>Any person can lodge a complaint with the police or the prosecutor's office. The prosecutor then takes responsibility for the conduct of the case. In serious or complex cases, an investigating judge will be appointed. The victim may refer a matter directly to an investigating judge should the police or the prosecutor decide not to investigate.</p> <p>In serious criminal cases, an individual can apply to become a party to a criminal case (<i>partie civile</i>) in order to claim compensation. A <i>partie civile</i> has the right to be consulted in relation to the investigation, to have questions asked at trial and make submissions as to the defendant's liability and the appropriate sentence. Families of victims and certain special representative organizations may have themselves recognised as a <i>partie civile</i> in a criminal law.</p>
<p>Germany</p>	<p>Individuals who have been harmed by the negligence or intentional actions of another.</p> <p>Organizations only have standing to sue on claimants' behalf in limited circumstances and in a limited range of cases (consumer and competition cases). They are unlikely to have standing in human rights cases.</p>	<p>Victims and others can file a criminal complaint. Following an investigation, the Federal Prosecutor's Office decides whether charges should be laid.</p>
<p>Japan</p>	<p>Individuals who have been harmed by the negligence or intentional actions of another.</p>	<p>National public prosecutors have wide discretion as to whether to pursue criminal proceedings or not. There is a legal avenue by which a victim can get a matter referred for trial even when the public prosecutor has declined to pursue it, though this route is rarely used in practice.</p>

Lack of readily applicable criminal offences or appropriate causes of action

The Rome Statute has led to a certain amount of convergence in domestic criminal law approaches to gross human rights abuses, and in some jurisdictions liability has been extended to corporate entities as well as individuals. However, there are still a number of jurisdictions in which prosecutions of corporate entities for gross human rights violations (as opposed to their individual managers and executives) cannot take place. Among those States where corporate criminal liability for gross human rights abuses is a theoretical possibility, there is much uncertainty about the scope of application in practice. Few legal systems have created criminal law regimes that address corporate involvement in gross human rights abuses specifically and explicitly, and fewer still have ever entertained proceedings.¹¹³

Among the jurisdictions reviewed for the purposes of this study, the only private law redress mechanisms to recognize a cause of action for human rights *as such* is the US ATS (although there are legal systems where it is thought that the breach of an international norm could potentially provide the element of wrongfulness to form the basis of a private law action under domestic law). Nevertheless, the application of the ATS to private (i.e. non-State) companies has always been controversial. In other jurisdictions, claimants seeking redress for gross human rights abuses must make do with existing categories of wrongs that do not adequately describe the gravity of the allegations. Moreover, there are a number of violations that do not fit well into existing categories, such as apartheid.¹¹⁴

Statutes of limitations

Another consequence of relying on general tort law to bring human rights claims is that general rules on limitation periods will apply, which may not be consistent with international statements in rights to redress in respect of gross human rights abuses. As noted above (see section 3.4.6) the 2005 Basic Principles state that time limits applicable to civil claims “should not be unduly restrictive”. In interpreting this requirement, account needs to be taken of the special considerations that apply “if the victims live in a country where the courts are overburdened or ineffective, or where they face threats and repression if a case were to be launched.”¹¹⁵ In some States, however, limitation periods for tort-based cases can be very short indeed, with periods of between two and four years reported in some cases.¹¹⁶ Although it is possible to get these time limits extended in certain circumstances (usually relating to considerations of justice, including the inability of the claimant to bring the claim within the relevant time frame), this adds to the procedural complexity of a case. Several of the cases profiled in Appendix 2 have been challenged, and some have been dismissed, on limitation grounds.

¹¹³ See discussion at pp. 91-92 below.

¹¹⁴ See further discussion at paragraph 2.2.2 above.

¹¹⁵ Taylor, Thompson and Ramasastry, n. 96 above, p. 16.

¹¹⁶ *Ibid.*

4.1.2 Practical and financial barriers

Limited availability (or non-availability) of legal aid

Human rights litigation is complex, costly and uncertain. The costs of legal counsel, expert witnesses, transport and other services (including translation services) put this kind of litigation beyond the reach of most people. Lack of availability of legal aid (or other forms of financial assistance for claimants) is therefore a significant barrier to remedy. According to a recent report, “many countries do not provide legal aid at all and in other countries it is available only for criminal defendants. In countries where it is available for civil plaintiffs, it may not be sufficient to pay the high costs of international human rights litigation”.¹¹⁷ As Table 10 below shows, some jurisdictions limit eligibility for legal aid to citizens only. The United Kingdom’s legal aid system has historically been one of the more generous but has recently been pared back as a cost-saving measure by the current UK government.¹¹⁸

Table 10: Variations in the availability of legal aid in civil cases

State	Availability of legal aid
United States	Legal aid is available to US citizens based on income but is unlikely to be adequate to fund civil action on its own. However, claimants unable to pay for legal representation may be able to access pro bono services.
United Kingdom	Legal aid is available for civil claims on a means tested basis. Legal aid is not available for civil prosecutions of criminal matters, except in very exceptional cases.
France	Legal aid may be available to French citizens or nationals on a means-tested basis.
Germany	Legal aid may be available in civil cases, subject to a means test and a “merits test” (claim must have a reasonable chance of success).
Japan	Legal aid may be available, on a means tested basis.

¹¹⁷ Taylor, Thompson and Ramasastry, n. 97 above, p. 20.

¹¹⁸ The UK government’s proposals to make changes to the availability of legal aid and to change regulations relating to lawyers’ fees prompted a letter from the SRSG, Professor John Ruggie. For the text of the letter plus media commentary, see <http://www.theguardian.com/law/2011/jun/16/united-nations-legal-aid-cuts-trafigura>.

<p>China</p>	<p>Legal aid may be available to Chinese citizens and residents on a means tested basis. It is only available to individual claimants, not to representatives or organizations. The budget is comparatively small and supplemented by pro bono services made available through various campaigns and initiatives, many of which are government sponsored or endorsed.</p>
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Additional source material: Linklaters, *Collective Actions Around the Globe: A Review*, 2011. Leibman, 'Class Action Litigation in China' (1998) *111 Harvard Law Review* 1523.

“Loser pays” rules

The problem is well summarised in the following extract:

“A great majority of countries have the “loser pays” rule, whereby the losing party in litigation pays the legal costs of the winning party. In a number of countries, such as Japan, India and the Philippines, it was reported that courts often do not implement this rule strictly. However, for victims, the “loser pays” rule raises the frightening specter of being faced with an enormous bill for adverse costs. Given the large legal expenditures that business entities are willing to make in defending human rights cases, the financial risk is significant.

The “loser pays” rule presents a major obstacle for any type of class action or other form of aggregation of claims. Several participants related how they have been forced to name as plaintiffs only those victims who are willing to face the risk of adverse costs because they have nothing to lose, i.e. they are completely indigent. As a result, all other victims face the prospect of forfeiting their claims due to statutes of limitations. Thus, justice is denied for victims who are afraid of losing whatever little resources they may have. The dampening effect of the “loser pays” rule obviously makes it difficult for victims to assemble a sufficiently large group to make a civil case sustainable over the lengthy periods such cases can take. Some financial arrangements can ease this burden. In the U.K. for example, it is possible to purchase “after the event” insurance which insures the policy holder against the risk of having to pay the legal fees of their opponent under the “loser pays” rule.”¹¹⁹

Impermissibility of contingency fee arrangements

Contingency fee arrangements significantly reduce the financial risks faced by claimants by allowing legal counsel to bear the burden of litigation expenses on the basis that, if successful, lawyers can have their fees and disbursements refunded out of the settlement or court award in favour of the claimant. In some jurisdictions, an uplift is permitted to compensate for the risk to the law firm concerned. While some governments have recently been relaxing rules on contingency fees (see Table 11 below) there are still bans on the use of contingency fee arrangements in many jurisdictions, either under

¹¹⁹ Taylor, Thompson and Ramasastry, n. 97 above, p. 21.

law, or as a result of professional rules and practice standards for lawyers.¹²⁰ In jurisdictions where they are permitted, there are often restrictions on the amount that can be reclaimed in this way, which can vary from State to State. There may also be variations in the circumstances in which these arrangements can be made available.

Table 11: Variations in the position with respect to contingency or “conditional” fees in civil cases

State	Position with respect to contingency fees
United States	Contingency fee arrangements are permitted.
United Kingdom	Rules on “damages based orders” allow lawyers to work on a contingency fee basis, taking up to a 50% share of general damages, or a 25% share in personal injury and clinical negligence claims.
France	Contingency fees are not permitted, although it is permissible to agree on a success fee which is payable in the event of a successful conclusion of the case.
Germany	Contingency fees are permitted in individual cases where the claimants could not access legal representation otherwise. In other cases, no-win-no fee agreements (where lawyers are entitled to higher than statutory remuneration if successful) are permitted.
Japan	Contingency fee arrangements are permitted in Japan.
China	Contingency fee arrangements have been permitted (without being officially sanctioned) but have been banned in relation to class actions.

Additional source material: Linklaters, *Collective Actions Around the Globe: A Review*, 2011. Leibman, ‘Class Action Litigation in China’ (1998) *111 Harvard Law Review* 1523.

Lack of availability of suitably qualified and experienced legal counsel prepared to act for claimants

Victims and their representatives have reported difficulties in finding an attorney who is willing to represent them in human rights litigation against companies.¹²¹ The reason for the small pool of lawyers and law firms prepared to take on human rights litigation for claimants was a subject of inquiry during the course of the SRSG’s mandate. One reason given is that

¹²⁰ Taylor, Thompson and Ramasastry, n. 97 above, p. 21.

¹²¹ Ibid, p. 17.

the litigation is so complex, and the outcomes so uncertain, and the prospect of securing sufficient legal aid to cover costs so unlikely, that few law firms can take on the risks associated with work of this kind. Another reason given is that:-

“in many emerging market countries, the relatively few major law firms are primarily working for the large companies, and conflict of interest issues could arise if one of their attorneys undertook a suit against one of their clients.”¹²²

As noted above, lack of access to legal counsel is not a problem confined to emerging market countries:

“there are also relatively few law firms taking such cases in countries with larger industrialized economies. But in countries with a smaller number of law firms and attorneys, the existence of a relatively small pool of potential practitioners presents a huge challenge. Even if attorneys in such jurisdictions do not have a conflict of interest with a business, they might be reluctant to represent plaintiffs in litigation against corporate entities for fear of losing future business. Lawyers who work for nongovernmental organizations often are best placed to bring civil suits but in order to do so must have adequate funding in place to engage in protracted litigation.”¹²³

Non-availability of, or complexities associated with, collective action arrangements

Many jurisdictions now provide for some kind of collective action which, though not necessarily having all of the benefits to claimants of the “US style opt-out” class actions, do still have the potential to reduce legal fees and risks for claimants.¹²⁴ These arrangements allow claimants to pool their resources and avoid duplication of legal costs and have proved enormously significant in improving access to justice in practice, especially in cases where the financial value of individual awards may not be high. As Table 12 below shows, collective actions are now widely available at domestic level, though with variations between States in their operation and the types of claims in which they may be used.

However, collective action arrangements are not permitted in every jurisdiction. And those collective action arrangements that are permitted do not always meet the particular needs of claimants in cases involving gross human rights abuses. Some practitioners have criticised “opt-in arrangements” that require that each claimant be named in court filings:

“Victims may decline to join in such suits for a variety of reasons, including fear of reprisals or exposure to adverse costs. ... In addition, settlements may run only to the benefit of named plaintiffs in a particular lawsuit, meaning that

¹²² Ibid, pp 17-18.

¹²³ Ibid, p. 18.

¹²⁴ D. Hensler, ‘The Future of Mass Litigation: Global Class Actions and Third Party Litigation Funding’, (2011), 79 *The George Washington Law Review*, 306, at p. 307. See also Linklaters, *Collective Actions Across the Globe – A Review* (2011).

other victims may not be compensated. The lack of aggregation mechanisms in many countries may mean that only a few plaintiffs are actual parties in a lawsuit. It was pointed out that even the ability to file complaints using fictitious ‘John Doe’ plaintiffs (as is permitted in the U.S.) would greatly benefit civil practice in this area.”¹²⁵

Table 12: Variations in the position with respect to collective actions

State	Position with respect to class actions
United States	Procedural rules allow for “opt out” class actions.
United Kingdom	“Opt in” collective actions are provided for in the United Kingdom under “group litigation orders” or “representative actions”.
France	Group or “collective” actions are only available in limited circumstances (e.g. for claims under consumer, competition and environmental law). However, it is possible in some circumstances for some associations to bring an action for damages before a civil or criminal court where a criminal offence has been committed.
Germany	No mechanism for class actions, but German Civil Procedure allows multiple claims based on the same facts against the same defendant to be heard simultaneously. The proceedings are run as a single trial and one judgment is given.
Japan	Rules on civil procedure provide for possibility of joinder (or consolidation) of claims raising similar legal issues and based on the same or similar facts and against the same defendant. Also, there is the possibility of “opt-in” representative actions.
China	Chinese civil procedure rules provide for consolidation of claims (where they are based on similar facts against the same defendant) and two kinds of “opt in” representative action.

