THE THIRD PILLAR

Access to Judicial Remedies for Human Rights Violations by Transnational Business

Prof. Gwynne Skinner
Prof. Robert McCorquodale
Prof. Olivier De Schutter

with case studies by
Andie Lambe

icar CORE ECCJ

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

Contact: Katie Shay – katie@accountabilityroundtable.org

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

Contact: Marilyn Croser – coordinator@coporate-responsibility.org

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

Contact: Filip Gregor – filip.gregor@eps.cz

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PREFACE

Every day around the world people are affected in their daily lives by the activities of business enterprises.[1] Some of these effects are beneficial in terms of salaries or goods and services. Other effects, however, can inhibit the exercise of people's human rights. Human rights violations can take place in the workplace, where labor rights and civil rights might be infringed; in a community, where the rights of access to education, health care, and the right to assemble might be limited; and in individuals' home lives, where the rights of privacy and family life might be restricted. Sometimes, the right to life, security, housing, and clean food and water are impacted. In addition to these, people are sometimes victims of rape, torture, beatings, extrajudicial killing, and other egregious abuses. The impact of abuses of human rights by business can be widespread in terms of its nature and the number of people affected.

The global reach of transnational businesses has significantly increased over the past thirty years as a result of the liberalization of international trade and investment. Yet, the conditions under which these businesses may be held liable for human rights abuses have not aligned with this evolution. Moreover, States have, in general, failed to fulfill their duty to protect human rights by ensuring that victims have access to effective remedies, including judicial remedies, particularly for human rights abuses that occur abroad (extraterritorially) at the hands of businesses. The resulting lack of access to judicial remedies provided by home States for human rights abuses by businesses, in particular those abuses that occur extraterritorially, has a considerable impact on the effective exercise of human rights.

The right to an effective remedy for such harms is well established in international law. In addition, the third pillar of the United Nations Guiding Principles on Business and Human Rights[2] (Guiding Principles or UNGPs) confirms that victims must have access to an effective remedy, and that the State has a duty to ensure that an effective judicial remedy is available. Since the universal endorsement of the UNGPs, however, there has been little focus on implementation of the third pillar. Further, some States have taken regressive steps since the adoption of the UNGPs, rather than work positively to ensure that effective remedy is accessible.

The purpose of the Access to Judicial Remedy (A2JR) Project is to understand which barriers are most insurmountable for victims and to provide recommendations for each of the jurisdictions examined regarding how the States can better fulfill their duty to reduce these barriers and ensure victims have access to judicial remedies in their States for abuses of human rights by transnational business. The A2JR Project was commissioned by the International Corporate Accountability Roundtable (ICAR),[3] CORE,[4] and the European Coalition for Corporate Justice (ECCJ).[5] It builds on the report drafted by Professor Anita Ramasastry, Professor Olivier De Schutter, Mark B. Taylor, and Robert C. Thompson, *Human Rights Due Diligence: The Role of States*, published in December 2012.[6]

Our approach has been to conduct consultations—in person and through the use of questionnaires—with key practitioners and experts in the relevant States, as well as to engage in independent research. We then drafted the Report based on these consultations and our own research. We also include Case Studies that illustrate the experience of victims who, in their search for effective remedy, have encountered the barriers we expose.

The consultations confirmed that there are many legal and practical barriers that prevent victims from accessing effective remedies. They also showed that in some jurisdictions, legislatures and judiciaries have developed law that has functioned to shield businesses from liability for harm or to make it more difficult for victims to seek effective remedy.

For instance, the State in which the harm occurred (host State) may not have a strong rule of law and thus there is no real protection of human rights despite international legal obligations agreed to by the State. Some States do not to have effective justice systems or an independent judiciary. Governments may be closely connected with the business that committed or was complicit in the violation. In some instances, the government itself may have played a role in facilitating the violation.

In States where the largest transnational businesses are domiciled (home States), primarily in the United States, Canada, and major jurisdictions in Europe (including the United Kingdom[7]), the rule of law does exist. However, these States have not ensured that victims have access to judicial remedies

for human rights abuses that have arisen extraterritorially due to the activities of businesses or their subsidiaries. In these home States, victims of human rights abuse have been denied access to remedy due to a range of obstacles and barriers. By creating or allowing these obstacles and barriers to remain, States have failed in their duty to protect human rights by ensuring access to effective remedy through the judicial process.

It is these obstacles and barriers that this Report examines. After discussing the barriers at length, we make several recommendations, largely legislative or policy changes regarding the greatest of these barriers, so that States may fully comply with their duty to protect human rights by ensuring effective judicial remedies.

We are grateful to the individuals who lent us their expertise on these issues and shared their stories of the barriers they have faced in searching for effective remedies. We sincerely hope the recommendations will help alleviate these barriers for future victims.

Professor Gwynne Skinner

Professor Robert McCorquodale

Professor Olivier De Schutter

Andie Lambe

Professor Gwynne Skinner

Gwynne teaches in the area of international human rights and directs the International Human Rights Clinic at Willamette University in Salem, Oregon, U.S.A. She has experience litigating human rights cases under the Alien Tort Statute in a range of cases, including cases against businesses. Her scholarly research primarily focuses on issues related to human rights litigation in U.S. courts and the role of customary international law in domestic courts.

Professor Robert McCorquodale

Robert is the Director of the British Institute of International and Comparative Law in London. He is also Professor of International Law and Human Rights at the University of Nottingham and a barrister at Brick Court Chambers, London. He researches, practices and advises in all areas of public international law, with a particular focus on corporations and human rights.

Professor Olivier De Schutter

Olivier teaches at the Catholic University of Louvain and at the College of Europe (Natolin), and has been the UN Special Rapporteur on the Right to Food since May 2008. Between 2002 and 2006 he chaired the EU Network of Independent Experts on Fundamental Rights, and from 2004-2008 he was the General Secretary of the International Federation of Human Rights on the issue of globalization and human rights.

Andie Lambe

Andie is a freelance consultant on legal and human rights issues. She was the founding director of Reprieve, a human rights charity that uses the rule of law to enforce human rights. She managed the Carlile Inquiry into the treatment of children in custody in the U.K. prison system. Most recently, Andie headed the International Justice team at Global Witness, where she worked to hold individuals, businesses, and governments accountable for human rights abuses.

EXECUTIVE SUMMARY

Background

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

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within the territory and/or jurisdiction those affected have access to remedy.[8]

The commentary of Guiding Principle 26 explains:

> Effective judicial mechanisms are at the core of ensuring access to remedy . . . States should ensure that they do not erect barriers to prevent legitimate cases from being brought before the courts in situations where judicial recourse is an essential part of accessing remedy or alternative sources of effective remedy are unavailable . . . [9]

Alongside the UNGPs, a number of human rights treaty monitoring bodies have established positive obligations on States to provide effective remedies for violations of human rights, including

the obligation to undertake effective investigations of the situation that led to the human rights violation, even if the action was carried out by a non-State actor or outside the State's borders.

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

The Project

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

The scope of this Report covers the situation in Canada, France, Germany, the Netherlands, Switzerland, the United Kingdom, and the United States, on the basis that the significant majority of transnational businesses are domiciled in these States.[10] These are also all member States of the Organisation of Economic Co-operation and Development (OECD), and are adherents to the OECD Guidelines for Multinational Enterprises 2011, which incorporates many of the core aspects of the UNGPs.[11]

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

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

Summary of Findings

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

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

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

In the United States, most lawsuits against businesses that allege harms as a result of violations of rights protected by international law, and international human rights law in particular, have proceeded in U.S. federal court under the federal Alien Tort Statute (ATS) for violations of customary international law, or under state tort law. In 2013, perhaps the most significant barrier to accessing judicial remedies for human rights violations that occur in a host State arose from the case of *Kiobel v. Royal Dutch Petroleum, Co.* In *Kiobel*, the U.S. Supreme Court held that the presumption against the extraterritorial application of U.S. law applies to the ATS, which can only be overcome if the claim "touches and concerns" the United States "with sufficient force."[12]

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

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

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

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

2. *FORUM NON CONVENIENS* DOCTRINE

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

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

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

3: CORPORATE LIABILITY FOR HUMAN RIGHTS ABUSE

Corporate Criminal Liability

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

The United States has federal criminal statutes in the area of human rights that apply extraterritorially and which could be invoked against businesses, namely genocide, war crimes, torture, and forced recruitment of child soldiers. The United States Department of Justice Human Rights and Special Prosecutions Section, established in March 2010, is charged with prosecuting these crimes. However, prosecutions against businesses for these human rights crimes remain rare. Moreover, federal criminal prosecutions of these crimes do not generally result in damages or compensation to victims.

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

Corporate Civil Liability

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

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

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

4. TIME LIMITATIONS ON BRINGING CLAIMS

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

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

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

5. IMMUNITIES AND NON-JUSTICIABILITY DOCTRINES

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

6. APPLICABLE LAW

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

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

7. PROVING HUMAN RIGHTS VIOLATIONS

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

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

In continental European systems, evidence rules may pose a significant stumbling block for plaintiffs in the absence of the equivalent of a disclosure rule obliging the defendant to divulge information in its possession. To a certain extent, this obstacle may be overcome where the human rights violation alleged by the victim could constitute a criminal offense, which the public prosecuting system may pursue. This allows the victim to rely on the public prosecutor for the collection of evidence. In practice, this option remains theoretical because public prosecutors—for a number of objective and subjective reasons including complexity of these cases, lack of resources and know-how, as well as lack of mandate—do not tend to pursue these types of cases.

8. THE COST OF BRINGING TRANSNATIONAL LITIGATION

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

Legal Aid

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

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

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

Loser Pays Provisions

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

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

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

The general position in U.K. litigation is that the unsuccessful party to the litigation has to pay the successful party's costs, which include lawyers' fees. However, the barrier to actions in the United

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

Legal Standing of Third Parties to Bring Claims

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

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

Collective Redress and Class Action Mechanisms

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

Though most European States have not adopted the class action mechanism, some analogous collective redress mechanisms have emerged in recent years. However, the effectiveness of these mechanisms usually have been limited by restrictive conditions. The most effective collective redress mechanism is provided in the United Kingdom, where procedural rules enable courts to allow collective actions on an opt-in basis. While this mechanism has enabled some groups to bring what amount to collective claims, considerable negotiation is required between each party's lawyers for the process to be effective, and it remains at the discretion of the court to allow it.

9. THE STRUCTURE OF THE CORPORATE GROUP

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

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

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

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

10. REMEDIES: REACH AND ENFORCEMENT

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

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

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

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

Conclusions

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

SUMMARY RECOMMENDATIONS

We recommend the following steps, which are set out in more detail in Section V of the full Report:

1. Ensure that controlling entities within business enterprises have a legal duty with regard to all parts of the enterprise for human rights impacts.
2. Enable victims of business' human rights violations to bring a case in the business' home State.
3. Enact legislation to limit or remove financial barriers that prevent victims from bringing and prosecuting a case.
4. Develop and enhance criminal laws to hold businesses accountable for their involvement in extraterritorial human rights violations.

RECOMMENDATIONS FOR POLICY MAKERS IN THE UNITED STATES

1. Amend the Alien Tort Statute to apply to extraterritorial conduct.
2. Amend the Torture Victims Protection Act to apply to persons and the type of claims allowed.
3. Enact state laws criminalizing violations of international human rights law and providing private rights of action for such violations.
4. Clarify choice of law.
5. Clarify that businesses are legal persons for purposes of international law.
6. Codify forum non conveniens to ensure courts do not improperly dismiss cases.
7. Require or encourage businesses to obtain insurance to adequately cover their actions abroad.
8. Increase the statute of limitations for torts that occur abroad and set aside the statute of limitations for genocide, war crimes, and crimes against humanity.
9. Clarify that civil aiding and abetting is governed by the knowledge standard.
10. Remove the limited liability for parent companies with wholly-owned subsidiaries operating abroad.
11. Allow for the recoupment of attorney fees.
12. Amend rules easing the requirements of certifying class.
13. Prevent retaliatory actions.

14. Create legal presumptions for failure to engage in human rights due diligence to overcome evidentiary burdens.
15. Create special visas for victims and witnesses and allow depositions by video.
16. Provide for "command responsibility" in criminal liability statutes; enhance criminal enforcement.
17. Enact legislation that provides for victim compensation when businesses or their officers are found guilty of human rights abuses.

RECOMMENDATIONS FOR POLICY MAKERS IN CANADA

1. Enact a statute providing a cause of action for violations of customary international law.
2. Codify forum non conveniens to clarify the test and ensure that victims have an adequate remedy available before dismissing the case.
3. Create exceptions for "loser pays" in public interest litigation, and ensure that such litigation includes international human rights cases.

RECOMMENDATIONS FOR POLICY MAKERS IN EUROPE

1. Make businesses domiciled in the European Union and in Switzerland, and their subsidiaries, liable for harm resulting from human rights impacts.
2. Allow cases to be heard in the European Union when no other forum is available.
3. Apply the law of the State where the case is heard in situations where the law of the State where the harm occurred does not provide effective remedy.
4. Reform collective action.
5. Extend legal aid.
6. Affirm the duty of the business enterprise to conduct human rights due diligence with respect to group's subsidiaries and business partners.
7. Increase reporting requirements of businesses in relation to their human rights responsibilities.
8. Reform access to evidence.
9. Criminalize human rights violations, including those that take place outside the European Union and Switzerland.
10. Training and awareness raising for public prosecutors and judges.

I. INTRODUCTION

Background

The United Nations Guiding Principles on Business and Human Rights (UNGPs or Guiding Principles)[13] were unanimously endorsed by the United Nations Human Rights Council in June 2011. The UNGPs, in setting a common platform for understanding the relative obligations and responsibilities of States and businesses pertaining to human rights, rest on three pillars: first, States have a duty to protect human rights; second, businesses have a responsibility to respect human rights; and third, those whose rights have been violated must have access to an effective remedy.[14]

The State duty to protect human rights contemplates that the State itself ensures that effective remedy is available to victims. As Guiding Principle 25, the foundational principle for the third pillar recognizes:

> As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within the territory and/or jurisdiction those affected have access to remedy.[15]

Further, it is recognized that the core to ensuring access to an effective remedy is having an effective and fair judicial system. The Guiding Principles unambiguously establish the effectiveness of judicial mechanisms as the bedrock of the access to remedy pillar. As the commentary to Guiding Principle 26 explains:

> Effective judicial mechanisms are at the core of ensuring access to remedy. [Judicial mechanisms'] ability to address business-related human rights abuses depends on their impartiality, integrity and ability to accord due process. 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 the legitimate and peaceful activities of human rights defenders are not obstructed.[16]

Alongside the UNGPs, a number human rights treaty monitoring bodies have established positive obligations on the part of States to provide effective remedies for violations of human rights. These include the obligation to undertake effective investigations of situations that lead to human rights violations, even if the actions were by non-state actors or outside the State's borders.[17]

Yet in some States, judicial mechanisms do not provide effective remedies for victims of human rights abuse by business enterprises, where the alleged abuse has taken place outside the State of origin of the business. Indeed, the United Nations Special Representative on Business and Human Rights (Special Representative) expressly noted this problem:

> Some complainants have sought remedy outside the State where the harm occurred, particularly through home State courts, but have faced extensive obstacles. Costs may be prohibitive, especially without legal aid; non-citizens may lack legal standing; and claims may be barred by statutes of limitations. Matters are further complicated if the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary. In common law countries, the court may dismiss the case based on *forum non conveniens* grounds—essentially, that there is a more appropriate forum for it. Even the most independent judiciaries may be influenced by governments arguing for dismissal based on various "matters of State." These obstacles may deter claims or leave the victim with a remedy that is difficult to enforce . . . States should strengthen judicial capacity to hear complaints and enforce remedies against all corporations operating or based in their territory, while also protecting against frivolous claims. States should address obstacles to access to justice, including for foreign plaintiffs especially where alleged abuses reach the level of widespread and systematic human rights violations.[18]

It is these types of obstacles, or barriers, and the means by which they can be overcome through State action, which this Report sets out to identify and explain. Until these barriers are overcome, States will not have fulfilled their duty to ensure access to effective remedy for human rights violations.

Methodology

The methodology undertaken by the Authors of this Report was primarily the gathering of material and information through a series of research consultations, as well as some independent research. The consultation participants included those in legal practice and non-governmental organizations (both lawyers and non-lawyers), legal academics, as well as senior retired judges and experienced consultants in this area.