Additional source material: Linklaters, *Collective Actions Around the Globe: A Review*, 2011. Leibman, ‘Class Action Litigation in China’ (1998) *111 Harvard Law Review* 1523.

Concerns about corruption, lack of impartiality of courts, fears of reprisals, and intimidation of witnesses

As noted elsewhere in this report, the risks of business involvement in gross human rights abuses are likely to be highest in conflict-affected areas, and areas of political instability. In these circumstances, legal systems are unlikely to be working as they should. Previous studies have highlighted numerous examples of cases where, it is claimed, corruption, intimidation and

¹²⁵ Taylor, Thompson and Ramasastry, n. 97 above, p. 15.

politically motivated blocking legislation have resulted in denials of access to justice for victims.¹²⁶

Lack of resources and specialised expertise within prosecution bodies

The last two decades have seen attempts to strengthen the capacity of domestic law enforcement bodies to deal with cases involving gross human rights abuses through the criminal law system. As discussed in section 4.2.2 below, this has been done in some cases by the creating of specialised units. However, many domestic prosecutors still do not have access to this specialist expertise and resources.¹²⁷ In addition:

“prosecutors face real dilemmas with respect to priorities: there is an inevitable conflict between the priority to be given to international crimes – with which only a few prosecutors have much experience - and that of all of the other types of crime within a prosecutor’s jurisdiction. International crimes of the type discussed at the Conference involves distant events and mostly foreign victims. Thus, while constructive steps forward with respect to international crimes have been taken in some jurisdictions (e.g. Canada, Norway, The Netherlands, the U.S.), the extra efforts required to get access to victims, to evidence, the unfamiliarity of the judges with the issues at hand, and the costs of undertaking international prosecutions, all militate against prosecutors taking on such cases. ... it will require significant political will, backed by resources, before such prosecutions become a priority”¹²⁸

Discovery problems

Discovery is the process by which parties to civil litigation gain access to the information needed to prove or defend a claim. In addition, discovery orders can, in certain circumstances, be made against third parties, including government entities. However, in practice, this process is complex and time consuming. Applications for information from government sources are likely to be resisted on national security grounds, and these claims are usually given “considerable deference” by courts.¹²⁹ Using domestic law discovery procedures to gain access to information from abroad is fraught with difficulty and can result in political tension, especially where there are divergences in the scope of discovery rules between the relevant jurisdiction. As one practitioner explains against the background of ATS litigation in the United States

“U.S. civil procedure allows for far broader discovery than other nations [footnote omitted]. Foreign jurisdictions, therefore, often view U.S. discovery orders with hostility and attempt to block U.S. efforts to examine evidence and witnesses located on their soil ... U.S. courts are among the few in the world

¹²⁶ See Oxford Pro Bono Publico, n. 97 above; Taylor, Thompson and Ramasastry, n. 97 above, pp. 24-25.

¹²⁷ See Taylor, Thompson and Ramasastry, n. 97 above, p. 18.

¹²⁸ Ibid, pp. 18-19.

¹²⁹ B. Stephens, *International Human Rights Litigation in the United States Courts* (2008, Koninklijke Brill NV, Leiden), p. 485.

willing to issue orders to any party over whom they have jurisdiction even if those orders relate to evidence found on other nations' territory. Foreign jurisdictions may resist what many view as unwarranted extraterritorial application of U.S law and civil procedure".¹³⁰

Insufficiency of damages (or sanctions) in many cases and enforcement problems

Although claimants are not necessarily motivated solely (or even primarily) by the prospect of financial remedies, the probability that a claimant will, at best, only receive a very small amount of damages (especially where the claimant is one of a very large group for the purposes of collective action proceedings) may dissuade many claimants from pursuing legal action in the first place.¹³¹ The prospect of only a small compensation award (at best) will also add to the difficulties of securing counsel (see pp. 81-82 above) on a contingency fee basis. To date, there have been few cases where claimants have secured substantial damages awards or settlements in cases alleging business involvement in gross human rights abuses. The cases of *Nippon Steel & Sumitomo Metal Court* (see case study 3, p. 17 above) and *Curacao Drydock Company* (see case study 5, p. 18 above) are possible exceptions, both cases involving judgments against companies domiciled outside the forum State. This can give rise to further procedural difficulties. Even where the claimant is successful, the need to enforce the judgment and distribute the proceeds can add further costs and complexity, especially where the defendant is domiciled in another jurisdiction. Divergences between States in their approach to damages (e.g. in the extent to which "punitive" or "exemplary" damages are permitted) can create problems for enforcement of damages awards in other States. There may be an order of magnitude of difference between damages awards for the same injury between the United States courts and European States. Differences in domestic approaches to damages can also lead to difficulties for claimants in jurisdictions where choice of law rules lead to the application of foreign law, not just in relation to substantive issues, but in relation to the determination of quantum and heads of damages as well.

For criminal cases, the outcome of a successful prosecution against an individual for involvement in gross human rights abuses may be a lengthy prison term, especially where those abuses amount to international crimes. For corporations, a fine is the likely primary sanction although other alternative or additional sanctions, designed specifically for corporate entities, may be imposed. As discussed above, fines can be less than satisfactory as a method of punishing gross human rights abuses and the maximum fines provided by legislation may carry neither sufficient deterrence, nor sufficient public condemnation of the activities involved. These sanctions usually offer no prospect of financial compensation to victims, although in some jurisdictions (e.g. France) it is possible for a compensation order to be made

¹³⁰ Ibid, p. 486.

¹³¹ See Taylor, Thompson and Ramasastry, n. 97, p. 22.

in favour of victims who have declared themselves *parties civile* as part of the sentencing process.

Table 13 below gives a sense of the variations that exist as between key home States for multinationals as regards the question of damages in civil cases, and also in terms of the sanctions that may be available in criminal cases involving corporate defendants.

Table 13: Variations in sanctions and remedies

State	Under civil (“private”) law	Under criminal law
United States	Compensatory and (potentially) punitive damages. Damages awards in the United States can be very large compared to those typically awarded in other jurisdictions.	Fines. Note also that in some contexts compliance plans may be requested as part of “corporate probation”. Another sanction applied in the US against companies is being struck off procurement lists.
United Kingdom	Usually compensatory damages plus possibility of aggravated or exemplary damages in very exceptional or severe cases.	Primarily fines.
France	Compensatory damages.	<p>Fines. (The maximum fine for a company is five times that which would be applicable to an individual offender).</p> <p>Other types of punishment provided for under the Criminal Code include dissolution, prohibition to undertake certain activities, placement under judicial supervision, closure of the establishments, disqualification from public tenders, limitations on access to credit or funding, confiscation of anything used for the commission of the offense, the public display or broadcasting of the sentence.</p> <p>Dissolution is reserved for extreme cases only. Confiscation of assets is another possible penalty.</p>

Germany	Compensatory damages.	Not applicable. However, individual executives and officers would be subject to lengthy prison sentences.
Japan	Compensatory damages.	Fines, and property can also be confiscated as a “subordinate punishment”.
China	Compensatory and in some cases aggravated damages.	Fines (there appears to be a fair amount of discretion, depending on the gravity of the offence). “Double punishment” is more common for intentional or serious crimes where the company will be given a fine and responsible individuals will be sanctioned separately.

4.1.3 Barriers to justice: some conceptual problems

Clearly, victims of gross human rights abuses wishing to seek redress through domestic judicial mechanisms face many obstacles in doing so. As noted in the previous Chapter, the UN Guiding Principles call on all States to “take appropriate steps to ensure the effectiveness of domestic judicial mechanisms ... including considering ways to reduce legal, practical and other barriers that could lead to a denial of access to remedy”.¹³² But despite the attention given to the problem of barriers to justice, in the course of the SRSG’s mandate and beyond, there is still a lack of consensus as to which *specific* features of *specific* jurisdictions amount to unacceptable barriers to justice *in practice*. The UN Guiding Principles provide a number of indicative examples of the factors which may potentially create barriers to justice for claimants,¹³³ but there is still much room for interpretation regarding the lengths to which States should go to in practice, and the practical steps they should take, in terms of reforming legal systems, amending rules of civil procedure, providing public financial support for litigants and boosting the resources available to public prosecutors. These are all issues that States should address in their national implementation plans for the UN Guiding Principles. However, there is still a lack of information as to how most States are planning to respond.

In the circumstances it is tempting to try to supply the missing “benchmarks” for State action through side-by-side comparisons of different legal systems and approaches, or from other theoretical models, but there are problems with trying to define barriers to justice using these methods. First of all, side by side comparisons of features of legal systems (or the lack of them) can be misleading. For instance, the presence of a helpful feature in State A that

¹³² UN Guiding Principles, Guiding Principles 26.

¹³³ UN Guiding Principles, Guiding Principles 26, Commentary.

does not appear in State B does not necessarily imply a “barrier” in State B, especially if this lack is compensated for in other ways. Defining barriers by reference to an abstract set of demands (however determined) is also problematic as the identification process becomes subjective to whoever is defining what the benchmark or overarching aims should be. Secondly, as features of domestic legal systems may have been developed in a particular legal context, or to fulfil a specific domestic law need, they cannot always be so easily exported from one jurisdiction to another.. Thirdly, it is important to be alert to the possibility of unintended consequences. Legal systems are not made up of a series of unrelated parts. If they work well, they are more likely to be highly integrated and mutually reinforcing. It may not be possible to alter one aspect of a legal system without creating problems and anomalies elsewhere. (This issue is explored more fully, specifically in relation to domestic legal responses to the problem of business involvement in gross human rights abuses, in the next Chapter, see section 5.1).

Sound comparative analysis involves not merely identifying similarities and differences between legal systems but analysing their effects in light of the structure and functioning of the whole. The concept of a “barrier to justice” is still a useful one, but care must be taken to ensure that it does not lead to simplistic analyses of legal systems, circular arguments and cherry picking. To avoid this, and to ensure that the debate about barriers to justice progresses in a productive and objective way, more work, and consensus-building is needed on questions relating to practical implementation of UN Guiding Principle 26, at a far more detailed level than has been done so far.

4.1.4 Consequences of barriers to remedy

There is clearly great variation between different jurisdictions in the nature and extent of the barriers encountered by claimants and complainants. However, it seems likely that there are barriers of some kind in every jurisdiction, and in many jurisdictions these are sufficiently serious as to be potentially prohibitive to prospective claimants. The lack of ability to access domestic judicial mechanisms and use them to enforce human rights effectively not only gives rise to concerns about impunity, it also suppresses legal development. Uncertainty and risk inhibits resort to private law remedies and the lack of use of domestic mechanisms is perpetuating uncertainty and risk. A way needs to be found to break this deadlock.

Furthermore, as will be discussed in more detail at 4.2 below, serious barriers to remedy in many jurisdictions are causing victims and their representatives to reject local options in favour of pursuing remedies in foreign jurisdictions (typically the place of “domicile” of the parent company of a multinational enterprise) with all the additional costs, uncertainties, logistical difficulties and legal challenges that this entails. This has not only led to diplomatic problems, it also has adverse effects in terms of capacity building at local levels in that problems of lack of legal and judicial resources and expertise become entrenched through lack of demand.

Box 5: Consequences of barriers to remedy at domestic level: a summary

- Victims of business involvement in gross human rights abuses are denied access to justice in many cases;
- Additional costs, complexity and delays for parties to civil litigation;
- In many cases, a lack of realistic prospect of effective remedies in the place where the abuse occurred;
- Resort to litigation in a foreign venue as an alternative, resulting in further costs and complexity, and also the possibility of political tensions over issues such as extraterritorial jurisdiction, discovery and enforcement;
- Lack of legal development and capacity building at the local level, with adverse impacts on future responsiveness and effectiveness;
- Lack of legal certainty and legal accountability for companies.

4.2 Distortions in patterns of distribution and use of domestic legal mechanisms

This section considers how the separate but related problems of (a) barriers to justice at domestic level and (b) differences in legal standards and conditions from jurisdiction to jurisdiction are affecting patterns of distribution and use of domestic judicial mechanisms. Section 4.2.1 describes the key features of present patterns, based on the evidence gathered for the purposes of this study, and section 4.2.2 identifies some recent developments that have the potential to alter this picture in the future.

4.2.1 The present picture

The United States is overwhelmingly dominant in the field of private redress mechanisms

Of the approximately 40 legal proceedings reviewed for the purposes of this study,¹³⁴ more than 20 were civil actions under the ATS and, in many cases, the TVPA as well. The most obvious reason for this is the availability of a special cause of action under the ATS for “torts in violation of the law of nations”. The scope and intentions behind this more than 200-year old statute have been the subject of much debate. However, it seems settled law, for the time being, that it does provide a cause of action against private actors, including (though more controversially) companies.

The geographical scope of the ATS is also significant. The landmark case of *Filartiga v Pena-Irala*¹³⁵ first drew attention to its potential as a means of holding individuals accountable for human rights violations outside the US. Since then, many cases have been brought against companies alleging complicity in human rights violations by State authorities. A number of these are profiled in section 1.2 above. However, it must be noted that the recent case of *Kiobel v Shell* has the potential to significantly limit the ability of

¹³⁴ See Appendix 2 for Table of Cases.

¹³⁵ 630 F 2d 876 (2d Cir). 1980).

plaintiffs to pursue cases under ATS in the future in relation to extraterritorial violations. This case is discussed in more detail below. It should still be possible for foreign claimants to bring lawsuits under State law. A number of the extraterritorial cases profiled above which were brought under the ATS also pleaded torts under State law. However, these may be more vulnerable to dismissal under the doctrine of *forum non conveniens*.

Criminal prosecutions are more likely to take place against individual executives than corporate entities

Although criminal prosecutions of corporate entities for gross human rights violations (including on the basis of complicity) would appear to be at least a theoretical possibility in a number of jurisdictions (see Table 7, p. 72 above), they are rare in practice and none of the cases reviewed for the purposes of this study has resulted in a conviction against a corporation. However, the Dutch courts have hosted at least two criminal prosecutions of individuals for complicity in gross human rights abuses as a result of their business dealings.¹³⁶ In 2005, the District Court of The Hague convicted Frans Van Anraat of war crimes as a result of his delivery, as an export broker, of thousands of tons of thiodiglycol to Saddam Hussein's regime, which was then used to create mustard gas. The conviction was based on the finding that he had "consciously and solely ... in pursuit of gain ... made an essential contribution to the chemical warfare program of Iraq".¹³⁷ Another Dutch businessman, Guus Kouwenhoven, was prosecuted under Dutch law for war crimes in Liberia and Guinea and violations of the terms of an arms embargo after his name appeared in reports by a UN Committee of Experts and the NGO Global Witness respectively. However, he was acquitted of the charges relating to war crimes at first instance in 2006, and of the remaining charges on appeal.

Case study 11 (see p. 20 above) relates to a complaint against a senior manager of the parent company of the Danzer Group. As noted above, this complaint was filed in a German court in April 2013 by NGOs Global Witness and the European Centre for Constitutional and Human Rights. In Germany, criminal complaints of this kind must necessarily be made against individuals (rather than corporate entities) as corporations cannot, under German law, be held criminally liable. However, even where criminal prosecutions of corporate entities for gross human rights abuses is a legal possibility, uncertainties about the application of international criminal law to companies (not to mention the challenges involved in proving a corporation's "state of

¹³⁶ There were a number of successful prosecutions of individual executives by the British and American military tribunals at Nuremberg arising from contributions by certain companies to atrocities committed by the Nazi regime. This study, however, is concerned with civilian courts.

¹³⁷ *Public Prosecutor v Van Anraat, UN AX6406, The Hague District Court, 23 December 2005, para. 17.* Quoted in International Commission of Jurists, 'Corporate Complicity', n. 11 above, Vol. 2, p. 22. Van Anraat was, however, acquitted of being an accessory to genocide. He unsuccessfully appealed his conviction for war crimes in 2007 and is now serving a seventeen-year prison term. In April 2013, the District Court of the Hague ordered Anraat to pay compensation to 17 people injured by chemical weapons attacks against Kurdish people in 1988.

mind” for the purposes of a criminal law conviction) may well cause prosecutors to focus on individual rather than corporate wrongdoing. Further examples of prosecutions of individual executives and employees (rather than companies) are mentioned in Appendix 2.

Criminal law redress mechanisms are used to a greater extent in civil law jurisdictions than in common law jurisdictions. On the other hand, complainants in common law jurisdictions overwhelmingly favour private law redress mechanisms.

Of the sample of 40 or so sets of legal proceedings gathered for the purposes of this study (see Appendix 2), around 30 were commenced in common law jurisdictions and around 17 in civil law jurisdictions. Of the cases commenced in common law jurisdictions, all but one are private law (i.e. tort-based) actions for compensation. On the other hand, of the legal proceedings that have been commenced in civil law jurisdictions, well over half were commenced as criminal law complaints.

Table 14: Numerical breakdown of cases involving corporate entities (and/or their officers) by type of jurisdiction (“common law” and “civil law”) and by type of proceedings (i.e. criminal law versus private law remedies)

Common law jurisdictions			Civil law jurisdictions		
Forum State	No. of criminal law cases	No. of private law actions	Forum State	No. of criminal cases	No. of private law actions
United States	1	27	Netherlands	3	0
Canada	0	2	France	2	2
United Kingdom	0	1	Germany	1	0
			Belgium	1	0
			Japan	0	1
			South Korea	0	1
			Argentina	1	1
			Switzerland	0	1
			Peru	1	0
			Colombia	1	0
			DRC	1	0
Total	1	30		11	6

* Note that it is difficult to quantify the number of civil claims brought in civil law jurisdictions due to the number of class actions and consolidated claims. For the purposes of this table, a set of claims arising from the same or similar facts is treated as a single “case”.

Source: The Business and Human Rights Resource Centre website, <http://www.business-humanrights.org/>. The South Korean case referred to above is not referred to on this website but is profiled in this study, see case study 3, p. 17 above.

Proceedings are only rarely instituted in the jurisdiction where the abuse is alleged to have occurred (and only in a limited range of cases)

Of the 48 case studies that make up the sample for Table 14 above, in only nine cases were proceedings (whether criminal or civil) instituted in the courts of the same State as where the abuse and damage is alleged to have occurred. These cases (indicated by the coloured lines in Fig. 1 below) included

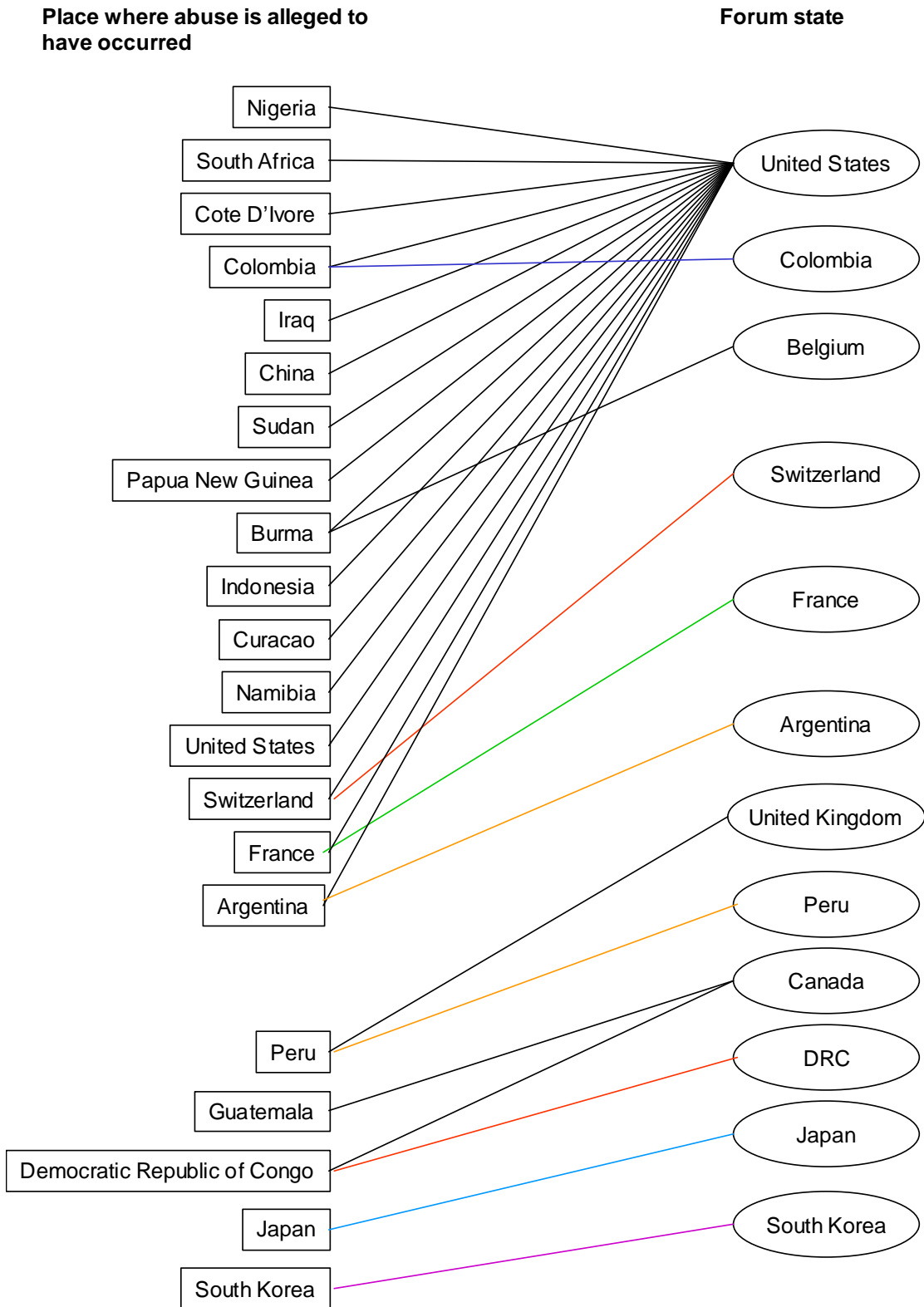
- a slavery reparations case (United States);
- a claim by three holocaust survivors in the French courts alleging complicity by SNCF in human rights abuses by the Nazi regime (France);
- a claim by orphaned children of Roma families against IBM alleging complicity in holocaust killings (Switzerland);
- proceedings against Ford (both criminal and civil) alleging conspiracy with the Argentinean military dictatorship to commit grave human rights abuses including abductions and mistreatment of workers at Ford premises (Argentina);
- a claim by South Korean workers against Japanese companies for compensation for forced labour suffered during the Japanese colonisation of South Korea (South Korea); and
- a claim by Chinese workers against a Japanese company for damages for forced labour they suffered during World War II (Japan). It is worth noting, as an aside, that cases based on the same or similar facts to the Swiss, French and Argentinean cases were also litigated in the US courts under the ATS.

Of these nine exceptional cases, four relate to historic abuses that took place in the course of World War II. Not all of these cases were initiated following a change of regime, but most of these legal actions were conducted within a legal framework and against a legal and political background very different from that in existence when the abuse took place. Finally, it is worth noting that six of these cases were also the subject of private law claims. However, several of these were subjects of parallel criminal law proceedings as well.

The frequency and distribution of extraterritorial cases (see Fig. 1 below) suggests that there are many jurisdictions where claimants are so pessimistic about their chances of obtaining remedy in their home courts (whether because of concerns about their own safety, lack of judicial resources, or

corruption, or other reasons) that they are prepared to go to the significant trouble, expense and inconvenience of litigating their cases far away.

Fig 1: Destinations of proceedings compared to place where abuse is alleged to have been caused



As noted above, the vast majority of private law claims relating to business involvement in gross human rights abuses have been commenced in the US courts. The presence of a specific cause of action – which has been interpreted to cover human rights violations by private actors – is obviously an important factor. However, there are a number of other influences too, including relatively flexible rules on personal jurisdiction, the ability to constitute claims as class actions, a legal culture that encourages pro bono services, the availability of contingency fees, flexible rules on standing, favourable procedural rules (e.g. as regards discovery), jury trials in civil cases, potentially generous compensation awards and the possibility, if successful, of punitive as well as compensatory damages.