The scope of this Report covers the situation in Canada, France, Germany, the Netherlands, Switzerland, the United Kingdom, and the United States, on the basis that the significant majority of transnational businesses are domiciled in these States.[19] These are also all Member States of the Organisation of Economic Co-operation and Development (OECD), and are adherents to the OECD Guidelines for Multinational Enterprises 2011, which incorporates many of the core aspects of the UNGPs.[20]

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

However, attempts are being pioneered in Canada and continental Europe as well, facing at times similar obstacles, so these States were included in the research. In addition, the breadth of States examined was important because some of the seemingly insurmountable barriers in the United States and Canada are not an issue in the European Union, while civil law States in Europe often do not provide legal tools well established in common law that make access to effective judicial remedy more possible.

Structure of this Report

Section II of this Report details the duty of States to protect human rights at home and abroad, victims' right of access to effective remedy, and the interrelationship of the two. Section III sets out the most significant legal and practical barriers victims of corporate-related human rights abuse face in pursuing an effective remedy in the jurisdictions examined. Section IV presents the conclusions of the Report. Finally, Section V provides recommendations to States of how to eliminate or alleviate the barriers identified. Case studies that illustrate the barriers through discussion of actual cases are given in the Appendix to the Report, and also appear in excerpts throughout the text.

The Authors hope that this Report will provide useful guidance to all States around the world, but particularly those jurisdictions covered in the Report as they work towards ensuring the duty to protect human rights is practiced, particularly by ensuring that effective judicial remedies are in effect and promoted.

II. THE INTERNATIONAL HUMAN RIGHTS FRAMEWORK

This section of the Report details the State duty to protect human rights under international law, including instances when a duty arises to protect human rights outside of the territorial jurisdiction of a home State. The section then discusses the right to effective remedy, as contained in international law, and clarifies the interrelationship between the duty to protect human rights and the right to effective remedy in the context of corporate-related human rights harms committed abroad.

The Duty to Protect Human Rights in International Law

Human rights courts and expert bodies established under widely ratified human rights treaties have repeatedly affirmed the duty of States to protect human rights, including by regulating non-State actors. Under the International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee takes the view that:

> the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities

> that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities.[21]

This is also the position the Committee on Economic, Social and Cultural Rights under the International Covenant on Economic, Social and Cultural Rights (ICESCR) has adopted.[22] Moreover, regional human rights courts and expert bodies established under regional human rights instruments have routinely affirmed that a State is responsible for regulating the conduct of private persons.[23]

The duty of the State to protect human rights, including through regulating the conduct of private actors over which it has personal jurisdiction, is now considered to extend beyond its own territory to situations where such conduct may lead to violations of human rights extraterritorially, even where such violations occur within the territory of another State.[24] International law is clear that the State "is under the duty to control the activities of private persons within its State territory and the duty is no less applicable where the harm is caused to persons or other legal interests within the territory of another State."[25]

Various United Nations (UN) human rights treaty bodies have explicitly affirmed the extension of the general obligation to control the conduct of non-State actors where such conduct might lead to human rights violations, to extraterritorial situations. The Committee on Economic, Social and Cultural Rights affirms that States parties should "prevent third parties from violating the right [protected under the ICESCR] in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law."[26]

Specifically in regard to businesses, the Committee on Economic, Social and Cultural Rights has further stated that: "States Parties should also take steps to prevent human rights contraventions abroad by corporations that have their main seat under their jurisdiction, without infringing the sovereignty or diminishing the obligations of host States under the Covenant."[27] Similarly, the Committee on the Elimination of Racial Discrimination has called upon States to regulate the extraterritorial actions of third parties, in particular businesses, registered in their territory. For example, in 2007, it called upon Canada to "[t]ake appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples in territories outside Canada," recommending that the State party "explore ways to hold transnational corporations registered in Canada accountable."[28]

The Right of Access to Effective Remedies

Under international law, victims of human rights abuses have the right to access an effective remedy; this means victims should always have recourse to judicial remedies where other remedial schemes, such as administrative remedies, are not sufficient. This has been explicitly recognized by various UN bodies, as well as in the regional context.[29]

To be effective, remedies must be capable of leading to a prompt, thorough, and impartial investigation; cessation of the violation, if it is ongoing; and adequate reparation, including, as necessary, restitution, compensation, satisfaction, rehabilitation, and guarantees of non-repetition.[30] To avoid irreparable harm, interim measures must be available, and States must respect all interim measures mandated by a competent judicial or quasi-judicial body.[31] In addition, victims have the right to truth about the facts and circumstances surrounding the violations, which should also be disclosed to the public, provided that it causes no further harm to the victim. The right to truth, which is an inherent component of satisfaction, has been established under the UN Principles and Guidelines on Reparation and in several resolutions of the UN Human Rights Commission and Council.[32]

The Interrelationship between the Duty to Protect Human Rights and the Right to Effective Remedy

International human rights law imposes on all States a duty to regulate the conduct of private groups or individuals, including legal persons such as businesses, in order to ensure that their conduct does not violate others' human rights.[33] It also imposes a duty upon States to ensure an effective remedy is available to victims of human rights violations.[34] Both of these duties apply in transnational situations. In other words, the duties apply to the conduct of private entities acting outside the home State. The UNGPs confirm this dual responsibility, noting that "States should 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," noting that such legal barriers can include "where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim."[35]

The implication is that, in extraterritorial situations, States should cooperate in order to ensure that any victim of the activities of non-State actors that result in a violation of human rights has access to an effective remedy, preferably of a judicial nature, in order to seek redress. In extraterritorial situations, the home State has a duty to cooperate with the host State to ensure that victims have access to effective remedies.[36]

IMPLEMENTING THE UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

NATIONAL APPROACHES

Since the UN Human Rights Council unanimously adopted the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011,[37] a number of States have developed or have begun the process of developing National Action Plans (NAPs) or other government-led strategies for implementing the UNGPs.

NAPs should directly address the full scope of the UNGPs, including those that require States to ensure access to judicial remedy for victims of business-related human rights abuse.[38]

To date, the only jurisdiction considered in this Report that has developed a NAP is the United Kingdom, which released its NAP on business and human rights on 4 September 2013.[39]

The fact that the United Kingdom has produced a NAP that applies to all of its government departments and sets clear expectations that a business domiciled in the United Kingdom should respect human rights, is a positive development. However, the U.K. NAP falls short in its approach to access to judicial remedy. The closest it comes to addressing this issue is a statement that the strategy is intended to "support access to effective remedy for victims of human rights abuse involving business enterprises within the U.K. jurisdiction."[40] However, concrete government support for effective remedy does not yet exist, other than in terms of supporting civil society and trade unions to access effective remedies in the States where the harm occurred.

As the first State to adopt a NAP that directly addresses UNGPs implementation, the United Kingdom should be commended for its efforts in moving its government toward fulfilling its business and human rights obligations. However, the U.K. NAP contains significant gaps in effectuating the State duty to protect human rights that must be noted as other States look to this plan as an example.

III. MAPPING ACCESS TO JUSTICE IN TRANSNATIONAL CASES AGAINST BUSINESSES: LEGAL AND PRACTICAL BARRIERS TO EFFECTIVE JUDICIAL REMEDY

ISSUE 1: EXTRATERRITORIAL HARMS: BRINGING CLAIMS WHERE HARM OCCURS ABROAD

This section of the Report considers whether the national courts of a business's home State (the State where the business is domiciled) have jurisdiction to hear cases brought against businesses alleging human rights abuses that occur outside that State, either through statute or case law. Given the large hurdles many plaintiffs face in bringing such claims in the host State (the State in which the harm occurred), the ability of courts in the home State to consider these claims in some cases provides the only avenue toward remedy.

A. UNITED STATES

Claims that allege harms as a result of violations of rights protected by international law, and international human rights law in particular, can proceed in U.S. federal court under the federal Alien Tort Statute[41] (ATS), the Torture Victim Protection Act[42] (TVPA), or for claims alleging violations of state law. Lawsuits alleging violations of state law can take place either in the state courts,[43] or more often, in federal courts when there is diversity of citizenship between the plaintiff and the

defendant and where the claim exceeds $75,000.[44] Often, claims for violations of state tort law are brought along with claims for violations of the ATS.[45]

To date, most cases brought against businesses for violations of international human rights are brought by foreign citizens in federal courts as civil claims for violations of customary international law (CIL) through the ATS. Claims against businesses under the TVPA have rarely succeeded because the TVPA limits lawsuits to individuals acting in an official capacity.[46]

The Alien Tort Statute: A Background

Congress enacted the Alien Tort Statute (ATS) as part of the First Judiciary Act of 1789 in order to give federal courts jurisdiction over tort claims by non-citizens for violations of the law of nations, or customary international law. For almost two centuries, the ATS lay, for the most part, dormant. However, a 1980 landmark case from the Second Circuit Court of Appeals, *Filartiga v. Pena-Irala*,[47] confirmed the ATS could be used to sue defendants, regardless of citizenship and regardless of where the violations occurred.[48] Since that time, over 200 cases have been brought against businesses for violations of customary international law, most under the ATS.[49] Many have been dismissed, a few have resulted in settlements, and many are still pending in the courts.

Later, in the 2004 case of *Sosa v. Alvarez-Machain*, the U.S. Supreme Court confirmed that the federal courts had jurisdiction under the ATS to adjudicate claims for violations of customary international law, regardless of where the violation occurred.[50] Specifically, the Court found the ATS was a jurisdictional statute wherein federal courts could use their common law powers to recognize claims for violations of international law norms that are specifically defined, and are universally recognized as serious violations of international law, *i.e.,* customary international law.[51] The Court cautioned lower federal courts, however, to evaluate the claims brought in each case with a prudential eye toward whether the recognition of such a claim in a particular case might cause foreign policy complications.[52] The Court also indicated in a footnote the possibility of requiring exhaustion of claims in the State where the harm occurred.[53]

i. Claims for Violations of Human Rights under International Law in U.S. Courts under the Alien Tort Statute.

In 2013, perhaps the largest barrier to access to judicial remedies for human rights abuses occurring outside of the United States arose in the case of *Kiobel v. Royal Dutch Petroleum, Co.* (*Kiobel*).[54] In *Kiobel*, the U.S. Supreme Court held that the presumption against the extraterritorial application of U.S. law[55] applies to the ATS, even though it is only a jurisdictional statute.[56] In discussing the presumption against extraterritoriality, the Supreme Court left open the possibility that claims that "touch and concern the territory of the United States" . . . "with sufficient force" could rebut the presumption against extraterritorial application of the ATS.[57] Finally, the Court indicated that because businesses are often present in many States, "mere presence" of a business in the United States would not be enough to meet the "touch and concern" test to overcome the presumption.[58]

The effect of *Kiobel* on the future of litigation against defendants for liability under the ATS where the acts giving rise to the claim occur abroad remains unclear. Individuals engaged in legal practice agree that *Kiobel* presents a barrier to individuals seeking access to judicial remedies for corporate involvement in human rights abuses outside the United States.[59] However, not all individuals agree as to how easily the presumption, as applied to the ATS, can be overcome. Many are optimistic that in certain cases, courts will find the presumption to be overcome, such as where 1) the defendant is a U.S. business; 2) some decision-making leading to the abuses occurred in the United States; 3) products from the illegal activity come into the United States; 4) serious human rights violations occur by a business active within the United States; 5) the United States' interest is affected in some way; or 6) some combination of the above.[60] In addition, such individuals also point to the fact that a majority of the Justices involved in the *Kiobel* decision appeared to suggest that certain factors which "touch and concern" the United States—such as serious violations of human rights—could exist with sufficient force to overcome the presumption against extraterritoriality.[61] In fact, in at least three cases since *Kiobel*—still the substantial minority of cases—lower courts have found the presumption to be overcome, refusing to dismiss the cases.[62] Others believe that only in a very rare case will the presumption be overcome and that, for all practical purposes, *Kiobel* sounded the death knell to ATS litigation for abuses taking place abroad. In fact, indications are that the vast majority of lower federal courts are applying *Kiobel* in a sweeping manner, dismissing cases under *Kiobel* when the alleged illegal acts took place abroad.[63]

CASE STUDY

Al Shimari v. CACI

Four Iraqi detainees at Abu Ghraib who allegedly suffered torture by the U.S. military and civilian defense contractors employed by CACI International, Inc., a U.S. corporation, brought a legal action including claims under the Alien Tort Statute, against the business in 2008. On 26 June 2013, Judge Lee in the Eastern District of Virginia dismissed the case on *Kiobel* grounds.[64] The court determined that because the alleged abuse took place exclusively in Iraq, the presumption against extraterritorial application of the ATS had not been overcome.[65] The plaintiffs filed an appeal to the Fourth Circuit Court of Appeals in October 2013.[66]

For more about this case, please refer to the full case study, which is located in the Appendix.

ii. Claims for Violations of State Law and/or Transitory Torts

The decision in *Kiobel* likely means that many cases brought in the United States against businesses for their role in human rights abuses abroad will be brought under state law in either state courts or in federal courts under diversity jurisdiction.[67] Such claims have been, and will likely be, primarily for violations of state common law torts or transitory torts applying the law of the host State, depending on the choice of law (conflict of laws) analysis employed by the state court.[68]

Typically, with some exceptions, transitory tort claims can be brought against defendants over whom a court has personal jurisdiction[69] if the conduct would give rise to an action in the host State where the conduct occurred (assuming such an action is not contrary to the public policy of the forum state).[70] Sometimes, the case can be brought under the substantive law of the forum state such as where the forum state has a particularly significant interest in the matter.[71] However, there are other potential barriers related to the fact that the acts occurred abroad, such as the doctrine of *forum non conveniens*, discussed below in Issue 2, and issues related to personal jurisdiction over the defendant.

Personal Jurisdiction as an Emerging Issue

For a court to have the ability to adjudicate the case and to enforce a judgment, the court must have the ability to assert judicial power, or jurisdiction, over the defendant.[72] In the United States, in order to assert personal jurisdiction over a defendant constitutionally, the defendant must demonstrate sufficient minimum contacts—defined as "systematic and continuous" contacts—with the state in which the court sits.[73]

A business incorporated in, or that has an office in, the jurisdiction would clearly meet the personal jurisdiction test. However, for businesses that do business in a state, much depends on the level and amount of that business and how that business is structured. Plaintiffs have successfully asked courts to assert personal jurisdiction over businesses domiciled abroad on the grounds that they had an agent doing business in the United States. For example, in *Wiwa v. Royal Dutch Petroleum*, the Second Circuit Court of Appeals found that a New York investor relations office of two foreign companies' subsidiary, for purposes of determining whether the companies were doing business in New York, was sufficient to subject them to personal jurisdiction there in human rights action under the ATS.[74] The court found that the New York investor relations office was an "agent" of the parent companies because all of the office's time was devoted to the companies' business, the companies fully funded the office's expenses, and the office sought the companies' approval on important decisions.[75]

In *Bauman v. DaimlerChrysler*, the Ninth Circuit agreed that the defendant's wholly owned subsidiary in the United States was its agent for purposes of general personal jurisdiction.[76] As this report was going to press, the Supreme Court reversed the case, finding that a court may assert personal jurisdiction over a business only if the business is incorporated in or has its principal place of business in the forum state. [77] Like *Kiobel*, this may prove to have huge implications for human rights litigation in the United States.

In addition, there may be an increase in claims brought for violations of customary international law under the theory that state common law has historically incorporated customary international law.[78] Defendants in such claims may raise the argument of federal preemption or argue that the foreign affairs preemption doctrine dictates that federal law regarding such claims should displace state law.[79] However, given that the ATS does not provide an *exclusive* grant of jurisdiction to federal courts (only concurrent jurisdiction with state courts), and given the limitations on the ATS imposed by *Kiobel*, preemption challenges may not pose much of a barrier. To the degree that federal preemption is raised in cases alleging violations of general state common law torts, federal preemption seems inappropriate given that there is no federal equivalent of such state tort claims. Undoubtedly, however, some courts may still inappropriately dismiss such claims under some sort of federal preemption analysis. At least one federal court in fact dismissed state law claims under foreign affairs preemption, but appears to be the only federal court to have done so.[80]

B. CANADA

Canada does not have a statute providing a cause of action for claims alleging violations of international law; nor has there been a successful attempt to argue that claims for violations of international law can be brought as part of Canada's common law. A statute that would provide Canadian courts with jurisdiction over claims for violations of customary international law has been introduced in the Canadian parliament since 2009,[81] but it ultimately has not yet passed.[82] The current bill is an act that would allow the Canadian Federal Court to exercise jurisdiction over cases that arise from a violation of international law or a treaty to which Canada is a party, and that are carried out by non-Canadian citizens if the violation occurs in a foreign State or territory.[83] In Canada, most tort actions against businesses involving violations of human rights abroad are for violations of the law of the province.[84] Such claims do apply to extraterritorial acts of businesses. Despite the significant numbers of mining and extraction businesses in Canada, claims for violations of provincial law that also constitute human rights violations abroad are relatively new, although they are increasing.[85]

C. EUROPEAN STATES

The Brussels I Regulation[86] makes it mandatory for the national courts of the EU Member States to accept jurisdiction in civil liability cases filed against defendants domiciled in the forum State, whatever the nationality of the defendant or the plaintiff and, in cases of extra-contractual liability, wherever the damage occurred.[87] Article 60 § 1 of the Regulation clarifies that "a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: a) statutory seat, or b) central administration, or c) principal place of business."

In recent years, victims of activities of businesses domiciled in the European Union have increasingly relied on the Brussels I Regulation to hold businesses liable for damages caused by human rights violations in third States.[88] It bears emphasizing that the rules on jurisdiction established by the

Brussels I Regulation are not exhaustive. Where the defendant is not domiciled in one of the EU Member States and insofar as no other court in the European Union has jurisdiction over the case, the Member States are free to extend the jurisdiction of their national courts beyond the minimum rules prescribed by the Regulation. A few examples from within the European Union are discussed below, as is Switzerland, which is not part of the European Union and is not subject to the Brussels I Regulation.

CASE STUDY

Four Niger Delta Farmers v. Royal Dutch Shell[89]

Farmers who brought a lawsuit against Royal Dutch Shell and its Nigerian subsidiary faced many practical barriers in bringing their case forward in Dutch courts. However, because the Brussels I Regulation allows courts to hear cases against businesses domiciled in the European Union where claimants allege extraterritorial harm, and because the Dutch court found that the claims against the Dutch domiciled parent company and its Nigerian subsidiary were so closely connected that they should not be separated, jurisdiction was not a barrier in that landmark case.[90]

For more about this case, please refer to the full case study, which is located in the Appendix.

i. France

In France, it follows from articles 14 and 15 of the Code Civil that the French courts may be competent for any civil brought against a French national, in the absence of any other ground for jurisdiction.[91]

ii. Germany

In Germany, the situation is as follows:

> As against foreign defendants, § 23(1) of the Code of Civil Procedure provides civil courts with jurisdiction over any monetary claims (e.g. claims in damages) if assets of the defendant are located within Germany. The legal venue of asset is rather attractive, as any, even foreign claimants can access it and plaintiffs will receive a German judgment enforceable without exequatur into the defendants' assets in Germany. If the foreign defendant has a claim for payment against a German debtor, § 23 regards that claim as an asset located in Germany. This means, for instance, that a claim of a foreign producer or constructor for payment against any German buyer or principal can establish jurisdiction against that foreign producer/constructor.[92]

iii. The Netherlands

Jurisdiction of Dutch courts may be established over non-EU businesses where the claims against the non-EU business are so closely connected with the claims against a business over which the Dutch courts do have jurisdiction that joint adjudication of these claims is considered justified for efficiency reasons.[93] It does not matter whether, in the end, the parent company is found liable; as long as there exists the possibility that the parent can be held liable, that suffices for a Dutch court to have jurisdiction over businesses not domiciled in the Netherlands. Further, in the Netherlands there is a basis for the exercise of international civil jurisdiction over claims that would normally not fall within one of the other bases for jurisdiction if effective opportunities to bring those claims in foreign fora are absent.[94] This concept, called forum necessitatis, is discussed in more detail infra.

iv. United Kingdom

Although there is no U.K. legislation that provides a basis for claims brought against businesses in the United Kingdom for their extraterritorial actions that violate human rights, cases can be brought for extraterritorial actions under common law. All of the cases that have been brought in the United Kingdom for corporate-related human rights harms have been primarily on the grounds of a breach of tort law, which is governed by common law and not legislation.

In addition, U.K. courts have exerted jurisdiction over businesses for harm that took place outside the United Kingdom under the Brussels I Regulation. In one case, a U.K. court applied the Brussels I Regulation and found jurisdiction over a British business for a claim that related to its involvement in dumping toxic waste on the Ivory Coast.[95]

Furthermore, U.K. courts recognize that a foreign subsidiary may be added as a co-defendant to a claim against a U.K.-based parent company, provided that the plaintiff can justify that the subsidiary is a proper and necessary party to the claim. For example, in 2009 a group of Peruvian individuals filed a lawsuit against U.K. based mining business Monterrico Metals and its Peruvian subsidiary, Rio Blanco Copper, alleging complicity in violence against protesters of their mining project.[96]

v. Switzerland

In principle, it is possible for Swiss courts to adjudicate claims against businesses located there for violations of international law.[97] Switzerland is not part of the European Union, and thus is not subjected to the Brussels I Regulation, but the situation is identical to that which is applied in the EU Member States under the Brussels I Regulation. Thus, the Swiss courts are in principle competent to adjudicate claims filed against defendants who are domiciled in Switzerland, whether or not the damage was inflicted in the State.[98]

The jurisdiction of the Swiss courts under the rules described above is mandatory; the courts may not refuse to adjudicate a claim that is presented to them if they have jurisdiction over the case. The only exception is where the claim presents no clear connecting factor to Switzerland.[99]

ISSUE 2: *FORUM NON CONVENIENS* DOCTRINE

This section of the Report considers the doctrine of *forum non conveniens*. This doctrine, where it is applied, allows courts to prevent a case from moving forward in the jurisdiction in which it is filed on the basis that another jurisdiction is ostensibly more "convenient" for the parties and witnesses.

In the context of cases against businesses, this usually means that the case is dismissed from the forum State with the expectation that it will be filed in the host State, where the violation or harm occurred. However, the host State may not have a judicial system that is as independent, functional, or stable as the forum State; may have not have remedies that sufficiently compensate the victims for the harm they have suffered; or the government may be unwilling or unable to allow the case to proceed, sometimes due to corruption or complicity. In addition, it may be riskier for victims to file cases in the host State, either because their identity will become better known than it would if the case was filed elsewhere or because of the lack of a rule of law. One reason that this issue is so critical is that statistics suggest that "ninety-nine percent of cases dismissed on *forum non conveniens* grounds in the United States, are, for one reason or another, never refiled"[100] in the alternate forum and the victims are therefore left without any remedy.

Should Cases be Brought Initially in Host States?

Some advocates argue that rather than bring cases alleging human rights abuse in the home State of the business, human rights litigators should focus on bringing cases within the host State, working with local human rights lawyers to build capacity and create law in those States**.** All advocates recognize that in the best of all possible worlds, host States would have a rule of law that would offer stable judicial systems that recognize human rights violations and provide adequate remedies. However, many challenges exist, including:

1. Capacity of host States to adjudicate claims: Often host States do not have stable judicial systems and may suffer from other challenges, including corruption, which could impact the judiciary and the rule of law.
2. Persecution of victims: Many victims and witnesses face persecution in the host State if they pursue litigation for human rights violations, especially for suits against businesses.
3. Legal tradition and culture: Many States do not recognize the culture of pro bono legal work and lawyers may struggle to be compensated for their efforts. This is also true of some home States.
4. Legal costs: Many States do not recognize contingency payments to ensure compensation upon a resolution of the plaintiff's claim. In many States because the legal costs of both sides is paid by the unsuccessful party, this is a barrier to local lawyers taking human rights cases and to victims being willing to bring the claim. This too is true of some home States.

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When these challenges exist, it is important to have an alternate forum in which to bring a claim for human rights abuses by businesses. Litigation in the home State of the business provides an opportunity for effective judicial remedy when host State barriers may be insurmountable.

Ultimately, the fact that claims are brought in home States does not mean host State causes of action are overlooked. In the United States, for example, there may be requirements to exhaust local remedies or establish that local remedies are futile before claims are brought, and it can be therefore presumed that victims have sought local remedy before bringing claims in U.S. courts.[101] In addition, there may be positive effects from home State litigation, as home State litigation can often be the catalyst for initiating proceedings in the host State and breaking the pattern of impunity.

In addition, there are a number of actors present within home States who are able to influence corporate behavior. Bringing cases in a forum where it is more likely that these stakeholders will be aware of the litigation can be beneficial. For instance, parent company executives should be compelled to explain their problematic business practices to peers and the public in their own social and political environment. Shareholders, who should be interested in the way their business deals with human rights, should be informed about the allegations against and actions of the business. In addition, consumers, who benefit from products manufactured under inhumane conditions, should also be fully informed about the consequences and harms that the production of certain products can cause.

Please refer to the Appendix of case studies for examples of concurrent home State-host State litigation.

A. UNITED STATES

In the United States, courts can dismiss a case under the *forum non conveniens* doctrine on the grounds that another forum—usually in the host State—is more "convenient" because the parties, witnesses, and evidence reside there, as long as the host State has a functional judicial system for which an adequate remedy is possible.[102] Under federal common law, the courts have held that dismissal of a claim based on *forum non conveniens* is appropriate where (1) an adequate alternate forum exists which possesses jurisdiction over the whole case, including all of the parties; (2) all relevant factors of private interest favor the alternate forum, weighing in balance a strong presumption against disturbing plaintiffs' initial forum choice; (3) if the balance of private interests is nearly equal, the court further finds that factors of public interest tip the balance in favor of trial in the alternate forum; and (4) the trial judge ensures that plaintiffs can reinstate their suit in the alternate forum without undue inconvenience or prejudice.[103]

i. Forum non conveniens at the federal level

Except for a few examples, *forum non conveniens* is not yet a significant barrier to access to judicial remedies in federal courts of the United States for human rights violations, especially those against businesses, under the ATS.[104] However, dismissal of cases on *forum non conveniens* grounds can be a barrier to victims and has been on a few occasions.

For example, in *Aguinda v. Texaco, Inc.*, citizens of Peru and Ecuador brought two putative class actions alleging that the oil company polluted rain forests and rivers in those two States, causing environmental damage and personal injuries.[105] The Second Circuit affirmed dismissal on *forum non conveniens* grounds after the oil company consented to suit in Peru and Ecuador, finding that courts in Ecuador provided an adequate alternative forum. This decision that led to a judgment in Ecuadorian courts, which Chevron—which later purchased Texaco—has since been challenging in U.S. courts (this case is discussed more fully in the text box, *infra*).

Perhaps one of the best-known cases against a business involving human rights that was dismissed on *forum non conveniens* grounds was *Bhopal v. Union Carbide Corporation*, in which thousands of victims who perished from a gas leak and explosion outside Bhopal, India in 1984 sought damages.[106] The dismissal on *forum non conveniens* occurred even though the Chief Justice of the Supreme Court of India indicated that the victims' only chance for a remedy would likely be an action in the United States, given the serious backlog of cases in India, and because other Indian legal commentators simply did not think the Indian courts could handle such a complex case.[107] After the U.S. courts dismissed the case on *forum non conveniens* grounds, the people of Bhopal and Union Carbide entered into an agreement brokered by the Indian government, providing for a "full and final settlement" of $470 million including all future claims.[108] The settlement, however, was widely criticized as providing ineffective remedies for the victims, given that the settlement resulted in recoveries of between $2,500 and $7,500 per person for deaths, and between $1,250 and $5,000 for permanent disabilities.[109]

ii. Forum Non Conveniens Under State Law

Where *forum non conveniens* will likely have the greatest impact will be for cases filed under state law, filings which are expected to increase in light of *Kiobel*. In fact, *forum non conveniens* has already been a significant barrier to victims for cases brought under state tort law for alleged acts that occur abroad.[110]

State law *forum non conveniens* doctrine can differ from the federal *forum non conveniens* doctrine. For example, in Texas, after a state court ruled that Texas statutorily abolished the doctrine of *forum non conveniens*, the Texas state legislature responded by passing a statute to permit *forum non conveniens* dismissals, placing a heavy burden on the plaintiff, who selected the forum in the first place.[111] In Florida, courts have continued to expand the state's *forum non conveniens* doctrine, going so far as to hold that "no special weight should [be] given to a foreign plaintiff's choice of forum."[112]

Further, Florida has applied its *forum non conveniens* doctrine in dismissing cases even where a foreign State has passed "blocking statutes," which prevent the State's courts from hearing cases dismissed for *forum non conveniens* in the United States. In *Scotts Co. v. Hacienda Loma Linda*, a Florida state court dismissed the plaintiff's lawsuit claiming that the defendant's product damaged its orchid crops, on *forum non conveniens* grounds.[113] A Panamanian court had already refused

to take jurisdiction over the lawsuit pursuant to the State's recently enacted blocking statute.[114] Although the Panamanian forum was therefore practically unavailable to the plaintiffs, the Florida appellate court nevertheless reasoned that the plaintiff was not entitled to reinstatement of its claim in Florida.[115]

One example of how the doctrine has left victims without a remedy is *Aldana v. Del Monte Fresh Produce N.A., Inc.*[116] In that case, brought by seven Guatemalans alleging to have been tortured for their leadership of a national labor union, a federal district court dismissed the case on forum non conveniens grounds and the Eleventh Circuit Court of Appeals affirmed, although with the understanding that the plaintiffs would not have to return to Guatemala for the case.[117] The claims under state law were also dismissed on the same basis. After the U.S. courts dismissed the claims, the plaintiffs filed a petition in Guatemala seeking relief for the violations of their human rights.[118] The Guatemalan court dismissed the case, however, finding that it lacked jurisdiction. Under Guatemalan law, a Guatemalan court cannot hear a case if a plaintiff has already brought the case in another forum with jurisdiction, in this case, Florida.[119] Plaintiffs filed a motion for reinstatement in the federal district court, which was denied. The reinstatement is on appeal and is pending.[120]

Enforcement of Judgments from Cases Where Plaintiffs have Re-filed in Host State

One issue with regard to dismissals on *forum non conveniens* grounds concerns the enforcement of judgments of home States when cases do go forward in a host State. An example of this is the ongoing litigation against Chevron involving alleged harm to the Amazon as a result of Texaco's oil extraction work in Ecuador (the case was initially against Texaco before Chevron acquired Texaco).

The case, *Aguinda v. Texaco, Inc.*,[121] was dismissed in U.S. federal court on the basis of *forum non conveniens* after Texaco agreed to submit to the jurisdiction of Ecuadorian courts and waived any statute of limitations defenses. Following the dismissal of the U.S. litigation, the plaintiffs re-filed their case against Chevron in Lago Agrio, Ecuador. In 2011, the Ecuadorian court granted judgment to the plaintiffs, ordering Chevron to pay over $18 billion to remediate environmental damage.[122] Chevron has refused to pay this judgment, arguing that it was a result of fraud and political pressure. After two years of various challenges and court rulings in Ecuador, Chevron continued to refuse to pay. In November 2013, the Ecuadorian Supreme Court affirmed the judgment against Chevron, but cut the amount it was required to pay nearly in half after finding an appellate judge erroneously doubled the penalty.[123] Still, it ordered Chevron to pay $9.5 billion to plaintiffs who reside in the rainforest it is alleged to have contaminated. Chevron has reiterated its view that "[t]he Lago Agrio judgment is as illegitimate and unenforceable today as it was when it was issued three years ago."[124] The San Ramon (Calif.)-based business has virtually no assets in Ecuador.[125] Thus, the victims may be left without recourse.

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In December 2006, and again in September 2009, Chevron filed an international arbitration claim before the Permanent Court of Arbitration at The Hague, alleging that the Government of Ecuador violated an U.S.-Ecuador bilateral investment treaty.[126] Chevron claimed that the Government of Ecuador violated international law by unduly influencing the judiciary and thereby compromising the judiciary's independence. Chevron won that arbitration, and plaintiffs who tried to prevent it being enforced lost in a U.S. federal court.[127] In addition, Chevron filed a racketeering lawsuit against the plaintiffs' lawyers and representatives in U.S. federal court in February 2011.[128] The lawsuit alleges that the plaintiffs' lawyers and representatives have conspired to extort up to $113 billion from Chevron through the Ecuadorian legal proceedings.[129] In addition, Chevron has attempted to obtain an injunction preventing it from having to pay the Ecuadoran award for damages, though it has lost that attempt.[130] Whether Chevron is bound to pay continues to be litigated. However this case is resolved, it demonstrates the risk of dismissals based on *forum non conveniens* to all parties in a case.