Private law cases against corporations are frequently settled out of court

Of the tort-based cases that make up the sample used in this study (around 36), settlements have been achieved in around six cases. However, the number of cases that have been dismissed is more than double this.

The decision whether or not to settle a case – and for what value – is often a difficult and complex one. Parties will take into account the likely risks and benefits of proceeding further which will include an assessment, especially on the defendant's side, of the potential risks to corporate reputation. Uncertainties about the way a court will approach a particular legal question will often steer the parties towards a settlement. For this reason, legal cases (and especially cases under the ATS) are frequently settled once they pass a crucial procedural stage. While each settlement may well be a welcome development for the litigants themselves (each side having been advised as to his or her best interests), it also means that key legal issues may not be conclusively resolved.

Claims against corporations under the ATS rarely make it to trial

Of the many private-law cases under the ATS that were reviewed for the purposes of this study (see Appendix 2), only three reached trial (*Estate of Rodriguez v. Drummond Co*, *Licea v. Curacao Drydock Co*, *Bowoto v Chevron*). Of these three cases, two resulted in dismissals and one resulted in a default judgment against the defendant (which had entered an appearance but had not appeared in court to defend the action).

Grounds for dismissal of the remaining lawsuits varied from case to case but included lack of subject-matter jurisdiction (e.g. on the grounds that corporate liability was not within the scope of the ATS as it was not recognized under international law, or because of the absence of “State action” necessary to bring the claim within the scope of the ATS), lack of jurisdiction over foreign acts (see in particular the discussion on *Kiobel v Shell* immediately below), failure to plead sufficient facts to show a case to answer based on accessory liability, sovereign immunity, non-justiciable political question, concerns about national security, defence contractor immunity, lack of standing of claimants,

expiry of limitation periods, and non-exhaustion of local (i.e. non-US) remedies.

4.2.2 Developments and trends that may alter patterns of distribution and use in future

The curtailing of extraterritorial jurisdiction under the ATS following Kiobel v Shell

On 17 April 2013, the US Supreme Court handed down its landmark judgment in the case of *Kiobel v Shell* (see case study 13, p. 20 above). The effect of the decision is substantially to curb the ability of non-US claimants to sue in US courts under the ATS in relation to damage occurring outside the United States. The decision could result in the dismissal of many of the ATS-based cases currently pending.

Kiobel v Shell concerned allegations that members of the Shell group of companies (incorporated in the Netherlands, the United Kingdom and Nigeria respectively) had been complicit in gross human rights abuses in Nigeria. Since its inception, the lawsuit had been challenged repeatedly on the issue of jurisdiction, and indeed had been dismissed on several occasions in the lower courts because judges had been unconvinced that the claimants had established that the case had sufficient connections with the United States. Following the dismissal of the whole complaint by the Second Circuit, (on the grounds that corporate liability is not recognized by the law of nations and hence outside the scope of the ATS), the matter was referred to the Supreme Court. Following oral argument the Court delivered a judgment that is likely to have far-reaching implications for the future of litigation of human rights cases in domestic courts.

The judgment turned on whether the “presumption against extraterritoriality” (a principle of statutory interpretation applied in the United States) applied to the ATS and, if so, how it should be applied in the particular case. The majority held that the presumption against extraterritoriality should indeed apply under the ATS, the effect of which would be that a case that does not “touch and concern” the United States “with sufficient force to displace the presumption” would be dismissed. On this basis, the decision was taken to dismiss the actions in *Kiobel v Shell*; a case brought by foreign nationals (albeit US residents) against foreign companies in relation to activities taking place entirely outside the United States.

Although the decision to dismiss the case was a unanimous one, the fact that judges were split on the reasoning makes the precise implications of the decision more difficult to determine. The majority judgment does not provide a great deal of guidance as to what connections with the United States will “touch and concern” the jurisdiction with sufficient force to constitute a viable ATS case. While it seems clear that the door is now closed to the so-called “F-cubed” cases (i.e. foreign plaintiffs, foreign defendants, foreign activities), cases involving US companies, and cases where some activity or direction

from the US (e.g. in the form of management decisions or policies) contributed to the abuse in some way, may still be able to be sustained.

As a result, the decision in *Kiobel v Shell* may not entirely stop litigation under the ATS in relation to human rights abuses taking place outside the United States. However, it will rule out the option of ATS litigation in many cases, and will certainly create additional procedural hurdles for future claimants. In the future, many claimants who are unable, for whatever reason, to take action in their own home States will need to seek out redress mechanisms elsewhere. This may contribute towards a growth in tort-based human rights litigation in other (i.e. non-US) jurisdictions and, potentially, greater resort to criminal law mechanisms too.

Growth of class action and other “collective action” procedures outside the US and other developments relating to litigation funding

As discussed above, the United States is regarded as a particularly favourable jurisdiction for claimants against multinationals. The availability of class actions in the United States is a key advantage, under which a group of claimants who share a common complaint arising from the same (or similar) set of facts can sue as a group (or “class”) under the name of one, lead representative. Rules of civil procedure govern how a class can be constituted and how the class action is to be managed thereafter. Claimants who fall within the definition of the class are automatically included and will be bound by the final judgement unless they decide to “opt out” (after which they may file their own proceedings). The advantages, from a claimant’s point of view, are that legal costs are spread over a large group (rather than duplicated), making the litigation more cost-effective, especially in the case of a large number of relatively small claims. It also means that claimants can get access to specialist counsel, whose costs would otherwise be prohibitively high were the claims to be pursued individually. Moreover, instead of the “first come first served system” (where the early claimants have better chances of a remedy than those who come later), the settlement is distributed among the whole class. The disadvantage, however, is that class members cannot reopen the case if they are dissatisfied with the settlement that is reached. From a defendant’s point of view, the class action system gives rise to greater certainty and greater control over the total quantum of damages. On the other hand, some argue that it has increased the likelihood of frivolous claims made in the hope of a quick settlement.

Until recently, class action procedures were largely confined to the United States. By the year 2000, different versions of class action procedures had appeared in Australia (under Australian federal procedural rules and also in one state, Victoria) and had spread from Quebec (where class actions had been provided for since 1973) to other Canadian state jurisdictions. However between 2000 and the present there has been a dramatic increase in the number of jurisdictions providing for or considering the introduction of class action systems. The jurisdictions in which some form of class action procedures are now available (in addition to the United States) include Argentina, Australia, Brazil, Bulgaria, Canada, Chile, China, Denmark,

Finland, Indonesia, Israel, Italy, Netherlands, Norway, Poland, Portugal, South Africa, Spain, Sweden and Taiwan.¹³⁸ In some jurisdictions, these class action mechanisms are not available in relation to all kinds of claims. Some are confined to consumer and investor disputes, for example. Also, rules on standing (i.e. who has the right to bring a claim) can vary. However, they are illustrative of a trend that could ultimately contribute to a spread in mass tort litigation beyond the historic and traditional centre of the United States.

Among the countries that have recently introduced class action systems, the amount of use by claimants varies widely. Levels of use appear high in jurisdictions such as Canada, Australia and Israel where, incidentally, class action procedures follow the United States model fairly closely. It has been suggested that the lack of use in other jurisdictions may be explained by prohibitions or limitations on contingency fees, which means that the risks of resorting to litigation remain prohibitively high for many claimants.¹³⁹

Longer term, the growth and spread of class actions outside the United States is likely to lead to further developments in relation to litigation funding. Prohibitions and limitations on contingency fees in many jurisdictions has contributed to the growth of an industry in offering non-recourse loans to claimants in return for a share of damages subsequently recovered. In recent years there has been an increase in the activities of loan providers operating at the “higher end” of the litigation market following class action successes in Australia and the United Kingdom.¹⁴⁰ This, in turn, has led to calls from law firms to governments to relax rules on contingency fees to put law firms on a more equal footing with litigation funding providers.

In summary, the growth of class actions and other collective actions outside the United States not only creates new opportunities for non-US claimants directly, it is also creating the momentum for other developments with respect to litigation funding, all of which could potentially contribute towards the evolution of a more diverse and dynamic system of transnational civil litigation in the future. However, the emergence of new centres for mass tort litigation creates new challenges for domestic courts, too, in terms of managing jurisdictional conflicts and overlapping claims emerging from different jurisdictions.

The growth in number and expertise of specialised prosecution and investigation units

All of the criminal law complaints reviewed as part of this study appear to have been initiated by NGOs and victims’ groups. This raises questions about the extent to which State authorities are proactively investigating reports of corporate involvement in gross human rights abuses. A development that could gradually alter this picture is the growth in number

¹³⁸ Hensler, ‘The Future of Mass Litigation: Global Class Actions and Third Party Litigation Funding’, (2011), 79 *The George Washington Law Review*, 306, at p. 307. See also Linklaters, *Collective Actions Across the Globe – A Review* (2011).

¹³⁹ See Hensler, n. 139 above.

¹⁴⁰ *Ibid*, pp. 320-321.

and expertise of specialized units within domestic prosecution and judicial authorities, established to investigate and prosecute gross human rights abuses.

Specialized war crimes units are not new. Between 1958 and 1998, a number of specialized units were established by State governments to investigate and prosecute Nazi war criminals found within their jurisdiction. The low rates of prosecution meant that many of these (with the exception of the Canadian and German units) were disbanded during the 1990s.¹⁴¹

The entry into force of the Rome Statute, followed by an EU Council Decision of 8 May 2003,¹⁴² has provided an impetus for a reevaluation by European States parties of investigation and prosecution arrangements at domestic levels which, in a number of cases, resulted in the establishment of new or reinvigorated specialized units. In Sweden, in 2008, a new specialized unit was established within the national police service together with a team of specially designated prosecutors working within the International Public Prosecution Office in Stockholm. In Germany, the entry into force of the new German Code of Crimes against International Law in 2002 was followed soon afterwards by the establishment of a Central Unit for the Fight Against War Crimes. The unit, which has steadily grown in size, was restructured and renamed in 2009. In France, a specialized judicial unit, charged with investigating and prosecuting war crimes and crimes against humanity, was established in 2010. The Dutch International Crimes Unit is one of the larger specialized units comprising around 30 investigators, together with additional consultants hired on a case-by-case basis for their country-specific expertise. In the United Kingdom war crimes investigations are undertaken by a team located in Metropolitan Police Counter Terrorism Command.

The rationale behind the creation of specialized units is that prosecutions of people suspected of gross human rights abuses require particular knowledge, skills, long-term commitment and resources.¹⁴³ However, while many of these units have had successes in relation to the prosecution of individual offenders, few have even begun to address the issue of business involvement in gross human rights abuses. So far, there do not appear to have been any prosecutions of corporate entities and only a tiny handful of prosecutions against corporate officers (see p. 91). However, given sufficient policy direction and resources, these units have the potential to play a more proactive role in future.

4.3 Legal uncertainty

As will be apparent from the discussion in section 4.2 above, differences between domestic systems in the legal criteria to be applied by the courts,

¹⁴¹ Redress and the International Federation for Human Rights ("IFHR"), 'Strategies for the Effective Investigation and Prosecution of International Crimes: the Practice of Specialise War Crimes Units', December 2010.

¹⁴² Council Decision on the investigation and prosecution of genocide, crimes against humanity and war crimes, 2003/335/JHA, Official Journal 118/12, 14 May 2003.

¹⁴³ See Redress and IFHR, n. 142 above, p. 9.

and uncertainties about the way legal standards will be interpreted, can create dilemmas for claimants as to which jurisdiction is preferable as a forum State for their private law claims. If the decision is to pursue the matter in a jurisdiction other than the place where the abuse occurred, there may be further uncertainty about which body of substantive law will be applied to the case, which alone may be sufficient to dissuade claimants from proceeding. The problems of uncertainty are exacerbated by differences in legal standards between law of the forum and the law of State that would have had territorial jurisdiction (the latter of which being, under choice of law rules, the law most likely to be applied to determine the substantive issues of liability and possibly also the levels of compensation). Uncertainty around these issues can delay the process of a case through the courts considerably, adding to risks and expense.

4.4 Unevenness in levels of legal protection and inequalities in the ability of different groups to access justice

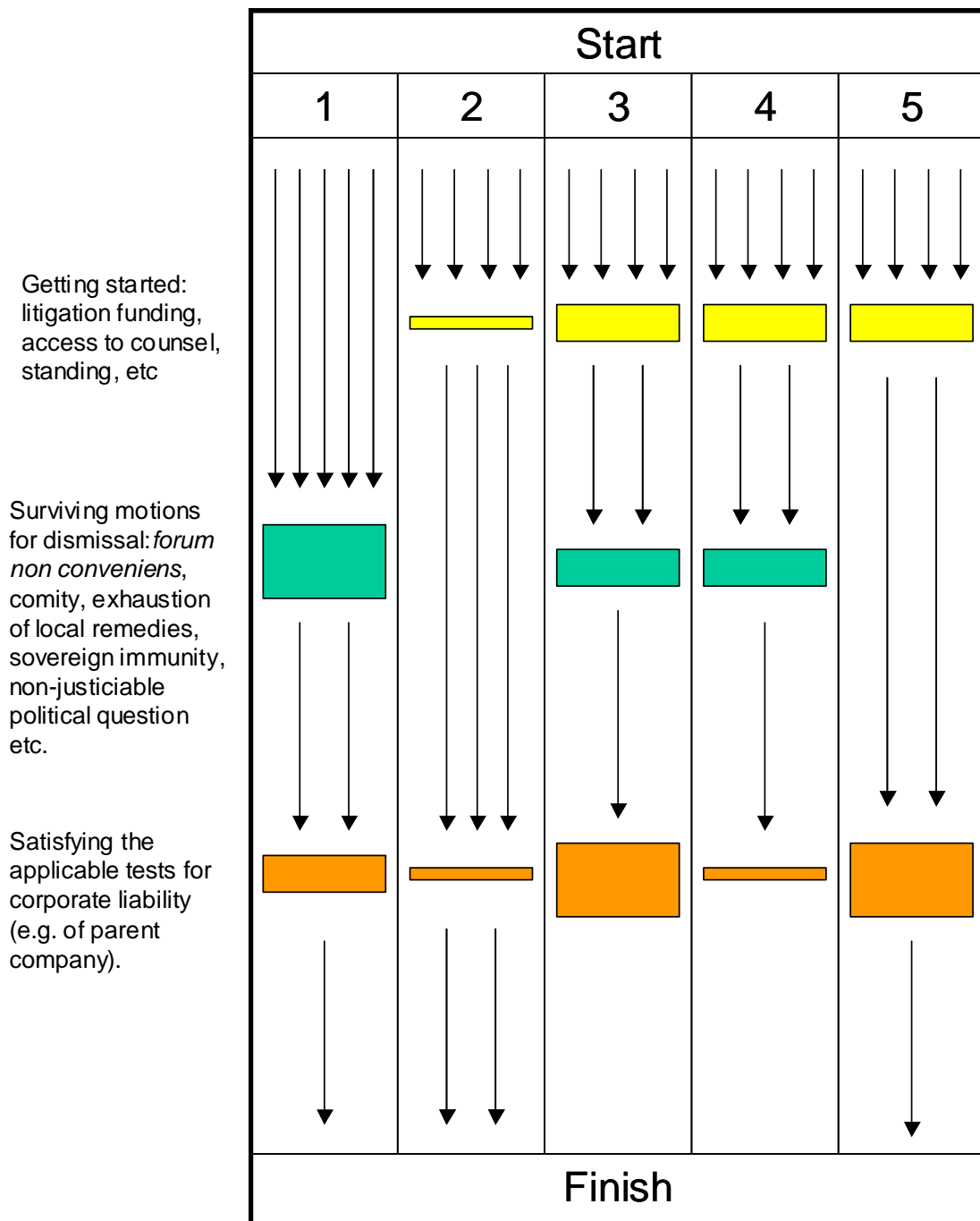
It is not always necessary for victims of human rights abuses to seek redress in foreign courts. As will be clear from the case studies profiled in Chapter 1 above, there have been cases where litigants have successfully pursued remedies in their own, local courts. However, in cases concerning claims of gross human rights abuses, this is comparatively rare. The reason for this, as noted in earlier chapters, is that the legal environment that has allowed the abuse to take place in the first place is not one which victims or their representatives can be expected to have much confidence in. As discussed above (see pp. 93-94, it usually takes a long passage of time, and a change of regime, before cases begin to come forward in the courts with territorial jurisdiction over the abuse.

In the meantime, victims of gross human rights abuses who are unconvinced about the prospects of achieving effective remedy in their local courts, or who are concerned for their own safety (or both) must look to the prosecuting authorities or courts of other jurisdictions. There is a certain amount of common ground between domestic legal systems regarding the extent to which courts are prepared to take jurisdiction over private law claims arising from abuse or harm suffered in other jurisdictions (see Table 6, p. 70 above). While assertions of extraterritorial jurisdiction under public (i.e. criminal) law must be justifiable in light of one or more international law principles, extraterritorial civil law jurisdiction depends on the establishment of sufficient “connecting factors” between the subject matter of the claim or its parties (or both) and the preferred forum State. A strong connecting factor is the place of incorporation of a key defendant. For this reason, claimants who are unable to commence proceedings in their local courts can usually look to the defendant’s home State (or that of its parent company) as a possible alternate jurisdiction.

However, some claimants may have more than one choice of alternate jurisdiction. The United States, for instance, has more flexible rules on jurisdiction than most (if not all) other States, meaning that if a claimant can show a connection with the United States (in some cases this only needs to

be a “presence” or the fact of “doing business” in the United States), he or she may be able to choose between bringing his claim in the United States, or elsewhere. These special features (together with the many other advantages offered to claimants under United States practice and procedural rules) account for much of the present unevenness in the present system of domestic judicial remedies. For claimants unable to show a connection to the United States, however, the alternate jurisdiction will usually be dictated by the nationality of the company (or companies) concerned.

Fig 2: A hurdling analogy



From that point on, differences between jurisdictions in almost every material respect (from the accessibility to litigation funding, to the grounds on which a case may be dismissed, to the speed and efficiency of court processes, to the substantive rules used to determine liability – including the rules on choice of law – to the rules on assessment of damages) make for an arbitrary and erratic filtering system for cases that should, by virtue of their grave nature, raise questions of international concern. As many of the cases referred to in Appendix 2 show, a case can fall at any of these different hurdles. Continuing the analogy further, as the hurdles are higher or lower, greater or fewer in number, or differently placed depending on which jurisdiction the claimant has chosen to litigate in, the outcome may be pre-determined by the relevant lane. However, in reality, claimants may not have a great deal of choice as to which lane they use. The problem is illustrated (in relation to five hypothetical jurisdictions) in Fig. 2 above. (Note that for the sake of simplicity this diagram is very stylized. In reality, the distribution of cases between these “tracks is not so even, and the proportion of cases that reaches the finish line in reality is rather smaller than indicated below).

4.5 Other possible consequences of differences in legal standards and conditions between jurisdictions

4.5.1 Obstacles to international cooperation

Differences in legal approaches between jurisdictions can lead to problems in requesting and obtaining assistance in relation to the investigation of allegations of gross human rights in other jurisdictions. In other regulatory contexts, as noted above, State law enforcement bodies have refused to assist with the enforcement of discovery orders because of disagreements as to whether an assertion of extraterritorial jurisdiction was warranted in the particular case, and also over the scope of pre-trial discovery demands.¹⁴⁴ Disagreements as to the appropriate legal standards, or the level or type of sanctions that may be imposed can also lead to problems in obtaining assistance from authorities in other countries (see for instance case study 6, p. 18 above). As was observed in a 2010 study for the European Commission on the EU framework for extraterritorial regulation in relation to human rights and the environment:

*“International cooperation is crucial for the effective implementation and enforcement of criminal law in relation to globally operating MNCs [i.e. multinational companies]. One persistent obstacle to effective international cooperation remains an insufficiently broad or too uneven participation of States in international treaties that criminalise conduct harmful to human rights and the environment”.*¹⁴⁵

Prosecutors and litigants may also encounter enforcement problems in cross-border cases where a decision of one domestic court appears to be

¹⁴⁴ See Zerk, Extraterritorial Jurisdiction, n.50 above, p. 100. See also Stephens, n.130 above.

¹⁴⁵ University of Edinburgh, n. 103 above, Executive Summary.

inconsistent with the law and practice of another or where one State disapproves of another's approach (e.g. criminalization of behaviour in one State that would only attract "administrative" liability in another). In the private law sphere, for example, courts can refuse to enforce a foreign judgment where that enforcement would appear to be contrary to "public policy" as determined by the courts of that State. Differences in approaches to damages have led to the refusal of some domestic courts to enforce judgements obtained in other (especially US) jurisdictions.¹⁴⁶

4.5.2 Lack of proactive behaviour on the part of domestic law enforcement agencies

Uncertainty surrounding legal standards and novelty of prosecutions are both factors that might dissuade criminal prosecution bodies from pursuing cases against corporate entities accused of being involved in gross human rights abuses, although further research is needed to establish whether these concerns are major factors in the low levels of public enforcement compared to private (e.g. "tort-based") enforcement. Another reason might be that the issue has not been prioritised as a matter of enforcement policy at governmental level, in which case it would be difficult for prosecuting bodies to justify spending limited resources identifying and prosecuting potential cases, especially where these relate to overseas abuses. In relation to overseas abuses, State prosecution bodies may be disinclined to act (or advised against acting) out of respect for the principle of non-interference in the regulatory affairs of other States. Again, further research is needed to understand more about how domestic prosecutors understand their roles and responsibilities specifically in relation to legal responses to the problem of business involvement in gross human rights abuses, and the legal and policy considerations that influence enforcement policy in general, especially as regards gross abuses that take place outside territorial boundaries.

4.5.3 Lack of a "level playing field" for companies

A problem that arises directly out of differences between domestic legal systems - and one which may also have a bearing on the lack of public/criminal law enforcement discussed immediately above - is the problem of lack of "level playing field" for companies. At present, companies domiciled in some jurisdictions face far greater risks of being subject to private law proceedings than others. (The relative risks of facing criminal enforcement are rather more difficult to assess due to the very limited activity on the part of criminal prosecution bodies so far, see pp. 91-92 above). This not only places the former group at a potential commercial disadvantage, it also makes it difficult for domestic policy-makers to move ahead with reforms that might tilt the playing field yet further.

¹⁴⁶ See Zerk, Extraterritorial Jurisdiction, n. 50 above, p. 100.

4.6 Conclusions

The domestic responses reviewed in Chapter 2 have combined to form an overlapping network of transnational redress mechanisms. The totality of these domestic judicial systems, some of which have been asserted extraterritorially, has been referred to as an “expanding web of liability”. However, this theoretical position does not yet translate into an effective system of remedies in practice. On the contrary, from the perspective of individuals and communities seeking to hold companies accountable for the abuses they claim they have suffered, the system is patchy, uneven, often ineffective and fragile.

The United States has emerged as the forum state of choice for many victims and their representatives. Compared to other jurisdictions, there are several features of the US legal system that may make it more attractive, including a unique and relevant cause of action, flexible rules on jurisdiction, the strength and depth of the public interest bar, and the availability of class actions and contingency fees that may help reduce the financial risks faced by claimants.. However, as has been made clear in this report, significant obstacles remain for victims and their representatives. Actions brought in the United States under the ATS are already frequently dismissed on jurisdictional and other grounds, and are even more likely to be so in future following the Supreme Court’s decision in *Kiobel v Shell*.

Elsewhere there are signs that some domestic criminal prosecuting authorities could potentially take on a greater role in relation to business involvement in gross human rights abuses, albeit with some prodding from NGOs. However, these developments seem largely confined to European jurisdictions. It is possible that the withdrawal of opportunities for non-US claimants under the ATS could lead, in time, to greater use of criminal law mechanisms, starting in Europe and then spreading elsewhere. As discussed in Chapter 2 above, prosecution of corporate entities or corporate executives (or both) for their complicity in gross human rights abuses is at least a theoretical possibility in many jurisdictions. In reality, though, few prosecutions have taken place in practice. There are reasons to think that prosecuting authorities may be deterred from pursuing cases arising in other jurisdictions due to resources constraints and the complexities of investigating and collecting evidence from abroad, although further research is needed to confirm this.

Private law mechanisms are not working well for victims either. In virtually every jurisdiction, victims of gross human rights abuses face significant obstacles to bringing a civil law claim against the corporate entities they hold responsible, not least because of the high financial costs of this kind of litigation, lack of availability of sufficient legal aid to fund the claim and the difficulties in finding suitably experienced counsel prepared to take conduct of the matter. It is important to note that these barriers are frequently inter-related. The complexities and uncertainties involved in proving corporate liability have a significant bearing on the costs and risks, for instance. And these costs and risks, plus the lack of availability of legal aid have, in turn, a material impact on the preparedness of legal counsel to act in a specific case.