B. CANADA

Forum non conveniens still remains a potential barrier to victims seeking judicial remedy in Canada against businesses for their role in violations of human rights abroad, although some practitioners suggest that it is not as great a barrier as it once was. The issue of *forum non conveniens* has not been litigated in the context of an international human rights case against a business in any of Canada's common law jurisdictions—it has only been litigated in Quebec (see below)—so it is unclear how such a case might fare.

Forum non conveniens has been adopted by all the courts in Canadian common law provinces,[131] and has been codified in British Columbia.[132] The leading common law case is the 2012 decision in *Van Breda Club Resorts Ltd. v. Van Breda*.[133] In that case, the Supreme Court of Canada held that in order for a court to dismiss a case on *forum non conveniens* grounds, the moving party (the defendant)[134] must show that an alternative forum exists that is "clearly more appropriate," and that in light of the characteristics of the alternative forum, it would be fairer and more efficient to litigate the case in the alternative forum.[135] The Court explained that the factors to be taken into consideration differ from case to case, and stated that the factors "might include the locations of parties and witnesses, the cost of transferring the case to another jurisdiction or of declining the stay, the impact of a transfer on the conduct of the litigation or on related or parallel proceedings, the possibility of conflicting judgments, problems related to the recognition and enforcement of judgments, and the relative strengths of the connections of the two parties."[136]

Quebec civil law provides that a Court can decline jurisdiction if it considers that a foreign court is better situated to hear the dispute. That statute reads: "Even though a Quebec authority has jurisdiction to hear a dispute, it may exceptionally and on application of a party decline jurisdiction if it considers the authorities of another State are in a better position to decide."[137]

Possibly the first human rights case against a Canadian-based business filed in Canada—*Recherches International du Quebec v. Cambior, Inc*.[138]—was dismissed on *forum non conveniens* grounds. In 1995, the tailings dam at Cambior's Omai gold mine in Guyana failed, releasing over three billion liters of toxic waste into the Essequibo River and contaminating the water supply of thousands of indigenous people. Many of the people sued Cambior in Quebec. The judge dismissed the case, finding that Guyana was the appropriate forum and that the plaintiffs did not have a right to a forum in Quebec. Another of the few human rights cases filed in Canada, *Bil'in Village Council v. Green Park*, was dismissed on *forum non conveniens* grounds.[139] In July 2008, the Village Council of Bil'in (Palestine) filed suit in the Superior Court of Quebec against Green Park International Ltd., claiming that the business and its director were participating in war crimes when helping to build settler villages on Palestinian land.[140] In September 2009, the court dismissed the case on *forum non conveniens* grounds on the basis that there was little connection between Quebec and the events that took place in Palestine, and that the case was more appropriately heard in Israel's High Court of Justice.[141] The Court distinguished the *forum non conveniens* doctrine in the United States, noting that in the United States, Congress had specifically given its courts jurisdiction to hear claims involving human rights abuses.

The plaintiffs in another case, A*ssociation canadienne contre l'impunité (ACCI) c. Anvil Mining Ltd*,[142] involving human rights violations surrounding mining in the Democratic Republic of Congo (DRC), initially survived a motion to dismiss on *forum non conveniens* grounds, only to lose on appeal based on an issue similar to *forum non conveniens*, called "forum of necessity," discussed in more detail *infra*. Because the appellate court overturned the lower court on the grounds it did not have jurisdiction under a forum by necessity theory, it did not reach the issue of whether to dismiss it on *forum non conveniens*.[143]

Notwithstanding these cases, and perhaps due to *Van Breda*, practitioners report that in the case of *Choc v. HudBay Minerals, Inc.*,[144] the defendant in February 2013 withdrew its motion to dismiss the case based on *forum non conveniens* just before the Ontario court was to rule on it.[145] It is suspected that HudBay withdrew the motion because it knew it may well lose it after closely reviewing the law and the facts associated with the *forum non conveniens* factors. Those representing victims of corporate human rights abuses viewed this as a major victory.[146]

In reviewing the statutory and common law, it does not appear to be yet well-settled in either the common law or civil law jurisdictions in Canada that a plaintiff can defeat a *forum non conveniens* motion by arguing that it would be difficult to obtain an adequate remedy in the host State. In fact, the notion of an adequate remedy and or of futility does not appear to be directly a part of the common law test.[147]

C. EUROPEAN STATES

The question of whether the doctrine of *forum non conveniens* is in conflict with the harmonization in civil jurisdiction and enforcement sought by the Brussels I Regulation has been hotly debated, in

the context of the application of the criteria of these European instruments by the British and Irish courts.[148]

However, the European Court of Justice has definitively rejected the application of the *forum non conveniens* doctrine.[149] In a judgment it delivered on 13 July 2000, the Court answered a concern expressed by a French judge that Community law would be applied in third States if a claimant could invoke the rules on jurisdiction established by the Brussels Convention.[150] The Court stated that "the system of common rules on conferment of jurisdiction established in Title II of the Convention is based on the general rule, set out in the first paragraph of Article 2, that persons domiciled in a Contracting State are to be sued in the courts of that State, irrespective [either] of the nationality of the parties,"[151] or of "the plaintiff's domicile or seat."[152] The rationale for that rule being that it is easier, in principle, for the defendants to defend themselves in the place where they are domiciled. The European Parliament noted that the Brussels I Regulation makes it mandatory for the national courts in the European Union to recognize their jurisdiction in cases where human rights violations are committed abroad, especially in developing States where European multinationals operate.[153]

iv. United Kingdom

The case of *Lubbe v. Cape plc*[154] is illustrative of the significance of the controversy with respect to the possibilities of acting against businesses domiciled in the United Kingdom.[155] In February 1997, claims to compensation were lodged by five employees of an asbestos mine in the Northern Province of South Africa, which was managed by a subsidiary wholly owned by Cape plc, a business domiciled in the United Kingdom. The plaintiffs suffered from asbestosis and an asbestos-related form of cancer. The liability of Cape plc was based on the negligent control by the parent company of the operations of its subsidiary, which it should have obliged to limit to a safe level the exposure to asbestos. The defendant business argued that, although it was domiciled in the United Kingdom and that, therefore, Article 2 of the Brussels Convention gave the U.K. courts jurisdiction over the case, these courts should relinquish jurisdiction in favor of South African courts, to the jurisdiction of which Cape plc offered to submit. Cape plc also insisted that South Africa was the proper forum, as the injuries were suffered there, and as the factual allegations were based in that jurisdiction. In a judgment of 20 July 2000, the House of Lords decided that the plaintiffs should be able to pursue the proceedings before the U.K. courts, as returning them to the South African courts could lead to a denial of justice because of the difficulties they would face in obtaining legal representation and because of the lack of experience of those courts in the handling of group actions.[156]

The leading opinion did not specifically adopt a position on the preemption of the *forum non conveniens* doctrine by Article 2 of the Brussels Convention.[157] However, the decision introduces its discussion of the *forum non conveniens* doctrine by saying that "the principles to be applied by the English court in deciding that application in any case *not governed by Article 2 of the Brussels Convention* are not in doubt."[158] Subsequent U.K. case law has followed the Brussels I Regulation, as it is required to do[159] and the U.K. courts have subsequently not applied the *forum non conveniens* doctrine.[160] Therefore, it is generally assumed that the doctrine of *forum non conveniens* is unlikely to be applied in the United Kingdom even in cases falling outside the Brussels I Regulation.

FORUM OF NECESSITY

The doctrine of *forum necessitatis*, or forum of necessity, allows a court to assert jurisdiction over a case when there is no other available forum. As described by one scholar:

> The forum of necessity doctrine allows a court to hear a claim, even when the standard tests for jurisdiction are not fully satisfied, if there is no other forum where the plaintiff could reasonably seek relief. It is thus the mirror image of *forum non conveniens*, which allows defendants to establish that a court should not hear a claim, despite the tests for jurisdiction being met, based on a range of discretionary factors. While the doctrines operate on similar principles, *forum non conveniens* gives defendants an extra chance to kill a case, whereas *forum of necessity* gives plaintiffs an extra chance to save it.[161]

This doctrine does not currently exist in the United States but it is available in Canada and in some parts of Europe.

Forum of necessity is a jurisdictional doctrine, and thus courts rule on it before ruling on *forum non conveniens*.

The *Anvil Mining* case from Canada is important because the plaintiffs utilized this "forum of necessity" doctrine, saying Canada should be a forum of necessity. The first court ruled that the case could be heard in Canada because the plaintiffs were able to show that prior litigation had occurred in both the Democratic Republic of Congo (DRC) (where the harm occurred) and Australia (where Anvil's corporate headquarters is located) and both were problematic.[162] However, this was overturned on appeal, with the appellate court dismissing the case, stating that it did not have jurisdiction under the forum of necessity doctrine given its finding that Anvil's Quebec office was not involved in the decisions leading to the abuse.[163]

In 2009, as part of the process of the first review of the Brussels I Regulation, the European Commission suggested inclusion of a *forum necessitatis* rule, "which would allow proceedings to be brought when there would otherwise be no access to justice."[164] However, this proposal was not accepted.

The proposal provided that a non-EU defendant could be sued at the place where property and moveable assets belonging to him are located provided their value is not disproportionate to the

value of the claim and that the dispute has a sufficient connection with the Member State hearing the claim. The European Commission also justified it on the grounds that "Such a rule currently exists in a sizeable group of Member States and has the advantage of ensuring that a judgment can be enforced in the State where it was issued."[165]

The Commission also proposed a new Article 26 in the Recast Brussels I Regulation, worded as follows:

> Where no court of a Member State has jurisdiction under this Regulation, the courts of a Member State may, on an exceptional basis, hear the case if the right to a fair trial or the right to access to justice so requires, in particular: (a) if proceedings cannot reasonably be brought or conducted or would be impossible in a third State with which the dispute is closely connected; or (b) if a judgment given on the claim in a third State would not be entitled to recognition and enforcement in the Member State of the court seised under the law of that State and such recognition and enforcement is necessary to ensure that the rights of the claimant are satisfied; and the dispute has a sufficient connection with the Member State of the court seised.[166]

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A *forum necessitatis* provision would allow the courts of a Member State to exercise jurisdiction if no other forum guaranteeing the right to a fair trial is available and the dispute has a sufficient connection with the Member State concerned. This rule may be found in some EU Member States.

The courts in the Netherlands have applied this doctrine.[167]

In addition, the Swiss Law on Private International Law[168] provides for *forum necessitatis* to ensure access to justice to victims where there is no other forum that is competent (or where it would be unreasonable to demand from victims that they file their claim before another forum), provided the claim presents some relationship to Switzerland.[169] The conditions are relatively restrictive and Swiss courts have treated the notion with caution. In particular, they have taken the view that the simple fact that the plaintiff has established residency in Switzerland after the fact does not per se constitute a sufficient link to Switzerland for the *forum necessitatis* clause to be applied.[170] Despite these limitations, this article constitutes a potentially useful "safeguard clause" to avoid cases of denial of justice.[171]

ISSUE 3: CORPORATE LIABILITY FOR HUMAN RIGHTS VIOLATIONS

This section considers issues of whether a business can be held liable, criminally or civilly, for human rights violations that occur outside the home State. In some jurisdictions, victims have the ability to bring a criminal complaint to a public prosecutor, or use the criminal proceeding to assist with potential civil recovery later. In other jurisdictions, this is not possible, and the best way forward is to bring a civil suit under either customary international law or tort law. In some instances, businesses have argued they cannot be liable for violations of international human rights law because of the fact that they are not natural persons. This section examines the applicable criminal and civil law that touches on this issue, as well as the issue of whether a business can be vicariously liable for these violations.

Corporate Criminal Liability

A. UNITED STATES

The United States has federal criminal statutes in the area of human rights that apply extraterritorially and which could be invoked against businesses, namely genocide,[172] war crimes,[173] torture,[174] and forced recruitment of child soldiers.[175] Under each of these statutes, persons (a term which ostensibly includes businesses[176]) can also be prosecuted for conspiring to engage in these crimes. In addition, under general federal criminal law, those who aid or abet crimes can be prosecuted as principals.[177]

The United States Department of Justice Human Rights and Special Prosecutions Section (HRSP), established in March 2010, prosecutes these crimes.[178] Prosecutions for these human rights crimes, however, to date have been rare.[179] Advocates report they have tried to get HRSP to investigate businesses for their participation in human rights abuses, but as of yet, no business has been

prosecuted under these statutes.[180] One business, Chiquita, was prosecuted for making payments to the paramilitary organization known as the United Self-Defense Forces of Colombia (AUC), which had been designated as a Foreign Terrorist Organization by the U.S. government, a violation of a different U.S. statute. Chiquita pled guilty in 2007, and paid a $25 million fine to the United States.[181] As of yet, the victims have not recovered, but ATS suits arising from the same payments are pending in the Eleventh Circuit. Among the issues the court is considering is whether *Kiobel* prevents the case from going forward.[182]

Although a court can order that property be returned to victims or order other equitable relief, these criminal statutes do not provide civil remedies for victims of such abuses. The Department of Justice houses the Office for Victims of Crime,[183] which has a victims' compensation fund, but that fund does not provide direct compensation to victims. Rather, grants are given to U.S. states or organizations within states to compensate individuals within their territory who have been victims of federal and state crimes.[184] Because the funds are given as grants to the U.S. states, there does not appear to be an avenue for victims of human rights crimes abroad at the hands of U.S. citizens or businesses to seek or obtain such benefits from the fund.[185]

The various statutes providing for prosecution of genocide, torture, and the recruitment of a child soldier do, however, provide for criminal penalties—both imprisonment and civil fines.[186] For example, those found guilty of genocide face imprisonment and up to $1 million in civil fines.[187] In none of these cases, however, does the award go to the victim.

Thus, federal criminal prosecutions in the United States have had little impact on the awarding of damages to victims. Thus far, civil liability, which can occur through a showing that a business was "more likely than not" involved in abuse rather than a showing a "beyond a reasonable doubt," has been more useful in compensating victims, and will be explored in the next section.