The many differences between jurisdictions in relation to a host of legal and procedural matters have given rise to an uneven and inefficient system of remedies which does not appear to be sustainable in the long term. One lesson that could be drawn from the recent Supreme Court decision in *Kiobel* is that the more popular forum States for human rights litigation may not be prepared to be “uniquely hospitable forum[s] for the enforcement of international norms”¹⁴⁷ for very long. While many adjustments will be needed to create a more even and coordinated system of domestic law remedies, this is unlikely to bring about real benefits for affected individuals and communities if it happens in a haphazard way. Greater evenness in domestic responses, and greater equality in levels of protection enjoyed by different affected groups, will only come about when there is political commitment based on a proper consensus not only in relation to how home States are *entitled* to respond in relation to extraterritorial abuses, but when and how they *ought* to respond, specifically in relation to the problems of business involvement in gross human rights abuses.

But this is not to overlook the importance of access to remedy at local level. The fact that so many claimants prefer to bring their claims in faraway jurisdictions than seek local remedies is revealing in itself. This suggests an urgent need to improve the functioning of domestic judicial mechanisms at a practical level, not just in a few jurisdictions but globally.

Compared to private law mechanisms, the role of criminal law enforcement as a domestic law response is still largely an unexplored area. The potential of these mechanisms is far from being realised. The lack of activity is surprising given that much of the behaviour that falls within the category of gross human rights abuses has also been criminalized under both domestic and international law. Again, a lack of consensus between States as to (a) the appropriate legal standards for corporate liability and (b) the regulatory and enforcement responsibilities of home and host States is potentially holding these key institutions back. The situation is unlikely to improve without greater levels of engagement from (and between) domestic prosecution bodies and ultimately greater levels of international cooperation, particularly with respect to areas such as investigation and enforcement.

The next and final Chapter sets out some recommendations as to next steps to help lay the foundations for a more coherent and effective set of domestic law responses.

¹⁴⁷ *Kiobel v Shell*, Supreme Court of the United States, No. 10-1491, judgment given 17 April 2013, copy available at http://www.supremecourt.gov/opinions/12pdf/10-1491_l6gn.pdf at p. 12, per Chief Justice Roberts.

Chapter 5: A way forward

This Chapter is concerned with identifying ways to lay down the foundations for progressive improvements in the performance of domestic judicial mechanisms, specifically in relation to the problem of business involvement in gross human rights abuses. As previous chapters have highlighted, the key problems, in a nutshell, are (a) many and varied barriers to justice for claimants in most (if not all) jurisdictions and (b) differences in legal standards and approaches at domestic level which lead to inequalities between different groups of affected individuals and communities in terms of their ability to seek remedies for harm. Presently standing in the way of improvements to the performance of domestic judicial mechanisms from the perspective of victims are (a) a lack of clarity as to what the appropriate tests for corporate liability should be (which, for a variety of reasons discussed in the previous chapter, is hampering legal development, international cooperation and potentially the work of criminal law enforcement bodies as well), (b) a lack of international consensus as to the roles and responsibilities of different States (e.g. “home” and “host” States) with respect to legal enforcement and remedies in cross-border cases (c) a lack of capacity and resources – financial, technical, legal – at local level in many jurisdictions (causing many claimants to favour extraterritorial legal proceedings over local ones, which not only adds to the costs and difficulties of legal proceedings, but also serves to further entrench the original capacity problems) and (d) a lack of consensus as to what constitutes “barriers to justice” in practice and the appropriate practical action needed to deal with them, taking account of the different needs and conditions in different jurisdictions.

There are various routes to better performance that could be considered at this stage, each with its own set of challenges. As discussed in more detail in this chapter, it should not be assumed that arrangements adopted in other areas of legal regulation can be readily and easily adapted to correct the many problems identified in this study.

On the other hand, there are many difficult issues of policy and principle which urgently require clarification and also good practices that would benefit from further discussion and dissemination. Therefore, the key recommendation of this study is for *a consultative, multi-stakeholder process of clarification* to be carried out in two parts:

- the first part focussing on the key issues of principle and policy relating to the appropriate tests for legal accountability, and the respective roles of “home” and “host” States in investigation and enforcement;
- the second part aimed at improving the accessibility and performance of domestic remedial mechanisms from a practical point of view. This would take the form of a programme of activities to promote technical cooperation and knowledge exchange between policymakers, operators and users of domestic remedial mechanisms so that examples of good practice (with respect to matters such as legal funding, protection of victims and witnesses, investigation, mutual legal

assistance, sentencing, supervision, enforcement and effective remedies) are identified, analysed and replicated.

Finally, as noted in the previous Chapter, the role of criminal law enforcement bodies in developing robust domestic law responses is a neglected area. Thus far, criminal law enforcement bodies do not appear to have taken a very proactive approach in relation to the problem of business involvement in gross human rights abuses. This study has identified a number of possible reasons for this, but further work is needed to test these hypotheses and identify ways to improve the effectiveness of these key institutions. Therefore, the recommendations in this chapter include a number of activities aimed specifically at (a) clarifying the difficulties and dilemmas faced by domestic prosecution bodies, including in relation to cross-border and extraterritorial cases and (b) boosting their capacity and effectiveness in this area.

5.1 Is convergence a realistic and desirable goal?

5.1.1 Building greater consistency in domestic approaches: some comments on the applicability of “anti-bribery” models

In some contexts, such as in the context of anti-bribery measures, States have sought to tackle issues of international concern through treaty-based initiatives. These kinds of initiatives support and guide States as they work to achieve greater convergence of legal approaches at domestic level, clarify the regulatory responsibilities of States, to generally raise standards of corporate conduct, and, particularly in the case of anti-bribery regimes, to help create a more level playing field for companies. The OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions (the “OECD Convention”) provides a useful example of how some of the difficulties associated with divergent domestic approaches and different legal conditions can be overcome by allowing States flexibility in the implementation of treaty obligations.¹⁴⁸ On the other hand, the various anti-bribery conventions that have been developed to date are aimed at one specific type of corporate misconduct which, compared to gross human rights abuses, is relatively easy to define. As discussed in more detail in subsequent sections, there are considerably more challenges in developing a workable and meaningful regime in relation to gross human rights abuses which must necessarily cover a range of behaviors, contexts and degrees of involvement. Given the present lack of clarity surrounding key legal issues (such as the nature of corporate liability, the standards for establishing liability on the basis of complicity and the respective roles and responsibilities of home and host States with respect to enforcement), a workable and viable treaty-based solution would seem to be a long way off.

¹⁴⁸ For example, the OECD Convention takes account of the fact that some Member States do not recognise the concept of corporate criminal liability. In this case, State parties are required to “ensure that legal persons shall be subject to effective, proportionate and dissuasive non-criminal sanctions.” See also the UN Convention Against Transnational Organised Crime, Article 10.

In addition to the problems of scope, there are further reasons to question the transferability of models developed in relation to the problem of bribery. The first reason relates to regulatory strategy and the second reason relates to regulatory aims.

First, account must be taken of the fact that the need to create a “level playing field” for companies, and the political and economic self-interest in ensuring that this is sustained, is fundamental to the underlying strategy to eradicate bribery in the context of business transactions. Different standards of compliance by States create pressure for companies and risk undermining the whole system. In other words, a high level of legal convergence in the anti-bribery field was essential, not just to raise standards, but for the successful operation of the whole regime. It is doubtful that “level playing field” arguments would have quite the same resonance in relation to regimes to deal with gross human rights abuses. While poor human rights standards can distort “level playing fields” for companies, as discussed in the previous Chapter, the business case for a *collective* raising of standards, and especially for ensuring compliance by peers, is not so immediate and obvious.

Secondly, anti-bribery regimes are not generally victim-focused, whereas measures to tackle the problem of business involvement in gross human rights abuses by definition must be. This gives rise to a different constellation of considerations when designing international regimes. As discussed in the next section, some kinds of convergence may not be helpful to victims; for instance if they precipitate a “race to the bottom” or if they result in even less choice for claimants as far as avenues for redress are concerned.

5.1.2 Potential pitfalls of convergence

Leaving aside, for the time being, the question of whether achieving convergence between different jurisdictions is realistic (which is discussed further in section 5.3 below) it is worth reflecting on the extent to which it is likely to result in practical improvements in access to justice for affected individuals and communities. While minimum standards could improve the performance of some States, there is also the risk that this could become a “floor” and that States will be discouraged from going beyond minimum requirements. There is the risk that States will be less prepared to innovate, which could stifle legal development in future. Worse, prescribing minimum requirements could lead to the dismantling of protections and procedural advantages currently available as a matter of domestic law on the basis that these amount to “gold-plating” or are unnecessary in light of international requirements.

Convergence could also be disadvantageous from the point of view of claimants if it restricts their choices about the best ways to pursue a complaint or press a claim. One example of how this might come about (included here only for the purposes of illustration) would be if it were a requirement, under a uniform procedure for launching a claim, that claimants were first required to exhaust local remedies. Another example would be an agreed position on extraterritorial jurisdictional rules that guaranteed jurisdiction based on the

domicile of the parent company but removed it on the basis of “business contacts”. While this could be advantageous to some groups of claimants, it may result in fewer options for others.

Although greater convergence in legal standards has the potential to lead to greater certainty in terms of what is expected of businesses, and arguably a more level playing field for companies, there is also the risk that too much, or the wrong kind, of convergence could stifle development and hinder the responsiveness of domestic legal systems. Given the many differences between States in respect of legal structures and traditions, economic resources and levels of development, finding the appropriate standards to converge around – whether in relation to legal standards, procedural matters or practical matters such as levels of funding for claimants – will not be at all straightforward. These and other difficult issues of standard-setting and implementation are discussed in more detail in the next section.

5.1.3 Achieving convergence in practice: practical and technical issues relating to scope, standard-setting and implementation

Developing regulatory proposals that can readily be adapted to a range of domestic legal structures and conditions is rarely straightforward. This is particularly challenging where the targeted behaviour cannot be neatly and simply defined. The alternative is to create bespoke regimes in relation to specific problems, but in order to be adopted and implemented by States these must still bear some relationship to the background domestic legal systems and also be justifiable in light of established legal initiatives and positions.

The first difficulty comes with finding a suitable definition of the corporate conduct to be targeted that corresponds to the full range of behaviours that amount to gross human rights abuses and deals adequately with the concept of “corporate complicity”. As discussed above, this is likely to be somewhat more complicated in relation to gross human rights abuses than was the case in relation to bribery offences. There is also the problem of ensuring that domestic implementation of any new crimes or private-law causes of action interfaces properly with existing liability regimes relating to the prevention and remedying of gross human rights abuses (including under the Rome Statute). Creation of different regimes and different levels of coverage for (a) companies and (b) individuals is likely to be problematic whether States are States Parties to the Rome Statute or not, especially in light of the linkages between criminal liability and individual liability in many jurisdictions (see pp. 34-38 above).

A key difficulty in agreeing and implementing international standards relating to corporate complicity and other forms of secondary criminal or civil liability lies in the fact that any changes to domestic law would have to be made against the background of established domestic law rules on accessory and conspiracy liability of general application. Achieving a high level of convergence would either mean, for many States, creating separate rules for aiding and abetting in relation to gross human rights abuses specifically, or

making reforms to the general law to bring this in line with the consensus concerning liability for gross human rights abuses. The former could potentially be very problematic, especially as there is likely to be overlap between crimes relating to gross human rights abuses and crimes under general criminal law (or torts under general tort law). This also seems difficult to justify in domestic law terms. The latter seems unrealistic. In the civil law sphere, the creation of a separate set of rules on parent company liability for a particular kind of tort will in many cases be difficult to justify as a matter of policy. Given that tort cases frequently invoke a range of causes of action, not all of which will be founded on allegations of gross human rights abuses, this seems unworkable, too. In addition, courts and legislators will be concerned about the implications of parent company liability for company law principles, and particularly the doctrine of separate corporate personality and the risk allocation policies and principles that underlie it. Any domestic reforms would need to take these wider concerns into account.

If greater convergence in relation to the concept of corporate criminal liability is sought, (including in the attribution of criminal acts and intent to companies), account must be taken of the reality that not all jurisdictions currently recognise the concept of corporate criminal liability and may not be prepared to make an exception for a specific set of crimes (although, as discussed in Chapter 2 above, it may be possible to create a functionally equivalent offence, e.g. under administrative law). If the intention is to give greater space and prominence to the concept of “human rights due diligence” in determining corporate criminal liability for gross human rights abuses, this will require adjustments to be made to existing corporate liability tests in the many jurisdictions that still apply “identification” theories to attribute criminal liability to corporations. However, this then raises the difficult policy issue as to whether it is appropriate, within domestic legal systems, to have different tests for corporate liability for different crimes, as opposed to a general test.

With respect to jurisdictional matters it is important, again, to recall that, for civil law matters, domestic law positions are governed by general domestic law rules of civil procedure which are in some cases (e.g. in the EU) already the subject of harmonisation measures. Again, achieving harmonisation for many States will involve either creating separate regimes specifically for cases involving gross human rights abuses, or reforming the whole area to conform with the recommended approach to cases involving gross human rights. The same comments made above (in relation to the workability and justifiability of a separate regime relating to gross human rights abuses) are also applicable here. There is a further consideration, in that rules on jurisdiction may not necessarily work in isolation. In some cases, they have developed partially in response to and against the background of local legal conditions. Care would have to be taken, therefore, to ensure that changes to jurisdictional rules do not have unintended effects elsewhere. With respect to criminal law jurisdiction, it may be possible to justify the existence of different jurisdictional rules for companies (i.e. compared to individuals) specifically in relation to business involvement in gross human rights abuses. Even so, the implications for cases involving both corporate and individual defendants would have to be carefully thought through.

Finally, achieving convergence in relation to damages and sanctions is likely to be very controversial and problematic. As discussed, the aim of compensatory damages is typically to “put the person back in the position they would have been had the damage not occurred”, the financial calculations of which will depend on local conditions such as wages, cost of living, and costs of treatment and rehabilitation. The question of whether punitive damages should form part of the remedies to which victims are entitled is likely to be a controversial one. Given the seriousness of these cases, there would appear to be a case for punitive (or “aggravated” or “exemplary”) damages as well as compensatory damages. However, States that do not presently permit the award of punitive damages may question whether a separate regime for victims of gross human rights abuses is justifiable. In addition, some of the other sanctions discussed in this report (e.g. dissolution) are likely to require changes to other domestic regimes (e.g. company law, insolvency law). In the case of criminal law sanctions, adjustments or perhaps additional measures may be needed in States that do not recognise the concept of corporate criminal liability.

5.1.4 Practical value of pursuing binding “convergence” initiatives as a way of improving access to remedy: a preliminary assessment

The challenges to a formal and binding “convergence” initiative in response to the problem of business involvement in gross human rights abuses should not be underestimated. Even if a political consensus could be achieved as to the aims and scope of such a project, the practical, legal and policy challenges involved in implementing such a regime at domestic level are likely to be considerable (see section 5.1.3 above). The key difficulty is that any such changes would have to take place against the background of existing domestic civil and criminal liability regimes. As discussed above, attempts to achieve convergence in relation to key issues such as scope, causes of action, tests for corporate liability, jurisdictional matters and sanctions are likely to have profound knock-on effects on these background regimes. Although “bespoke” harmonizing initiatives have been concluded and successfully implemented in the field of anti-bribery, the range of behaviours and contexts that would need to be covered here is much greater, which greatly increases the chances and problems associated with overlap and inconsistency with other areas.

In light of these difficulties, States would, in reality, need considerable flexibility in the way they implement any proposed reforms. However, developing harmonizing solutions which are sufficiently flexible so that they can be implemented by States into existing regimes, but not so flexible and vague that they cease to have any impact in practice, is a difficult balancing act.

Another important point to bear in mind is that features of domestic legal systems are not necessarily independent from each other. Legal rules in one area may have developed because of a particular set of conditions elsewhere within the same system. For instance, generous treatment in one area may

have been introduced to compensate for particularly stringent treatment in some other respect. The existence or non-existence of a legal provision can be less important in practice than the way it is used. Apparently divergent regimes may still be functionally equivalent in terms of their outcomes. The upshot of this is that a reform in one area may not have the desired effect if it is not accompanied by consequential or supporting changes elsewhere. Because of these inter-relationships, there is also the danger of unintended consequences. It is important that reform proposals take account of the inter-relationships that exist within accountability systems, but this is difficult to achieve at the level of international initiatives.

Finally, it is important to be realistic about what convergence of approaches can achieve in practice. Convergence of legal standards and procedural matters will not, of itself, address all of the problems identified in the previous Chapter (e.g. barriers to remedy relating to the high costs of litigation, delays or the unavailability of legal counsel). Many of these can only be addressed by a significant injection of resources (both financial and technical) at domestic level. On the other hand, there are many difficult issues of policy and principle which would benefit from further clarification. It is in light of this dual need – clarification of issues of principle and policy plus improvement in the functioning of domestic judicial mechanisms at a practical and technical level – that the recommendations in the following section are made.

5.2 Recommended next steps

5.2.1 Consult and clarify

The primary recommendation of this study is the launching of *an inclusive, consultative, multi-stakeholder process of clarification*. This consultative process would be carried out in two parts.

Part 1: Clarify key issues of principle and policy

The first part of this process would focus on the appropriate tests for legal accountability, and the respective roles of “home” and “host” States in investigation and enforcement, which would take account of differences between States in legal systems and traditions. This would include an examination of:

- The elements of corporate liability for involvement in gross human rights abuses, under both private law regimes and public law regimes (and in particular as a matter of criminal law) (a) where the corporation is the primary perpetrator and (b) under theories of secondary liability and the conceptual differences between the two;
- The tests for attribution of liability to corporate entities (under both public law and private law regimes);
- Legal coverage and definitions of offences;
- The application of limitations periods;
- Different approaches to the choice of law (i.e. in private law cases);

- The international law rules governing the use of extraterritorial jurisdiction in cases of business involvement in gross human rights abuses (in both the public law and private law spheres) and the appropriate use of that jurisdiction in practice.

The aim of this process would be a better understanding of the strengths and weaknesses of different legal strategies, in light of the guidance in the UN Guiding principles and other relevant international instruments, to identify ways of strengthening domestic legal responses at the level of law and policy (and against the background of different legal systems and traditions) and to explore the extent to which there might be potential for greater international cooperation in the future.

Part 2: Identify models of best State practice in relation to functioning of domestic judicial mechanisms

While greater clarity on the above issues will be helpful in building consensus and commitment with respect to the need for better law enforcement in this area, it will not solve all of the problems identified in this study. As the previous Chapter shows, many of the most serious barriers to justice are not necessarily legal but practical and financial in nature. The second part of the consultative process, therefore, would be aimed at improving the accessibility and performance of domestic remedial mechanisms from a practical point of view. The recommendation is for a programme of activities to promote technical cooperation and knowledge exchange between policymakers, operators and users of domestic remedial mechanisms so that examples of good practice (with respect to matters such as legal funding, protection of witnesses, liaison with victims, sentencing, monitoring and enforcement) are identified, analysed and replicated. The list of topics that would be useful to explore in this setting would include:

- Legal funding options;
- Management of collective, representative and group actions;
- Simplifying and streamlining the process of making and prosecuting a claim;
- Rules of discovery;
- Challenges faced by prosecution bodies in investigating allegations (including in cross border cases);
- Processes to ensure appropriate levels of involvement of victims in decision-making by prosecution bodies, including access to information and rights of consultation at different stages of the proceedings;
- Access to legal representation;
- Promoting awareness of legal rights and remedial mechanisms;
- Protecting prosecution bodies and courts from political interference and the effects of corruption;
- Devising appropriate and effective sanctions;
- Calculating damages;
- Protecting victims and witnesses from intimidation and harm; and

- International cooperation, managing jurisdictional conflicts, mutual legal assistance and enforcement of foreign judgments.

The aim of the second part of the process would be to clarify, in far more detail than has been done thus far, what the relevant provisions of the UN Guiding Principles (see Chapter 3 above) mean for States at a practical, procedural and administrative level. A possible outcome of this work could be a set of agreed “best practice” models which demonstrate, using practical examples, what effective State responses to the problem of business involvement in gross human rights abuses would look like, taking account of diversity in legal systems and traditions, economic conditions and levels of development. These models could then be used by policymakers, decision-makers and advocates to help assess, in an objective and realistic way, the efficacy of States’ responses to the problem of business involvement in gross human rights abuses, and the quality of implementation of the UN Guiding Principles. They could be used to help identify priorities for future technical assistance and capacity-building activities involving relevant domestic institutions, such as police, prosecution bodies, court services, legal professional bodies and the judiciary. They would provide a more solid basis for advocacy, and offer States a practical and pre-tested set of ideas and action points to help improve the performance of domestic remedial mechanisms from the perspective of affected individuals and communities.

5.2.2 Further activities to build know-how and capacity of domestic prosecution bodies

Further research is needed into the causes of the overall lack (and in many jurisdictions virtual absence) of activity by domestic criminal law enforcement agencies in relation to the problem of business involvement in gross human rights abuses. It would be useful to establish the extent to which this is due to a lack of political commitment, lack of policy direction, lack of resources, legal difficulties, lack of information and guidance, or a lack of knowledge and training, or a combination of all or some of these. The obvious starting point would be to seek the views of representatives of law enforcement bodies (and particularly of specialised units responsible for investigations into allegations of gross human rights abuses). A conference, meeting or questionnaire could be used to help clarify the issues.

A programme of training and knowledge-sharing for law enforcement personnel on legal and technical challenges associated with investigating and enforcing cases of business involvement in gross human rights abuses (including cases involving foreign abuses) should also be considered.

5.3 Final comments

This study has been concerned with two separate but interrelated problems: first, the barriers to justice that are frequently faced by affected individuals and communities in seeking to use domestic judicial mechanisms to hold companies accountable for alleged involvement in gross human rights abuses and, second, the serious inequalities that exist in the levels of protection

under domestic law and in the extent to which affected individuals and communities can enforce their rights in practice. These inequalities occur partly because of divergences in legal standards, but there are other reasons too, such as lack of availability of financial resources, lack of capacity and resources of prosecution bodies, lack of court resources and, in some jurisdictions, problems associated with political interference and corruption. Because of this array of factors, it is unlikely that it will ever be possible to eradicate “protection gaps” altogether. However, there is much that could be done to address at least the worst of these. The question is where to begin.

This study does not make any case for extraterritorial solutions over local solutions (or vice versa), taking the view that both have a role to play. By clarifying the key issues of principle and policy, it will be possible to start to address the unevenness that presently exists in relation to cross-border enforcement and to lay the foundations for greater international cooperation on this issue in future. However, this is not to overlook the urgent need to raise standards and build capacity everywhere. The second part of the consultative process outlined above is aimed at improving the ability of all domestic legal systems to respond appropriately and effectively to cases of business involvement in gross human rights abuses, whether they occur within territorial boundaries or beyond. The programme of activities contemplated in this report will provide valuable opportunities for technical cooperation and exchange of know-how, which can then be used to aid future domestic implementation efforts in accordance with the UN Guiding Principles.

There is a particular need for a renewed focus on the area of criminal law enforcement, given the apparently very low levels of activity by domestic law enforcement bodies from only a small number of States. This report therefore concludes with recommendations for some further activities to be undertaken specifically with domestic prosecution bodies, to better understand the challenges they face and to help build local enforcement know-how and capacity.

Making domestic remedial systems work better for victims of gross human rights abuses will take time and effort. The complexities are such that the journey towards a fairer and more effective system of domestic remedies for victims of business-related gross human rights abuses will not be one of great leaps, but of incremental steps, based on international dialogue, engagement and consensus-building.