B. EUROPEAN STATES

A number of instruments adopted within the European Union seek to ensure, in specific fields, the approximation, or harmonization, of the criminal laws of the EU Member States, including the criminal liability of legal persons.[188] The authority of the European Union to adopt criminal legislation is now defined in the Treaty on the Functioning of the European Union (TFEU).[189]

As part of this authority, the European Union may define minimum rules for the definition of criminal offenses and sanctions in the areas of particularly serious crimes with a cross-border dimension, resulting from the nature or impact of such offenses or from a special need to combat them on a common basis; or to ensure the effective implementation of a Union policy in an area that has been subject to harmonized rules by the adoption of common sanctions of a criminal nature for violation of such rules. Though the list of the serious crimes with a cross-border dimension is a closed one, the Member States acting within the Council of the European Union may extend the list if they decide to do unanimously.[190]

The instruments adopted to date in the area of criminal law illustrate the potential of criminal law to encourage the Member States to adopt legislation making it a criminal offense for businesses domiciled in the European Union to contribute to certain human rights violations, even where such violations take place outside the European Union.[191]

CASE STUDY

Amesys Prosecution

In October 2011, the Fédération Internationale des Ligues des Droits de l'Homme (FIDH) and the Ligue des Droits de l'Homme (LDH), both NGOs, filed a criminal complaint in France against Amesys, alleging that the business was complicit in grave violations of human rights, including torture, committed by members of the Gaddafi regime in Libya.[192] The Paris prosecutor's office announced in April 2012 that it would not open an investigation into this case, stating that the alleged acts did not qualify as criminal.[193] After the investigating judge stepped in and ordered an investigation into whether Amesys and its management could be held criminally liable,[194] the Paris Tribunal de Grande Instance opened a judicial investigation in May 2012.[195] The Paris prosecutor then appealed this decision, but, in January 2013, the Court of Appeal rejected this appeal.[196] FIDH publicly stated that there have been "road blocks erected by the Paris [p]rosecutor's office" throughout the case and suggested that the prosecutor was "reluctant to allow an impartial and independent inquiry into this matter."[197] The newly formed Paris Court section specializing in crimes against humanity, genocide, and war crimes now manages the case.[198]

i. The Netherlands

Dutch criminal law does not make a distinction between natural and legal persons, and it would be possible on the basis of article 51 of the Dutch Criminal Code to prosecute a legal entity for international crimes.[199] However, whether or not a person will be prosecuted is up to the public prosecutor to decide, and cases reveal that important considerations weigh against decisions to engage in proceedings.[200] For instance, on 14 May 2013, the Dutch public prosecutor issued its decision not to prosecute the corporation Lima Holdings (Dutch parent-corporation) for the role of the corporation Riwal in provision of cranes used in the construction of the separation wall by Israel in occupied Palestinian territory.[201] In 2010, a complaint was submitted to the prosecutor based on the Dutch International Crimes Act,[202] stating that these corporations aided and abetted violations of international law by Israel.[203] The public prosecutor dismissed the case for several reasons. First, the prosecutor found the business's involvement in the Wall construction minor compared to other businesses' involvement.[204] The Dutch war crimes legislation requires a "substantial" contribution by an accomplice to such acts.[205] Second, the prosecutor highlighted that the business's Israeli branch

restructured following the incidents in the complaint, suggesting that the danger of repetition (within the Dutch jurisdiction) was minor.[206] Finally, the prosecutor stated that because the question of the business's responsibility is complex, a further investigation would be required, which would "consume a significant amount of resources" and would prolong the proceedings.[207] Also, "lack of cooperation from the Israeli authorities" would hinder efforts to obtain further evidence.[208]

ii. France

In France, public prosecutors were reluctant to proceed with prosecution of several cases, including a complaint against DLH[209] that concerned harboring conflict timber from Liberia, and against Amesys[210] that concerned exportation of surveillance software to Libya.

iii. United Kingdom

As a general rule, U.K. criminal law is limited to acts done within the territory (and may even be limited to the particular jurisdiction within the United Kingdom) and only a statutory provision asserting extraterritorial jurisdiction will criminalize acts committed abroad.[211] Businesses normally cannot be charged with a crime, as the business itself has no mens rea, or criminal intent. While the Corporate Manslaughter and Corporate Homicide Act 2007 has changed this, it does not apply extraterritorially.[212] It remains to be seen whether a draft Modern Slavery Bill aimed at creating tougher sentences for human trafficking adequately reflects the extraterritorial nature of U.K. businesses' supply chains and seeks to apply any of the Bill's provisions extraterritorially.[213]

However, the Serious Crime Act 2007 (SCA) and the Bribery Act 2010 have increased possible levels of corporate accountability for crimes and have an expanded assertion of extraterritorial jurisdiction. The SCA criminalizes conduct that takes place in England and Wales (as part of the United Kingdom), if that conduct is capable of encouraging or assisting the commission of an offense abroad.[214] While this could provide a mechanism to prosecute businesses for actions outside the United Kingdom, including those that might constitute human rights harm, it is unlikely as *mens rea* is still necessary to prove and, in any event, any such prosecution requires the consent of the (politically appointed) Attorney General.[215]

Following criticism from both the Organisation for Economic Co-operation and Development[216] and the European Commission,[217] and after its ratification of the UN Convention against Corruption 2003, in July 2011 the U.K. Government enacted the Bribery Act 2010 (BA).[218] The offenses created by the BA include the bribery of another person;[219] being bribed;[220] and bribing a foreign official.[221] While not necessarily aimed at businesses, each of these offenses could apply to a business, irrespective of where the criminal act occurs.[222] Non-U.K. businesses and partnerships can also commit these offenses if an act or omission, which forms part of the offense, takes place within the United Kingdom.[223]

The offense of failing to prevent bribery[224] can be committed by any "relevant commercial organization"[225] irrespective of where the act occurred and irrespective of the identity of the person

Civil Claims Linked to Criminal Claims

In some European jurisdictions, contingent criminal claims arise from civil claims relating to transnational human rights abuse associated with businesses. In many European States the prosecution of criminal offenses is the exclusive prerogative of the public prosecutor, acting in the name of society.[226] However, most legal systems allow the victim who has been aggrieved by the conduct that is allegedly criminal to play an active role. The victim in general may file a complaint alleging that a criminal offense has been committed, and if the public prosecutor refuses to investigate or concludes that there is no reason for the prosecution to be launched, the victim will have the possibility to challenge that decision.

The rights of victims were first strengthened under EU law though the 2001 Council Framework Decision on the standing of victims in criminal proceedings.[227] It provides for the assistance of crime victims before, during, and after criminal proceedings, and aims to ensure that the EU Member States shall guarantee that the rights of victims are recognized throughout the proceedings. Specifically, crime victims are to have the possibility of being heard during proceedings as well as of supplying evidence. They also must be given access to any information relevant to the protection of their interests.[228] Member States should also reimburse their expenses resulting from the participation in the proceedings.

In 2004, a directive was adopted on compensation to crime victims.[229] The purpose of the directive is to facilitate a citizen, who has suffered injury as a result of a crime of violence, in making a claim for compensation to the appropriate authority in the EU Member State where the incident took place.

The entering into force of the Lisbon Treaty on 1 December 2009 further encourages these developments, because it highlights, in Article 82 Treaty on the Functioning of the European Union (TFEU), the rights of victims of crime as an area where the European Union may establish minimum rules.

This development led, in particular, to the adoption of Directive 2012/29/EU of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime,[230] which replaced the Framework Decision. The Directive considerably strengthens the rights of victims and their family members to information, support, and protection as well as their procedural rights when participating in criminal proceedings.

In Germany, the right to appeal against the prosecutor's decision not to prosecute is referred to as *Klageerzwingung*, and it leads to a judicial review of the prosecutor's decision.[231] The same possibility is stated, for instance, in Article 12 of the Dutch Code of Criminal Procedure.[232] Moreover, during the criminal trial, witnesses, such as the individual affected, can and should be heard by the court directly. This allows the victim to rely on the public prosecution for the collection of evidence. Finally, the victim generally will be allowed to claim damages for the prejudice suffered as a result of the criminal conduct, such damages being awarded directly by the criminal court (this is the institu tion called *Adhäsionsverfahren* in German criminal procedure).[233] In practice, this option remains in the realm of theory, because public prosecutors for a number of objective and subjective reasons—including complexity of these cases, lack of resources and know-how, as well as lack of mandate—do not pursue these types of cases.[234]

This applies also in France. In France, victims of criminal offenses may file a claim for compensation by joining the criminal procedure. Damages may then be awarded by the criminal court. Moreover, the victim having filed the claim for damages is recognized certain prerogatives in the criminal procedure.[235] Victims who have filed a complaint in the hands of the prosecuting authorities are to be informed by the public prosecutor of the decision whether or not to prosecute, and they have a right to appeal that decision.[236] In practice however, it would seem that victims are not always informed adequately of the decision of the prosecutor, a situation that most commentators attribute to a lack of capacity of the prosecuting authorities.[237]

There exists in Switzerland a similar system: victims of criminal offenses may join their claim for compensation to the criminal prosecution, and be awarded damages in the course of the criminal conviction.[238]

who committed the act.[239] It is a defense for the business to prove that it had in place adequate procedures to prevent bribery.[240] This offense circumvents the common law principles of corporate liability and places the burden firmly on businesses to ensure that their anti-corruption procedures are sufficiently robust to prevent bribery, even by third parties, and most unusually it allows businesses to be held accountable for their actions abroad.

A criminal case in the United Kingdom requires the consent of the Director of Public Prosecutions before it can be commenced and there is no practice of a civil claim being directly linked to a criminal case.[241]

Overall, there is no specific statute aimed at regulating the criminal liability of businesses for human rights violations committed abroad. Thus all cases that have been brought in the United Kingdom have been civil claims based on common law tort or contract claims, with no criminal cases having been brought.

iv. Switzerland

Further, in Switzerland, legal persons, including businesses, may be criminally liable since 1 October 2003 under a new provision of the Criminal Code.[242] A business's criminal liability may be engaged if a criminal offense has been committed, and if the natural person responsible for the act cannot be identified due to the organization of the business.[243] Furthermore, even where the natural person can be identified for certain serious crimes: the participation in a criminal organization,[244] the financing of terrorism,[245] money laundering,[246] bribery of public officials,[247] or the provision of an advantage to a public official,[248] the business will be punished.[249] Even if the business's management was unaware of the acts being committed, the failure to take all reasonable measures required to prevent the offense will lead to liability, regardless of the individuals' criminal liability.[250] This is intended to constitute a strong incentive for the business to act with due diligence in order to avoid any such criminal act being adopted in the course of its activities.

Corporate Civil Liability

A. UNITED STATES

Cases brought in federal court under the ATS look to customary international law, given that the language of the ATS assumes that non-citizens can bring claims for violation of the "law of nations," a term courts have found to be interchangeable with customary international law.[251] In the 2004 case of *Sosa v. Alvarez-Machain*, the Supreme Court affirmed that "domestic law of the United States recognizes the law of nations."[252] In *Sosa*, the Supreme Court confirmed years of lower federal court precedent regarding the ATS by finding that federal courts, as a matter of their common law power, can recognize claims for a violation of "a norm of international character accepted by the civilized world and defined with specificity comparable to the features of the 18th Century paradigms" recognized at the time—attacks on diplomats, safe conducts, and piracy.[253]

Thus, under the ATS, international law supplies the applicable law, at least with regard to the underlying norm at issue.[254] As litigation becomes more prevalent in state courts or for state claims in federal court due to diversity of citizenship of the parties, practitioners may argue that state common law incorporates customary international law, much like federal common law does.[255] For those claims, like claims under the ATS, the applicable law will be customary international law.

It is still somewhat unsettled, however, as to whether businesses can be liable for violations of customary international law under the ATS in U.S. courts, a question prompted by a footnote in the Sosa case, which noted the unresolved issue of the extent of liability to private actors, including businesses.[256] The Second Circuit in *Kiobel* held in 2010 that businesses cannot be liable for violations of customary international law under the ATS because there is little consensus that businesses can be liable under international law for human rights violations.[257] Yet, the Supreme Court refrained from so holding when it could have done so in *Kiobel*.[258] In addition, the discussion in the majority opinion in *Kiobel* regarding when a business's activities touch and concern the United States, and its questioning whether "mere presence" suffices, strongly suggests that the Supreme Court accepted the notion that businesses can be liable under the ATS.[259] The majority of courts, including those circuit courts that have considered the question after the Second Circuit in *Kiobel*, have held that businesses can be liable under the ATS, with some finding businesses can be liable under international law and others finding that domestic law controls.[260] Under domestic law, it is uncontroversial that businesses can be civilly liable for torts because they are considered "legal persons."[261] However, the question remains in relation to corporate accountability for extraterritorial claims under the ATS, and businesses will likely continue to press this issue.

B. CANADA

Canada, while civil cases have gone forward against businesses alleging human rights abuse, there has yet to be a case for a direct violation of international law. Tort cases have typically been brought as negligence cases under the law of the province. There has been, however, a claim for torture in violation of international law against the government of Canada and a Canadian official that an Ontario court allowed to proceed.[262] In addition, international law may apply in some ways, including against businesses. In the 2007 decision in *R v. Hape*,[263] where the Canadian Supreme Court ruled that *Canadian Charter of Rights and Freedoms* does not apply extraterritorially, the court ruled that Canadian common law incorporates customary international law.[264] Moreover, in *Bil'in Village Council v. Green Park*, the court held that violations of international law defined the standard of care under province tort law; thus, if the acts violated international law, they violated provincial law as well.[265] The court also found in that case, which involved Green Park's involvement in settlements in the West Bank, that violations of the Geneva Conventions could constitute war crimes, and result in civil liability.[266] The case was dismissed on *forum non conveniens* grounds.[267]

C. EUROPEAN STATES

Today, all forty-seven Member States of the Council of Europe (including all the EU Member States) allow their courts to apply directly the European Convention on Human Rights in the disputes they are asked to adjudicate. In most European States (though not in the United Kingdom), that would extend to litigation between private parties.[268] However, European courts are not always willing to acknowledge the applicability of international law to claims filed against businesses. International law is addressed primarily to States, and in some cases international law has developed mechanisms to hold individuals directly accountable for violations of certain rules, particularly those defining international crimes. No such mechanism exists, either at the universal or at the regional level, to hold businesses accountable for violations of rules set out in international law. This explains why domestic courts have sometimes been reluctant to apply international law directly to the conduct of businesses. However, rules of international law might be applied to businesses if, consistent with their obligation to protect human rights as described above, this is how States choose to discharge their duties under international law to control the behavior of private persons under their jurisdiction.

i. United Kingdom

All the cases brought to date in the United Kingdom have been civil actions on the basis of common law torts, with one case also having a contract basis, and not as claims based on international law.[269] In most instances the claim's cause of action is negligence.[270]

Other causes of action for which a tort claim could be brought include nuisance,[271] trespass to the person,[272] privacy,[273] tort under *Rylands v. Fletcher*,[274] and statutory torts.[275] Thus, there are a number of causes of action that can be brought by claimants for these types of claims, but there is no ability to bring a claim based directly on breach of international law or of a violation of human rights by a business. While U.K. law can implement the United Kingdom's international legal obligations by legislation, the courts can only use international law that is not implemented in a statute, as a means of interpreting a statute.

Instead, a violation of the right to privacy, the right to health or a labor right is presented as, for example, a claim in tort for negligence or a breach of a contractual obligation.[276] Even a case involving the alleged torture and mistreatment of community members has been brought as a claim in tort for negligent management and as instigating trespass on persons.[277]

This forces claimants to fit their claims within certain restrictive legal parameters, and it privileges only those violations that can be expressed in tort claim terminology. For example, claims based on a business's denial of access to education, a business preventing its workers from forming and joining trade unions, a business infringing the rights of indigenous communities, and a business restricting the exercise of cultural rights may be ignored and dismissed. While the effects of the litigation may seem the same in some instances, this lack of legal expression diminishes the potential significance of the Guiding Principles' clear statement that businesses (and not just States) can violate the full range of human rights.[278]

Vicarious Liability of a Business

In the United States, another significant and related barrier to human rights litigation involving businesses, which are typically alleged to have committed violations of human rights vicariously, is whether aiding and abetting exists as a norm under international law. Even more unsettled is what the standard to determine aiding and abetting liability should be. In particular, the issue regarding the standard is whether a plaintiff must establish that the business had knowledge, and with such knowledge, gave substantial assistance, or whether the plaintiff must establish the business acted with intent or purpose to violate human rights law. The standard required is still unsettled in U.S. courts. Some courts and individual judges have opined that courts should look to international law to determine the standard, with differing views on what international law requires.[279] In 2009, the Second Circuit, in *Presbyterian Church v. Talisman*, looked to international law and found that businesses could be held liable for aiding and abetting where they have provided substantial assistance to the government with the *purpose* of aiding the government's unlawful conduct.[280] In 2011, the D.C. Circuit Court, in *Doe v. Exxon* agreed with the Second Circuit that international law should determine whether aiding and abetting exists for purposes of liability under international law, concluding that aiding and abetting liability does exist thereunder, and thus can be the subject of an ATS suit.[281] It also agreed that international law should govern the standard for aiding and abetting. However, it found that knowledge with substantial assistance was the appropriate standard, disagreeing with the purposeful standard the Second Circuit applied.[282] Other judges have opined that while the underlying violations (*i.e.*, torture, extrajudicial killing) should be determined under international law, the standard for liability, and thus aiding and abetting, under the ATS should be governed by domestic law, requiring knowledge only.[283]

The definition for aiding and abetting varies to some degree under domestic tort law, but a leading case on the subject defines aiding and abetting liability as "whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not . . . whether the defendant agreed to join the wrongful conduct."[284] It is not necessary that the defendant know exactly what illegal conduct the perpetrator is involved in; thus, it is not necessary that the defendant share the same intent to commit the crime. The definition has also been stated as follows in the Restatement of Laws: "A person liable if he 'knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other.'"[285]

Because U.S. courts look to international law in their determination of aiding and abetting, it is important to understand the recent international jurisprudence on this subject, including that of the Appeals Chambers of two international criminal tribunals, which provided inconsistent standards. In the 2013 case of *Prosecutor v. Perišić*, the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber set a very high standard for aiding and abetting. It held that for a defendant to be liable under an aiding and abetting theory, the prosecution had to establish that the defendant's assistance was "specifically directed" to aiding the commission of the offense.[286] More recently, the Special Court of Sierra Leone Appeals Chamber, in the case of *Prosecutor v. Taylor*, confirmed that the *mens rea* standard for aiding and abetting was knowledge.[287] Although it should be noted that in both of these cases, the international courts were considering the standard in relation to a criminal claim and not a civil claim, U.S. courts will typically apply the international law as it determined by these international criminal tribunals.

Thus, the issue of the standard for aiding and abetting in particular is still unresolved and could have great implications for cases against businesses. Requiring the plaintiff to prove that the business had the specific intent to purposefully violate a specific human rights abuse, rather than a "knowledge" requirement, may be difficult,[288] as it requires more than the general domestic civil law standard requires.

This could become an issue in other jurisdictions as well.

ISSUE 4: TIME LIMITATIONS ON BRINGING CLAIMS

This section explores time limitations, such as statutes of limitations and other measures that seek to restrain the time period for causes of action to be brought. Such time limitations are commonplace and applicable to many claims, but pose specific barriers to human rights claims, given the difficulties in investigating and gathering evidence for such claims, among other factors.

A. UNITED STATES

i. Statutes of limitations for human rights claims under federal law

The Alien Tort Statute does not contain a statute of limitations. Most courts that have chosen to apply a statute of limitations under the ATS have adopted the TVPA's ten-year statute of limitations[289] rather than the statute of limitations of a similar tort under state law. Adopting the TVPA's statute of limitations typically results in a greater limitations period for plaintiffs than they would have had if the court had adopted the state statute of limitations. In addition, extraordinary circumstances typically lead courts to apply principles of equitable tolling.[290] Thus, even where statutes of limitations have been imposed under the ATS, they have not posed much of a hurdle at the federal level.

ii. Statute of limitations under state law

Unlike with claims brought under the ATS, statutes of limitations are often barriers to cases brought under state law, given the time it takes for cases to be investigated and victims to locate a lawyer. State statutes of limitations are often fairly short, with many states imposing a two to three year statute of limitations for intentional tort claims.[291] As more human rights litigation moves to state courts, this will pose a challenge. There will also be uncertainty as to the particular statute of limitations that applies. In tort litigation brought in U.S. state courts for torts that occurred abroad (known as transitory torts), approaches under choice of law analysis in applying foreign statutes of limitations vary widely from state to state. For those states that apply their own short statutes of limitations, this would limit the time period within which to bring claims. Conversely, in some states, foreign law might supply the applicable statute of limitations and could be beneficial when the host State imposes a relatively long statute of limitations. For example, many civil law States apply much longer statutes of limitations for violent crimes or torts. Some States incorporate international human rights law norms directly into domestic law, and this might include statutes of limitations. Many States now recognize that genocide, crimes against humanity, and war crimes are subject to no statutory limitations.[292] Consistent with this approach, the American Bar Association has recently recommended that the statute of limitations for these offenses be set aside.[293]

B. EUROPEAN STATES

The limitation period for these actions in Europe is now governed by the Rome II Regulation, which means that the period depends on which national law is applicable, likely to be that of the State where the harm occurred.[294] This can create barriers in terms of determining what those time

limitations may be and when they apply, which may not be easy to determine in some host States' legal systems and may require costly additional expert evidence being obtained, especially as the decision by the court as to which national law is applicable is usually made during the course of the litigation. In addition, when the applicable limitation period is clear, a short period could prevent victims from being able to bring their cases at all.

ISSUE 5: IMMUNITIES AND NON-JUSTICIABILITY DOCTRINES

This section explores immunities and non-justiciability doctrines that may limit the ability of victims to seek access to effective judicial remedy. These immunities and doctrines work to either absolve the defendant from liability, or disable or dissuade courts from adjudicating certain claims. In both situations, they have the clear potential to limit recourse and inhibit access to effective judicial remedy.

The International Law Commission: State Responsibility for Internationally Wrongful Acts

The International Law Commission has identified at least four situations in which the acts of a business can be attributed to a State,[295] and so raise the possibility of a State being a co-defendant in those situations where a State has waived its sovereign immunity. Immunity will not apply where the State concerned is the forum State, as it is not immune in its own courts. First, a State would be responsible for the acts of a business where the latter was exercising elements of governmental activity and was empowered to do so.[296] Second, a State would be responsible for the acts of a business that was acting under the instructions of, or was under the direction or control of, the State in carrying out the conduct that allegedly resulted in a violation of human rights.[297] Third, a State may incur international responsibility for the acts of a business where the State adopts or acknowledges the act as its own.[298] Fourth, a State may also incur international responsibility where it is complicit in the activity of the business or fails to exercise due diligence to prevent the effects of the actions of the business.[299]

A. UNITED STATES

Typically, immunities such as foreign sovereign immunity, which attach to a foreign government or its officials,[300] will not apply to businesses because they are not sovereigns or a sovereign's officials. However, in theory, where a business has a foreign government or official as a shareholder, such immunity might apply. Sovereign immunity of this type has not yet posed a barrier for victims of corporate human rights abuses in U.S. courts.

Other types of immunity, which could be termed statutory immunity, have posed barriers for victims.

In the case of *Saleh v. Titan Corp.*, involving a contractor's actions at Abu Ghraib prison in Iraq, the D.C. Court of Appeals found that, among other things, because the defendants had contracted with the United States for their work in Iraq, the plaintiff's claims were pre-empted by the Federal Tort Claims Act combat exception, even though the contractors were private entities.[301] This resulted in the plaintiffs having no remedy at all.[302]

CASE STUDY

Al Shimari v. CACI

In *Al Shimari v. CACI*,[303] the federal District Court of the Eastern District of Virginia dismissed the plaintiffs' state common law claims (the Court also dismissed the ATS claims under *Kiobel*) arising out of the four plaintiffs' alleged torture at Abu Ghraib prison in Iraq. The plaintiffs alleged that employees of CACI, a security firm that had contracted with the U.S. government to perform interrogation, had conspired with the government in their torture.[304] The court found CACI immune from legal action on the grounds that Iraqi law governed the claims, and because Iraqi law at the time of the torture precluded liability for actions of the contractors related to terms of CACI's contract, and for injuries related to military combat operations, CACI was immune from liability.[305]

In addition to the above immunity issues, corporate defendants working with governments often argue, and the courts sometimes agree, that the court should not adjudicate the merits of the cases under the political question doctrine or due to "case specific deference" as suggested by the U.S. Supreme Court in *Sosa v. Alvarez-Machain*.[306] A few courts have dismissed cases involving corporate defendants under the political question doctrine[307] or due to case specific deference.[308] These doctrines remain a hurdle in some cases against businesses, especially where it is alleged the business assisted the government in the conduct at issue.[309]

In many cases, the State Department has filed a statement, called a "Statement of Interest" with the federal court hearing an ATS or TVPA case asking that the court not adjudicate the matter due to such foreign policy considerations.[310] Most courts give some deference to these statements while at the same time recognizing that such statements do not bind them.

B. EUROPEAN STATES

The 1972 European Convention on State Immunity, also referred to as the Basel Convention, entered into force on 11 June 1976.[311] It seeks to codify the existing customary international law concerning the conditions under which States may claim immunity before national courts. Though it is applicable only to the eight member States of the Council of Europe that have ratified the instrument,[312] it is probably relevant beyond those States alone and beyond the European continent.

The Basel Convention defines a number of exceptions to the principle of the jurisdictional immunity of States. According to Article 6, such immunity cannot be claimed if the State "participates with one or more private persons in a company, association or other legal entity having its seat, registered office, or principal place of business in the territory of the State of the forum, and the proceedings concern the relationship, in matters arising out of that participation, between the State on the one

hand and the entity or any other participant on the other hand."[313] This exception does not apply to a situation where a victim files a claim against a State as owner of a public enterprise having taken part in a violation of human rights. However, the immunity of the State may also be set aside, under Article 7, where a State "has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment."[314]

Therefore, the doctrine of State immunity cannot be considered to impose an obstacle to claims filed against public businesses (state-owned entities) or against the State acting in a private capacity.

i. United Kingdom

Immunities and non-justiciability due to political issues have not occurred in corporate-related human rights cases in the United Kingdom. However, immunity issues could arise where a State is complicit in the business's activity and the claimant seeks to bring the State into the proceedings as a defendant. The State involved could be the forum State, in which case immunity would not apply, or the State in which the harm occurred (or, possibly, a third State), in which case immunity would be likely to be claimed by that State under the State Immunity Act. Immunity might also be claimed by a State where the business (domiciled in the European Union) is a State owned or controlled enterprise (whether of the forum State or another State) or where the activity undertaken by the State is commercial activity. In these instances it is unlikely that a State's claim to immunity would be upheld.

ISSUE 6: CHOICE OF LAW/APPLICABLE LAW

When courts consider cases for harm arising in another jurisdiction, they engage in a choice of law/applicable law analysis to determine which law applies to the case. In some cases, the result of the analysis could form a barrier for victims bringing human rights cases for harm caused by businesses outside the home State. This section examines the choice of law analysis undertaken and describes barriers associated with this issue.

A. UNITED STATES

After *Kiobel* and the likely consequence of more transitory tort litigation occurring in state courts (or in federal courts under diversity jurisdiction applying state tort common law), choice of law analysis will take on added importance. The types of state tort claims that plaintiffs have brought in the past, and will likely bring in the future, which arise out of violations of international human rights include wrongful death, assault and battery, negligence, nuisance, false imprisonment, intentional and negligent infliction of emotional distress, and even unlawful business practices, as was claimed in the *Unocal* case filed in California state court.[315]

Each state in the United States employs its own law governing choice of law analysis. A federal district court that has jurisdiction over claims of state law due to differences of citizenship of the parties (diversity jurisdiction) applies the choice-of-law principles of the forum state (the state in which the federal court resides) in order to establish the substantive applicable law for a plaintiff's claims.[316] Typically in a choice of law analysis, the court will first determine if an actual conflict exists between domestic law—the law of the forum state—and foreign law. If not, the court will simply apply the law of the forum state.[317] If there is a difference in the law—*i.e.* there is conflict—the court will then decide which law to apply.[318] Typically, the court will apply the substantive law of the host State or locality where the injury occurred, unless the forum state has a greater interest in determining a particular issue, or if it has a more significant relationship to what occurred and to the parties.[319]

If a court chooses to apply the law of the host State, this could present significant barriers to litigation, such as when the chosen law affects statutes of limitations, does not recognize or limits vicarious or secondary liability, has elements for its torts that are more difficult to prove, or provides for stricter immunity than under state common law. The latter occurred in the case of *Al Shimari v. CACI*, discussed *supra*, where the federal district court found that under a choice of law analysis, it should apply the law of Iraq. This resulted in the defendant, a U.S. corporation that had contracted with the United States, being immune from suit under Iraqi law.[320] Barriers, even unforeseen barriers, may be therefore erected, especially if foreign law is chosen as the substantive law.

However, in determining choice of law questions, there should be an interest in ensuring that the plaintiff has a remedy—especially when the conduct is also considered to be in violation of the law of nations.[321]

B. EUROPEAN STATES

In the European Union, the Rome II Regulation[322] applies to tort liability claims presented to the national courts of the EU Member States.[323] This Regulation in principle designates the law of the State in which the harm occurred (the *lex loci delicti*) as the applicable law. Civil liability claims shall be decided on the basis of the rules in force in the host State, where the damage occurred.[324]

While this is the general rule, and the one most likely to apply in most instances, there are a number of exceptions,[325] including three that are of particular interest where claims are based on the allegation of human rights violations. First, provisions of the law of the forum may apply, "in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation."[326] Thus, it is possible to argue that, where the law of the State where the harm occurred is not sufficiently protective of the human rights of the person harmed, (including where core labor rights as recognized in the core ILO conventions as confirmed in the UNGPs), the law of the forum State will apply. For instance, courts in Germany have recognized that the right to maternity leave or the right to sick pay are both mandatory in that sense,[327] and also possibly the right to form unions and the prohibition on discrimination.[328]

Second, "[i]n assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability."[329] This provision can apply where there are global supply chains, because it implies that where harm occurs in a host State as a result of the conduct of a business domiciled in the forum State, the definition of the conduct that may be considered reasonable shall be defined in accordance with the law of the forum State. Therefore, in an EU Member State where a law provides that a failure to act with due diligence may engage liability, businesses domiciled in that Member State could be found liable on that basis. This is true even if the harm occurs in a third State and even though the law applicable to the claim for damages filed before national courts in the European Union would in principle be the State where the harm occurred. This is fully consistent with Principle 2 of the UNGPs, which clarifies that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations."[330] Specifically, to the extent that the duty to act with due diligence is imposed on businesses operating from within the European Union, these businesses should be made aware that, as a result of the Rome II Regulation (and Art. 17 in particular), this standard of conduct shall apply also to assess whether they are liable for human rights violations that occur outside the European Union, which they would have been able to prevent.

Third, the law of the State where the harm occurred may not apply "if such application is manifestly incompatible with the public policy (ordre public) of the forum."[331] This exception might be applied where the laws of the State where the harm occurred are considered to be contrary to the protection of human rights.[332]

ISSUE 7: PROVING HUMAN RIGHTS VIOLATIONS

One of the largest barriers to human rights litigation for corporate abuses is getting communities and victims to pursue the litigation and continue it over a number of years, let alone pursue it in a court abroad. This section will describe the barriers to accessing an effective judicial remedy caused by the evidentiary burden the claimant must provide, including the difficulty of obtaining evidence and barriers caused by rules of discovery. The specific difficulties associated with transnational claims shall be addressed, in particular the admissibility and reliability of evidence that may have been collected.

A. UNITED STATES

The difficult task of pursuing, preserving, and gathering evidence and providing testimony in the face of security risks and harm is something that is common among affected communities, and may be increased in areas of human rights violations where corporate interests are involved. Even if victims or witnesses are willing to provide testimony, securing such testimony by deposition or in court is a significant hurdle. The taking of depositions abroad is quite costly, and there are often

complications involving travel and security in the host State. In one case, a judge reportedly asked the plaintiff's lawyers to prove that they could actually take a deposition in order to continue the case.[333]

An additional hurdle is getting a victim or witness to be able to come to the United States for a trial.[334] Typically, such a victim or witness will have to obtain a visa, but doing so is very difficult. For example, a person coming to the United States temporarily will need to establish ties to the host State in order to convince the State Department that he or she will return to the host State.[335] It is even more difficult to obtain such a visa if the victim or witness has a potential asylum claim. In many cases, the victim or witness may not have appropriate documents in order to secure a passport, a visa, or allow a return to the host State. Where victims or witnesses have obtained visas, it has typically required the active involvement of the court.[336]

Discovery is normally not done through inter-State judicial cooperation or through various mechanisms of The Hague Convention, given the complications and the length of time it takes to secure such cooperation and support. Discovery is usually secured through procedures under the Federal Rules of Civil Procedure, with duties inherent under the rules on both sides of the litigation, with intervention by the court when needed.

B. EUROPEAN STATES

In the European Union, it remains for each State to define the conditions under which courts are to assess the evidence with which they are presented. In continental Europe there is a particular barrier as there is no discovery or disclosure rule obliging the other party to divulge information in its possession. Where an equivalent rule exists, it is typically only in an attenuated form.

To a certain extent, however, this obstacle may be overcome where the human rights violation alleged by the victim would also constitute a criminal offense, and which the public prosecuting system may seek to pursue. In most EU Member States, including Belgium, France, and Germany, where a particular form of conduct is both a criminal offense and a tort that could lead to engaging the civil liability of the perpetrator, the victim may claim civil damages in the course of the criminal trial, where the burden of gathering evidence is on the prosecutor.[337]

i. The Netherlands

In the Netherlands, the Code of Civil Procedure makes it clear that the person making the claim for damages has to prove the existence of the alleged facts, unless there is a specific reason for a different division of the evidence burden.[338] Though the plaintiffs may demand that the corporate defendant provides relevant documents, such a request is restricted by the fact that the requesting party needs to have a legitimate interest and that they need to specify the documents required.[339] While these requirements are meant to prevent "fishing for evidence," they have proven to be a major obstacle to acquire evidence.