Glossary and Abbreviations

“**ATS**” means the United States Alien Tort Statute (otherwise known as the Alien Tort Claims Act);

“**Forum State**” means, in cases where there is an extraterritorial or cross-border element, the State in which a prosecution is undertaken or a private law action is heard;

“**Monist system**” refers to a domestic law system that accepts the unity of international and domestic law systems, such that international law rules that are applicable to the system by treaty or customary international law can be treated as directly applicable;

“**NGO**” means non-governmental organization;

“**OHCHR**” means the Office of the United Nations High Commissioner for Human Rights;

“**OPT**” means Occupied Palestinian Territory;

“**Parties civiles**” refers to a method available in civil law systems whereby a victim can apply to become a party to a criminal law proceeding;

“**RICO**” means the United States Racketeer Influenced and Corrupt Organizations Act;

“**Rome Statute**” means the Rome Statute of the International Criminal Court;

“**Rome Statute offences**” refers to the international crimes referred to in the Rome Statute (see Articles 6 to 8);

“**SRSG**” means Special Representative of the Secretary General on human rights and transnational corporations and other business enterprises;

“**TVPA**” means the United States Torture Victim Protection Act of 1991;

“**UNGA**” means the United Nations General Assembly;

“**UNGPs**” means the United Nations Guiding Principles on Business and Human Rights;

“**Working Group**” means the UN Working Group in the Issue of Human Rights and Transnational Corporations and other Business Enterprises;

“**2005 Basic Principles**” means UNGA’s 2005 Resolution on *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law*.

Appendix 1

The author would like to thank the following Experts who provided comments both orally and in writing on earlier drafts of this report. Their help and advice is much appreciated, although this should not be taken to imply any endorsement by any of these individuals of the content of this report or its conclusions and recommendations.

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Harriet Berg, Minister-Counsellor, Permanent Mission of Norway to the United Nations in Geneva

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Audrey Gaughran, Director of Global Issues, Amnesty International

Victoria Gobbi, Third Secretary, Permanent Mission of Argentina to the United Nations in Geneva

Peter Herbel, General Counsel, Total S.A.

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Jonathan Kaufman, Legal Advocacy Coordinator, Earthrights International

Benedetta Lacey, Human Rights Adviser, Foreign and Commonwealth Office, United Kingdom

Lauretta Lamptey, Commissioner for Human Rights and Administrative Justice, Ghana

Rae Lindsay, Partner, Clifford Chance

Carlos Lopez, Senior Legal Adviser, International Commission of Jurists

Richard Meeran, Partner, Leigh Day

Anita Ramasastry, Director, University of Washington

Victor Ricco, former Legal Coordinator, CEDHA

Peter Rossman, Director, International Union of Food Workers

Mark Taylor, Senior Researcher, Fafo

Matthias Thorns, Director, International Organisation of Employers

Margaret Wachenfeld, Director of Legal Affairs, Institute for Human Rights and Business

Representative from FIDH

Appendix 2

**Table of cases referred to in this study
(in alphabetical order, by defendant)**

Defendant	Year	State where alleged abuse occurred	Incident or facts giving rise to complaint	Forum State	Cause of action	Outcome (and date)/Status
Alstom/ Veolia	2007	Israel	Planned construction of Israeli light rail or tramway project to link West Jerusalem with Jewish settlements in the West Bank.	France	Petition to nullify contracts on grounds of illegality.	Dismissed, (2011).
Anvil Mining	2010	Democratic Republic of Congo	Attempts by military to quash an uprising by rebels in 2004, resulting in grave human rights abuses including extra-judicial killings and pillage.	Canada	Tort-based Note: Separate criminal proceedings took place in DRC in 2007 which exonerated the soldiers and Anvil employees of war crimes.	Dismissed (insufficient connection to Canada) (2012)
Barclays et al	2002	South Africa	Apartheid	United States	Tort-based; ATS, TVPA and RICO	Without prejudice settlement achieved against one defendant in 2012. Other actions still pending.
Blackwater	2007	Iraq	Killings by Blackwater employees in 2007	United States	Tort-based; ATS Note: Criminal charges were filed against individual employees in 2008.	Settled (5/6 in 2010 and the 6 th in 2012)
Bull/Amesys	2011	Libya	Human rights abuses by the Libyan regime (allegedly facilitated by technology developed by the defendant)	France	Criminal complaint	Judicial inquiry opened in May 2012 by Frances specialised war crimes and crimes against humanity unit.

Defendant	Year	State where alleged abuse occurred	Incident or facts giving rise to complaint	Forum State	Cause of action	Outcome (and date)/Status
Chevron	1999	Nigeria	Violence in the course of a protest against the company's activities; protestors allegedly subsequently beaten and tortured.	United States	Tort-based; ATS, RICO and US state law	Reached trial but dismissed by a federal jury in 2008. Attempts to gain a retrial not successful.
China Construction Bank	2009	China	Alleged torture, beatings sexual abuse and prolonged arbitrary detention of claimant by Chinese law enforcement authorities	United States	Tort-based; ATS	Dismissed (2010) on grounds that facts alleged no sufficient proof to show defendant's responsibility for abuse in gaol. Upheld on appeal, 2011.
Chiquita	2007-2011	Colombia	Violence (especially against union leaders) by Colombian paramilitaries, resulting in many thousands of deaths.	United States	Tort-based; ATS, TVPA, state law and foreign law.	Pending
Cisco Systems	I-2011 II – 2011	China	Alleged grave human rights abuses by Chinese authorities (allegedly facilitated by technology developed by the defendant)	United States	Tort-based; ATS, TVPA and US laws relating to the manufacture and distribution of devices to intercept information.	Pending
Coca-Cola	2001	Colombia	Grave human rights abuses by paramilitaries (torture and murder)	United States	Tort-based; ATS and TVPA.	Dismissed against Coca-Cola in 2003 and against two foreign bottlers in 2006. Lack of subject matter jurisdiction (lack of State action) Dismissals affirmed on appeal in 2009.

Defendant	Year	State where alleged abuse occurred	Incident or facts giving rise to complaint	Forum State	Cause of action	Outcome (and date)/Status
Curaçao Drydock Company	2006	Cuba, Curaçao	Trafficking and forced labour on oil platforms and ships	United States	Tort-based; ATS, RICO and tort (pleadings under foreign law)	Judgement given for claimants in default of attendance by defendants, damages of \$80m awarded against the defendant in 2008.
Danzer Group	2013	Democratic Republic of Congo	Abuses by Congolese military	Germany	Private criminal complaint.	Pending
Deutsche Afrika-Linen GMBT & Co.	2001	Namibia	Enslavement; alleged crimes against humanity during the period of German occupation	United States	Tort-based; ATS and federal common law	Dismissed.
Drummond	2002	Colombia	Killings of union leaders by paramilitaries; other violence	United States	Tort-based. ATS, TVPA and state law.	Reached trial but dismissed by jury (2007)
	2009	As above	As above	United States	Tort-based, ATS Note: Criminal proceedings have also been filed in Colombia against a Drummond contractor for unlawful killing.	
Exxon-Mobil	2001	Indonesia (Aceh)	Human rights abuses committed by security forces	United States	Tort-based, TATS, TVPA and state law.	Awaiting trial in relation to ATS and state law claims.
Ford – I	2002	Argentina	Repression, abductions and mistreatment of Ford workers during the military dictatorship	Argentina	Criminal action	Indictments filed against several individual executives in May 2013.

Defendant	Year	State where alleged abuse occurred	Incident or facts giving rise to complaint	Forum State	Cause of action	Outcome (and date)/Status
Ford – II	2004	Argentina	Repression, abductions and mistreatment of Ford workers during the military dictatorship	United States	Tort-based; ATS	[unclear]
Ford – III	2006	Argentina	Repression, abductions and mistreatment of Ford workers during the military dictatorship	Argentina	Civil claim for damages	[unclear]
HudBay	I-2011; II-2010; III-2012	Guatemala	Violence and abuses carried out by security personnel at the “Fenix” project in Guatemala	Canada	Tort-based claim	Pending. Defendant companies’ motions to dismiss all claims were dismissed on 22/7/13.
IBM - I	2002	Switzerland	Atrocities committed by the Nazi regime during WWII	Switzerland	Civil action for damages	Dismissed on limitation grounds
IBM - II	2001	Switzerland	Atrocities committed by the Nazi regime during WWII	United States	Tort-based; ATS	Plaintiffs withdrew. Dismissed.
Jeppeson	2007	United States	Extraordinary rendition flights (allegedly aiding and abetting torture and inhuman treatment)	United States	Tort-based; ATS	Dismissed on grounds of national security concerns.
Kellogg Brown Root	2008	Jordan/Iraq	Alleged trafficking, forced labour.	United States	Tort-based, ATS plus US federal trafficking laws plus RICO.	Awaiting trial.

Defendant	Year	State where alleged abuse occurred	Incident or facts giving rise to complaint	Forum State	Cause of action	Outcome (and date)/Status
L-3 Group	2004	Iraq	Inhuman treatment of prisoners at Abu Ghraib prison	United States	Tort-based; ATS and common law	Initial actions dismissed on grounds of defence contractor immunity. Subsequently actions largely dismissed but one settlement achieved. Amended claims have been filed in some cases, now pending.
Lima Holdings BV	2009, and 2010	Israel	Construction of annexation wall and settlements in the OPT.	Netherlands	Criminal complaint	Dismissed (2013)
Nestle, Archer Daniels, Midland and Cargill	2005	African States	Alleged trafficking, forced labour, torture on cocoa plantations.	United States	Tort-based; ATS, TVPA, State law and UN constitution	Dismissed (2010) on basis that corporate liability not sufficiently well established under international law to found an action under the ATS. On appeal.
Monterrico metals	2009	Peru	Alleged abuses by Peruvian police against protestors at the Rio Blanco mine.	England	Tort-based action pleaded under English and Peruvian law. Note: parallel criminal complaint was also filed in Peru in 2008 against police and security personnel.	Settled, 2011
Nippon Steel & Sumitomo	[?]	South Korea	Forced labour during Japan's colonisation of South Korea.	South Korea	Civil claim for compensation	Judgment in favour of the claimants, and award of damages (July 2013).

Defendant	Year	State where alleged abuse occurred	Incident or facts giving rise to complaint	Forum State	Cause of action	Outcome (and date)/Status
Nishamatsu Construction	1998	Japan	Forcible removal of individuals, forced labour during World War II	Japan	Tort-based action	Dismissed on basis that defendants' rights were extinguished by treaty between Japan and China. However, voluntary settlement subsequently reached.
Occidental	2003	Colombia	Colombian air force bombardment on Santo Domingo on 13 December 1998, resulting in many civilian deaths.	United States	Tort-based; ATS	[unclear]
Qosmos	2012	Syria	Alleged human rights abuses (allegedly facilitated by the technology developed by the defendant).	France	Criminal	Pending. Investigation launched in June 2012
Rio Tinto	2000	Papua New Guinea	Violence and abuses committed by Papua New Guinea army during a secessionist conflict on Bougainville.	United States	Tort-based; ATS	By Oct 2011 all claims had been dismissed except for the genocide and war crimes claims. Appeals decisions then vacated pending decision in <i>Kiobel</i> .
Shell	2002	Nigeria	Violence by Nigerian authorities putting down protests against company's activities in Nigeria; torture, extra-judicial killing and other violations by the Nigerian government.	United States	Tort-based action; ATS	Dismissed (2013).
SNCF – I	2000	France	Transportation of prisoners to death camps under the Nazi regime during WWII.	United States	Tort-based; ATS	Dismissed on grounds of sovereign immunity

Defendant	Year	State where alleged abuse occurred	Incident or facts giving rise to complaint	Forum State	Cause of action	Outcome (and date)/Status
SNCF – II	2001	France	Transportation of prisoners to death camps under the Nazi regime during WWII.	France	Administrative law action.	Dismissed on basis that the court did not have jurisdiction over SNCF, a private company
Talisman	2001	Sudan	Violence against non-Muslim Sudanese living in the area of the defendant's oil concession in southern Sudan.	United States	Tort-based; ATS	Dismissed (failure to pled sufficient facts to justify aiding and abetting liability).
Total	2002	Myanmar	Abuses by the security forces of the Myanmar Military Junta in the vicinity of the Yadana Gas Pipeline.	Belgium	Complaint under Belgium's universal jurisdiction law (now repealed)	Dismissed for lack of standing.
	2007	As above.	As above	Belgium	New criminal complaint	Abandoned
Unocal	1996	Myanmar	Abuses by the security forces of the Myanmar Military Junta in the vicinity of the Yadana Gas Pipeline.	United States	Tort-based; ATS	Settlement reached (2005)
Yahoo-I	2007	China	Alleged human rights abuses by Chinese authorities.	United States	Tort-based; ATS, TVPA and state law.	Settlement agreed 2007
Yahoo – II	2008	China	Alleged human rights abuses by Chinese authorities.	United States	Tort-based; ATS	[pending?]
Many ("Slavery reparations case)	2002	United States	Slavery	United States	Tort-based; ATS	Dismissed on grounds of "non-justiciable political question," lack of standing and limitations grounds.