CASE STUDY

Four Niger Delta Farmers v. Royal Dutch Shell

In the *Dutch Shell* case, the plaintiffs requested the disclosure of key evidentiary documents from Shell.[340] The documents concerned issues such as the condition of the oil pipelines and internal policies and operational practices of the Shell Group.[341] The court denied the request, stating that the plaintiffs lacked a legitimate interest and had not substantiated that the parent company could be held liable for the damage caused by its subsidiary.[342] Moreover, concerning documents from Shell Nigeria (SPDC), the Nigerian subsidiary, the court found that the plaintiffs insufficiently substantiated that the damage was not the result of sabotage.[343] In other words, plaintiffs were required to provide specific information that they were seeking in the requested documents and what documents they specifically sought before knowing what was in those documents.

ii. United Kingdom

One of the most difficult barriers to overcome with these types of actions is the obtaining and using of evidence for such claims. This evidence is very often contained in the documents that are in the sole possession of the business. As noted in *Lubbe v. Cape*:

> Resolution of this issue [of a duty of care] will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent corporation, including minutes of meetings, reports by directors and employees on visits overseas and correspondence.[344]

This is a reason why the process of disclosure of relevant documents in the business's control can be a very important step for claimants in establishing the parent company's knowledge and control. U.K. procedural rules provide for general and specific disclosure of relevant documents by parties to litigation,[345] and also for answers to be given on oath to a request for information.[346] For example, in *Vava & Others v. Anglo American South Africa*, the claimants sought specific disclosure of documents relating to the location of the defendant business's "central administration" to assist in its jurisdictional basis for the claim. In ordering disclosure, the U.K. High Court concluded that without disclosure of documents, there was a "very great risk that the claimants will be contesting jurisdiction at an unfair disadvantage."[347]

Because the decision on ordering disclosure is made by the court on the basis of the claimant's requests, there are two potential risks: that the claimant will not ask for some relevant documents as they are unaware that they exist; and that the court may exercise its discretion not to order disclosure. Also, if the business's documents came into the possession of the claimant by illegal or unauthorized means, there may be an issue as to whether the documents will be admitted as evidence by the court.[348]

iii. Switzerland

Switzerland does not have a procedure for disclosure of documents. As a result, the claimants will be at a disadvantage, because the elements that would allow them to prove the alleged human rights violations will generally be in the hands of the defendant. In principle, the court can remedy this imbalance, if it decides to order a party to produce certain documents or other evidence. However, the changes introduced by the unified Swiss Code of Civil Procedure in January 2011 have erected new barriers to that possibility, by (i) allowing a defending party, in a civil suit, to refuse to collaborate in the gathering of evidence, and (ii) by relying on a broad understanding of which confidentiality requirements may be invoked in this regard by the party refusing to provide certain documents.[349] It is sufficient, to justify such a refusal to cooperate, that the party concerned put forward plausible reasons why their interest in preserving confidentiality trumps the interest in the establishment of truth.[350]

ISSUE 8: THE COST OF BRINGING TRANSNATIONAL LITIGATION

Transnational litigation is incredibly costly. This is because of the costs associated with gathering evidence in a foreign State to support a claim, the cost of legal and technical experts, and the sheer fact that these cases can take upwards of a decade to litigate. For human rights victims, who may be without many financial resources, the cost of litigation can preclude access to a judicial remedy.[351] This section explores practical and substantive difficulties that victims face in bringing human rights claims against businesses in home States. It discusses recent legal developments in the jurisdictions examined that have made judicial remedies increasingly economically inaccessible. These developments include restricted availability of legal aid, how legal fees are awarded, compensation rules, third-party complaints brought by parties on behalf of victims and collective action challenges.

Legal Aid

A. UNITED STATES

Plaintiffs who bring civil cases in U.S. courts, whether federal or state, are not entitled to direct legal aid. Courts will, however, usually waive any filing fee associated with commencing litigation for those plaintiffs who can establish, through affidavit, that they lack the financial resources to cover the fee. This includes plaintiffs who are non-citizens.[352]

Claims brought under the ATS or the TVPA do not provide for lawyers' fees or costs to the prevailing party; neither do claims brought under state common law. Both federal and state courts and state bar association rules allow lawyers to be compensated on a contingency basis, which means that plaintiffs do not have to pay lawyers' fees. Rather, lawyers will recover a certain percentage of any settlement or award of fees. This has resulted in lawyers taking a few cases, but overall, these cases are seen as so risky and unlikely to result in any award of fees or costs that it is difficult to get lawyers to take them. Most human rights cases in the United States are taken pro bono, either by NGOs, pro bono lawyers, or legal clinics, which do not charge the client legal fees. Given this lack of fees, the fact that the costs in these cases tend to be expensive, and that the cases can often take years to litigate, the task of finding representation in these cases can be a barrier to effective remedy.

B. EUROPEAN STATES

In the European Union, a 2003 Directive[353] seeks to promote the application of legal aid in cross-border disputes for persons who lack sufficient resources where aid is necessary to secure effective access to justice. The directive is premised on the idea, expressed in the 6th Recital of its Preamble, that "Neither the lack of resources of a litigant, whether acting as claimant or as defendant, nor the difficulties flowing from a dispute's cross-border dimension should be allowed to hamper effective access to justice."[354] The Directive defines that an appropriate level of legal aid should guarantee: (a) pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings; (b) legal assistance and representation in court, and exemption from, or assistance with, the cost of proceedings of the recipient, including the costs directly related to the cross-border nature of the dispute;[355] and (c) the fees to persons mandated by the court to perform acts during the proceedings. Moreover, in Member States in which a losing party is liable for the costs of the opposing party, if the recipient loses the case, the legal aid provided shall cover (d) the costs incurred by the opposing party, if such costs would have been covered by legal aid had the recipient been domiciled or habitually resident in the Member State in which the court is sitting.[356]

However, the Directive aims at facilitating access to justice in cross-border disputes within the European Union, as a means to promote the achievement of the internal market.[357] It is limited to cross-border disputes within the European Union and is therefore not applicable where the claim is against a parent business domiciled within the European Union and the harm was caused outside the European Union. It also only benefits nationals who are domiciled or habitually resident in the territory of a Member State and third-State nationals who habitually and lawfully reside in a Member State, and so would not assist victims who are resident outside the European Union.[358]

Nevertheless, it could be argued that the Directive may be relevant to transnational litigation against businesses domiciled in the European Union. First, a difference in treatment in access to legal aid based solely on the criterion of residency may be increasingly treated as subject to appeal. Second, the principles set out in the Directive may be seen as implementing, within its specific scope of application, the fundamental right to access to justice.[359] It may be argued that the claimants under

Retaliatory Litigation, including Claims for Damages for Reputational Losses

Some victims, NGOs, and plaintiffs' lawyers have faced claims by businesses, seemingly in retaliation for bringing a human rights case against the business. These lawsuits create a barrier for future litigation in that they may intimidate the parties. In addition, tremendous time and financial resources are needed to defend against these attacks.

Although most U.S. practitioners bringing human rights claims do not consider retaliatory lawsuits by businesses or business executives for reputational losses—called Strategic Lawsuits Against Public Participation, or SLAPP suits[360] —a serious threat as of yet, a troubling trend is developing. For example, in the *Chevron* case involving Texaco's extraction efforts in Ecuador, discussed above, Chevron sued the plaintiffs for fraud and the lawyer under the Racketeer Influenced Corrupt Organization (RICO) Act for conspiracy in U.S. federal court in February 2011.[361] The lawsuit alleges that the plaintiffs' lawyers and representatives have conspired to extort up to $113 billion from Chevron through the Ecuadorian legal proceedings. The allegations involve influence over an expert in the case and the lawyer's role in the expert's report. Whether the claims about the lawyer are true or not, the suit against the plaintiffs themselves appears retaliatory.

Chevron also sued another of the plaintiffs' lawyers in federal court in California for malicious prosecution.[362] The U.S. District Court of San Francisco applied California's anti-SLAPP statute.[363] Though Chevron's malicious prosecution claim was ultimately denied, it had successfully forced the lawyer, a solo practitioner, to expend a great amount of time and expense for his defense.

In yet another case, the defendant in *Baloco v. Drummond*,[364] and *Giraldo v. Drummond Co.*, Inc.,[365] long-standing human rights cases[366] involving allegations that the business had made payments to the paramilitary group United Self-Defense Forces of Colombia (known by its Spanish acronym AUC) to kill labor leaders, has sued plaintiff's lawyer for defamation[367] and sent him burdensome discovery requests.[368] The state in which he is being sued, Alabama, does not have an anti-SLAPP statute. The case is currently being litigated.

Many states have anti-SLAPP statutes, allowing the party or lawyer being sued to request the court to dismiss the case promptly in order to avoid the burden and costs of litigation and to recover fees. However, there is currently no federal anti-SLAPP statute. Federal courts are divided as to whether state anti-SLAPP statutes apply to state claims being litigated a in federal court sitting in diversity, *i.e.*, where the federal court has jurisdiction because the parties are not from the same state. The First, Fifth, and Ninth Circuits have found they must enforce state anti-SLAPP statutes in federal court diversity cases, overturning their respective district courts.[369] However, a federal district court in the District of Columbia has cast doubt on whether the D.C. anti-SLAPP statute applies in federal diversity cases, implicitly holding that it does not.[370] Similarly, a federal district court in Illinois recently held that a Washington state anti-SLAPP statute would not be applicable in its diversity case because it found that the statute conflicted with the Federal Rules of Civil Procedure.[371] A Massachusetts federal district judge recently made the same finding.[372] Thus, there is no guarantee that state anti-SLAPP statutes will provide safety to plaintiffs and plaintiffs' lawyers in human rights cases, most of which end up in federal court due to diversity jurisdiction.

the Brussels I Regulation, because they invoke a right to access to justice on the basis of provisions of EU law, should have *effective* access to justice, and therefore should not face disproportionate financial obstacles.

Aside from the legal rules surrounding legal aid, there are also practical challenges stemming from the high cost of legal proceedings in many EU Member States.

i. France

In France, Article 3 of the Code de Procédure Civile provides that legal aid may be obtained by French and EU nationals, as well as by third State nationals who reside habitually and regularly in France; other third State nationals can only be granted legal aid in exceptional circumstances.[373] However, legal aid is granted without condition to third State nationals when they are parties to criminal proceedings. This includes cases where they are victims and seek compensation for the damage caused by the allegedly criminal conduct.[374]

ii. Germany

Contingency fees were introduced in Germany six years ago as an exception to a general rule prohibiting such agreements between clients and lawyers.[375] The new provision requires that the client be able to have a contingency fee agreement if, without having such agreement, the client would not be able to enforce or defend his rights in a proper manner for personal financial reasons.

iii. The Netherlands

In the Netherlands, legal aid is normally only granted for cases involving legal interests situated in the Dutch legal sphere.[376] Yet, it is not impossible for foreign plaintiffs to acquire legal aid, as illustrated by the fact that the Nigerian farmers in the Dutch Shell case[377] successfully applied for legal aid. In 2011, a proposal made by the Dutch Parliament to establish a legal fund especially aimed at providing legal aid to plaintiffs from developing States was rejected.[378] The government indicated that this type of civil claim should not be treated differently when it comes to legal aid than other types of civil claims, and therefore there was no need for alternatives in this respect.[379]

Costs are particularly high in the Netherlands,[380] where legal representation is mandatory in civil liability cases,[381] although this is counterbalanced somewhat by the fact that proceedings in the Netherlands are relatively short.[382] Also, contingency in form of the fees that are only granted in the case of a victory are not allowed as such.[383] However, the client and lawyer may negotiate a premium for success in addition to another method of compensation such as a flat fee or hourly rate.

iv. United Kingdom

The earliest cases filed against businesses domiciled in the United Kingdom for human rights violations committed overseas were funded by legal aid. This meant that there was government funding where the claimants had a good case but insufficient funds of their own. This government

funding paid the legal fees at a fixed rate. This provision has since been limited greatly due to deliberate government policies to reduce legal aid funding generally in the United Kingdom, which makes it very difficult to obtain it for these types of cases.[384]

Most U.K. lawyers involved in these cases do so on a "no win no fee" basis, with an uplift of fees if they do win, as is allowed under U.K. legislation (though see the discussion below on the changes to the U.K. legislation in this regard).[385] Those legal costs are payable by the defendant if they lose, as a separate cost to the claimant's compensation.[386] This is also relevant in any settlement, as the Trafigura settlement involved "an insurance premium of nearly £10 million and legal fees costing tens of millions [whereas] . . . the U.S. lawyers' contingency fees were subtracted from the $30 million headline figure in the Unocal settlement."[387]

v. Switzerland

Legal aid in Switzerland can be granted to foreigners and to individuals who do not reside in Switzerland;[388] however, it is only granted for fees associated with the legal proceeding in Switzerland, and is not available for all costs associated with the litigation. As complex extraterritorial cases typically involve substantially higher costs related to investigation and organizational work, this makes it difficult for victims with few resources to proceed without the assistance of legal aid. To receive legal aid, two conditions must be met. First, the claimant must show that they have a fair chance to win the case, which is difficult to achieve in cases alleging human rights abuses committed by a business abroad. If authorities believe the chances of winning the case are low, they can refuse legal aid. Second, the claimant has to prove that if he pays for the costs of the proceeding he would not be able to provide for his or his family's basic needs. In cases where victims live abroad or in developing States, the cost of basic needs is calculated according to the victim's State.[389]

In the recent *Nestlé* case, the family of the Colombian victim did not receive legal aid because the Swiss authorities believed the family had enough money to live in Colombia and still pay the costs of the legal proceeding.[390]

Loser Pays Provisions

A. UNITED STATES

In the United States, the general rule is that each side in litigation pays its own lawyers' fees. Some statutes do allow prevailing parties to recover their fees, but the ATS and TVPA do not. There are exceptions to this general rule; the most notable is that if a judge determines a party acts in bad faith, the judge can order that the party pays the costs, including lawyers' fees pursuant to Federal Rule of Civil Procedure 54(d). Such an award, however, is in the court's discretion. Most plaintiffs in human rights litigation have very few, if any, financial resources, and thus, the court usually does not award such costs against them, nor does it appear that defendants typically seek such costs. In *Al Shimari v. CACI*,[391] however, the defendant submitted a bill of costs, asking the court to order

the plaintiffs to pay them. The court agreed it should award costs, ordering the four Iraqi plaintiffs, of little resources, to pay $14,000 to the business.[392] State rules of procedure on this issue typically mirror the federal rule.

B. CANADA

In Canada, each province has a "loser pays" system, where the loser in litigation typically has to pay the prevailing party's costs, including lawyers' fees, although it is often on a partial scale. This is a continuing obligation throughout the case, so that if one brings a motion and loses, the losing party has to pay costs. If the losing party does not pay the costs, the case can be dismissed at that stage. In Canada, there is no restriction on lawyers or NGOs paying costs (although, like in the United States, clients remain ultimately responsible), so if a lawyer or NGO wants a case to go forward, they can pay the costs. But similarly, one must have a law firm or NGO that has the money to be able to pay the costs of litigation in the event of a loss. Moreover, foreign plaintiffs can be required to post a "security for costs" that will go towards defendants' costs if the defendants prevail. In determining the security, the court can take into account the financial resources of the plaintiff.

Judicial Review in the Context of the Environment

Article 9 of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention)[393] provides that the procedures established to allow judicial review of the decisions affecting the environment "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely *and not prohibitively expensive*," and that "[i]n order to further the effectiveness of the provisions of this article, each Party shall . . . *consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice*."[394]

In the case of *Edwards*, the Court of Justice of the European Union noted that:

> the requirement that the cost should be 'not prohibitively expensive' pertains . . . to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law.[395]

It follows that a requirement that judicial proceedings should not be "prohibitively expensive" "means that the persons covered by those provisions should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result."[396] The national courts must ensure that "the cost of proceedings . . . neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable."[397]

Many of those involved in Canadian litigation report that the loser pays system this has been a barrier to some cases being taken or appealed. Of course, if plaintiffs win their motions, they can recover costs. But with the added financial risk, and the fact that these cases have not yet had much success, the loser pays system likely inhibits human rights litigation. It should be noted that, at least in British Columbia, plaintiffs can apply for a no-costs ruling in public interest litigation, and it appears that this practice, and its likely success, may be increasing in Canada.[398] In addition, class action litigation in Quebec allows some class actions to apply for and receive funding to prosecute the class action.[399]

C. EUROPEAN STATES

In many EU Member States, the party that loses will have to pay the costs of the other party, and this may include the lawyers' fees.[400] This may constitute a serious obstacle for plaintiffs from developing States. However, it is not unusual for courts to waive the rule, and to decide that the parties carry their own costs. Human rights NGOs, having relied on courts to denounce instances of violations, have often bitterly complained that the rules concerning compensation to the defendant if they lose the case are sometimes applied so as to create a chilling effect on the filing of complaints. In the *Alstom-Veolia* case, where NGOs were alleging the complicity of the businesses in violations of international humanitarian law by Israel operating in the Occupied Palestinian Territories, the French courts imposed the payment of a sum of €90,000 on the plaintiffs, although the relevant rules of the French civil code would have allowed them to take into account the specific situation of the plaintiffs.[401]

i. United Kingdom

The general position in U.K. litigation is that the unsuccessful party to the litigation has to pay the successful party's costs, which include lawyers' fees. However, the barrier to actions in the United Kingdom in terms of recovery of costs has increased significantly with the passing of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), effective from April 2013.[402] Legal fees for a successful claimant will now have to be paid out of the claimant's compensation damages and cannot exceed twenty-five percent of the damages.[403] It is proposed that legal costs should not generally exceed damages, which may not be the reality in these factually and forensically intensive cases from distant locations. In addition, due to the Rome II Regulation, damages will be assessed in accordance with the law and procedure of the State where the harm occurred,[404] which may be considerably lower, not least due to the economy in that other State.

This change increased the barriers for these types of cases. After all, one reason a legal case is brought against a parent company is that the laws and practices (and rule of law) in the State where the violations of human rights occurred may not be in place or operating in any effective or fair manner. Thus any decisions on damages for these cases are likely to be absent, untested or even subject to political and other pressure.

The changes brought about by LASPO prompted former Special Representative John Ruggie to write to the U.K. Justice Minister raising his concerns about "disincentives" being introduced, on the basis that they may have a potential impact:

> on the position of legitimate claimants in civil actions . . . particularly in cases involving large multinational enterprises . . . [and the reforms constitute an] effective barrier to legitimate business-related human rights claims being brought before [U.K.] courts in situations where alternative sources of remedy are unavailable.[405]

ii. Switzerland

If the victim is successful in the claim in Switzerland, the defending party may be required to cover part of the costs of litigation, including lawyers' fees. However, this would rarely cover the totality of such costs and fees. The opposite is also true, as if the claim is considered ill-founded and fails, the defendant may request that the losing party cover the costs. This includes lawyers' fees, and because the amounts can be significant, this has a clear chilling effect on the willingness of the potential plaintiff to bring a claim forward.

Business/Internal Grievance Mechanisms

At least one business based in Canada, Barrick Gold Corporation, has instituted a grievance procedure process to compensate victims of alleged human rights abuses at its Porgera Gold Mine in Papua New Guinea (PNG). Located in the State's remote highlands, Porgera is one of the largest gold mines in the world. It has faced constant criticism, however, regarding its adverse social and environmental impacts.[406] In particular, Barrick Gold has faced allegations of vicarious responsibility for widespread violence against native women by employees of its Porgera operation. A report by Human Rights Watch documents numerous incidents of gang rape by mine security personnel and considers that "these incidents represent a broader pattern of abuse."[407]

After years of denying allegations of rape, beatings and killings, in 2010 Barrick began engaging in substantive dialogue with Human Rights Watch and acknowledged that there had been allegations made against members of the Porgera Joint Venture.[408] In 2012, Barrick Gold began to implement a non-judicial remedy procedure for victims of Porgera-related abuses in PNG.[409] Called "Olgeta Meri Igat Raits" or "All Women Have Rights," the framework includes an individual non-judicial claims process as well as a number of community projects Barrick says is designed to support victims and increase awareness of violence against women in the region.[410]

Some members of the international community have raised concerns about the framework. In particular, MiningWatch Canada has criticized a provision that requires any woman accepting an individual benefit package to sign a legal waiver that bars initiation of legal proceedings.[411]

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On 7 June 2013, Barrick released a summary of changes to the Porgera remedy framework based on feedback and criticism from external stakeholders.[412] Changes include an amended legal waiver that specifies that the settlement agreement does not preclude further criminal charges and "cover[s] only instances where a claimant may seek a double recovery from the company for the same injury."[413] Notwithstanding these changes, MiningWatch Canada and others continue to speak out against the legal waiver, arguing that there should be no conditionality attached to the mining business's remedy and that the waiver sets a dangerous precedent for other businesses that have committed human rights abuses abroad.[414]

Companies like Barrick that institute non-judicial grievance mechanisms that include waivers likely do so to limit liability in the judicial system and prevent further recovery. It is possible, even likely, that these business-sponsored grievance mechanisms will become a trend in the future, especially given that the UNGPs specifically provide for the establishment of non-judicial grievance mechanisms, including non-State mechanisms.[415] These mechanisms, although they have great potential in securing remedies for victims, especially those that cannot realistically file suit in their own State or in a business's home State, should be viewed with caution as a substitute for access to a judicial remedy. They are non-judicial mechanisms and, as such, they have the potential to inhibit and even prevent access to judicial remedies. In addition, they may not have an impartial arbitrator, may lack fair trial protections, may lack evidentiary rules designed to ensure fairness, may result in individuals "waiving" their rights to protections and remedies without true informed consent or understanding, and may leave victims without a remedy to which they are entitled. This is not to say that all non-judicial mechanisms will pose obstacles to access to judicial remedy; it is rather to highlight the fact that privately-driven mechanisms do not have the same safeguards as those built into developed judicial systems and therefore might not provide the same access to effective remedy. Any such grievance procedures, or settlements that are reached through them without judicial-like safeguards and remedies, should not limit individuals' rights to achieve effective remedy through the judicial process.

The Guiding Principles provide further guidance to ensure access to an effective remedy. The commentary to Guiding Principle 29 explicitly states that victims should not be required to exhaust such grievance mechanisms before bringing a judicial claim; that such mechanisms should not preclude access to judicial grievance mechanisms; and that any non-judicial mechanism should comply with the requirements set forth in Guiding Principle 31.[416] Principle 31 provides that non-judicial grievance mechanisms, both State-based and non-State-based, should present a number of characteristics in order to provide an effective contribution to improving accountability, particularly in the context of the activities of businesses that have an impact on the enjoyment of human rights. These characteristics are that the grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, the source of continuous learning, and based on engagement and dialogue.[417] Any mechanism that does not fully satisfy these criteria is not complaint with the UNGPs and "[p]oorly designed or implemented grievance mechanisms can risk compounding a sense of grievance amongst affected stakeholders by heightening their sense of disempowerment and disrespect by the process."[418]

The Office of the High Commissioner for Human Rights (OHCHR) issued an opinion in July 2013 regarding Barrick's grievance procedure, in light of the UNGPs.[419] With regard to the waiver, the OHCHR states:

> The presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism . . . nonetheless and as there is no prohibition *per se* on legal waivers in current international standards and practice, situations

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> may arise where business enterprises wish to ensure that, for reasons of predictability and finality, a legal waiver be required from claimants at the end of a remediation process. In such instances, the legal waiver should be as narrowly construed as possible, and preserve the right of claimants to seek judicial recourse for any criminal claims.[420]

The OHCHR also emphasized that any grievance procedure must comply with the UNGPs, including Principle 31.

The OHCHR's statement regarding the limitation of waivers mentions criminal claims only. However, the language in the commentary of Principle 29 that such mechanisms should not preclude access to judicial mechanisms does not distinguish between civil and criminal mechanisms.

It is still too early to tell whether grievance mechanisms, even those that arguably meet the criteria of the UNGPs, will provide adequate and effective remedies to victims of human rights abuses. For all the reasons described above, such mechanisms should be viewed with caution.

Legal Standing by Third Parties to Bring Claims

A. UNITED STATES

Nearly all cases in the United States are brought by either individual victims or by multiple victims who have "standing" to bring the case.[421] Organizational standing, a type of third party standing, is permitted in the following circumstances: (1) where members of an organization would otherwise have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit.[422]

Litigants interested in the outcome of a case that have not otherwise been injured by the actions of the defendant are not allowed in U.S. courts on behalf of third parties.[423] However, the courts have allowed litigants standing to bring actions on behalf of others where (1) the litigant has suffered an "injury in fact," thus giving her a "sufficiently concrete interest" in the outcome of the issue in dispute; (2) the litigant has a close relation to the third party; and (3) there must exist some hindrance to the third party's ability to protect her own interests.[424]

Practitioners did not identify the lack of third party standing as a barrier to human rights litigation in the United States,[425] given that there do not appear many hindrances to foreign plaintiffs bringing claims in U.S. courts. However, there have been a few attempts to bring cases under the ATS on behalf of others, all of which have been dismissed.[426]

B. EUROPEAN STATES

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

i. France

The French Court of Cassation considered in 2008 that an association defending the rights of certain patients with disabilities could file a claim against the institution alleged to have ill-treated such patients, and be awarded damages on that basis.[427]

ii. The Netherlands

In the Netherlands, it is accepted that an association with full legal capacity may file a civil claim aimed at protecting the analogous interests of other persons.[428] The formal requirements under Dutch law for filing such a case are that the association employs actual activities connected to the case and the case fits within its statutory objective. It should be noted that it is only possible to bring a claim for declaratory and/or injunctive relief but not for monetary compensation. Moreover, such a claim may only be filed after the association has attempted to resolve the matter through consultation.[429]

CASE STUDY

Four Nigerian Farmers v. Royal Dutch Shell

In the *Dutch Shell* case,[430] the District Court upheld its 2010 interlocutory judgment regarding the admissibility of the claims of Friends of the Earth Netherlands (*Milieudefensie*). The court held that the NGO may bring a claim pertaining to interests that lie outside the Dutch legal sphere altogether.[431] The NGO met the formal requirements that it employs actual activities connected to the case (campaigns aimed at stopping environmental pollution due to oil production in Nigeria) and that the case fits within its statutory objective (global environmental protection).[432] According to the court, the claims clearly exceeded the individual interest of the plaintiffs because measures that might be ordered by the court would not only benefit the claimants but also the others members of the community, and the environment in the vicinity of the villages. Moreover, the court noted that because many people may be involved, litigating in the name of interested parties may be problematic; hence the opportunity for the NGO to start a public interest case.[433] It follows from this judgment that the Dutch legal system does not pose major obstacles for organizations seeking to bring representative actions on behalf of the human rights of people or the local environment elsewhere.

For more about this case, please refer to the full case study, which is located in the Appendix.

iii. United Kingdom

There is no public interest litigation in the United Kingdom for these types of claims, and the lack of public interest litigation has normally not been an obstacle to access to justice.[434] Nonetheless, as discussed in relation to the cost concerns stemming from recent changes in U.K. law, public interest litigation could be a useful approach to these types of cases going forward, both as a mechanism to raise funds for cases and as a means of advocating for vulnerable groups or individuals.

Collective Redress and Class Action Mechanisms

A. UNITED STATES

Proceeding as a class action—where an entire class of victims is represented by a representative or representatives—in a human rights case has some advantages, notably that a positive outcome in the case can result in a remedy for numerous victims without the need for their involvement in the case and in a relatively efficient manner. Another advantage is that, unlike other types of litigation where lawyers are typically not allowed to pay the expenses, repayment of expenses can be contingent on the outcome of the litigation.[435] In such cases, the law firm remains responsible for the costs. This can allow a group of victims to pursue a case without the need to worry about costs. This method of proceeding also helps protect plaintiffs from intimidation and threats. A few ATS cases have been certified as class actions.[436]

However, class action litigation in the United States has become more difficult after the 2011 Supreme Court decision in *Wal-Mart v. Dukes*.[437] The case involved 1.5 million women suing Wal-Mart for gender discrimination, relying primarily on statistical information rather than on proof of a general policy of discrimination.[438] Class certification is complex, but among other things, requires common questions of law or fact, and that claims of the representatives are typical of the claims of the entire class.[439] In *Wal-Mart*, the Court found that for each putative class member, different reasons might exist as to why she was terminated, even if they were discriminatory.[440] Thus, because of the potential variability in each plaintiff's situation, the plaintiffs did not have enough in common to constitute a class.[441] The Court appeared to require a higher bar for establishing commonality; basically holding that the only way to do so was to prove the existence of a general policy treating a group of people the same way, and that where there *may be* differences in the way individuals are treated, a class action cannot survive. In the context of many cases, including human rights abuses, where circumstances among victims can differ, this poses significant challenges.

Practitioners report that they are not even considering the possibility of proceeding as class actions anymore under the belief it is not possible or feasible after *Wal-Mart*.[442] Although individual cases and cases involving multiple plaintiffs can still proceed, of course, limiting class actions will affect the ability of large numbers of victims in certain, appropriate cases to obtain a remedy in a manner that class actions can make more efficient. However, given the complexity of class action litigation generally, including the difficulty associated with notification of potential class members that is

required,[443] not many ATS cases proceeded as class actions prior to *Wal-Mart*. Thus, although this is now a barrier to some ATS cases that might have proceeded as a class action, it is not a significant barrier to litigation.

B. EUROPEAN STATES

Though EU Member States have not adopted the class action mechanism as in the United States, some analogous collective redress mechanisms have emerged in recent years. Collective redress is a "concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices."[444] Class action lawsuits can be seen as a subset of collective redress mechanisms,[445] but the terminology of "class actions" is not generally used in the European Union.[446] Opportunities for collective redress in key European jurisdictions are discussed below.

i. France

In France, the "action en représentation conjointe," or action in joint representation, was introduced in 1992.[447] This form of action allows a consumers' organization, if mandated by at least two individual consumers who have been aggrieved by the same conduct, to file a claim in their name, in effect endorsing their claim as its own. It represents a joint exercise, through the consumers' organization, of individual claims against a single defendant.[448] A similar action can be brought by designated NGOs in the areas of environment,[449] finance,[450] and health,[451] but these have met with very limited success due to their restrictive conditions. For instance, the range of NGOs within these fields that have the legal capacity to bring cases is very limited. Only those that have a special authorization from the State may do so.[452] Hence, the biggest and most powerful NGOs have such legal standing. Second, the law also limits the outreach of those NGOs to all victims as there is no right to advertise the action to generate clients, nor may they contact victims.[453] They only can act based on a victim's written mandate to give them legal representation—similar to an "opt-in" system.[454] As a consequence of this situation, it is difficult for NGOs to conduct outreach to victims/customers, let alone serve as their representatives.

ii. Germany

In Germany, a claimant may under certain, strictly defined conditions, transfer the claim to another party for that party to litigate before courts. This is known as the *gewillkürte Prozessstandschaft* ("arranged standing"). The conditions are that: (a) the claim must be one that is not strictly personal but transferrable, (b) the right-holder must have given the plaintiff power to represent him or her, (c) the plaintiff must have his own legal interest in winning the lawsuit, and (d) the "arranged standing" does not have a detrimental effect for the defendant (for instance, if the claimant stepping forward, having been transferred the claim of other claimants, is bankrupt, the defending party may not be able to recover the costs if the claim is rejected).[455]

iii. The Netherlands

A settlement reached out of court in the Netherlands can be presented to the court to be declared binding on all covered by it after the parties have agreed to the settlement.[456] The settlement reached may be put before the court by a representative organization and if declared binding all those that have obtained damages by the harmful event and have been made aware of the settlement agreement are bound by it unless they have opted out.[457] The mechanism is relatively new and it remains to be seen how it would function in the context of transnational litigation.

iv. United Kingdom

The United Kingdom does not have a legislative procedure specifically allowing for collective redress or class actions.[458] Thus the process to bring a collective action is determined by court procedural rules, for example, the Civil Procedure Rules of England and Wales.[459] There are two possible routes: the representative action[460] and the Group Litigation Order (GLO).[461] The former allows a representative to act where more than one person has the same interest in a claim, and that representative represents parties not before the court, with the court deciding if its orders operate to all claimants. A GLO is flexible and allows a court official, with the senior judge's approval, to decide if the management of the case would be assisted (and possibly cost effective) where cases involving common legal or factual issues were brought together. "Lead cases" are then selected as the means by which to resolve common issues.[462] These group actions require commencement or registration of claims by all members of the class initially and the lawyer who is representing the representative (or "lead") claimant must take instructions from all members of the group. Only those who "opt-in" are bound by decisions made in respect of the group. While the operation of the GLO has enabled some groups to bring claims in effect as a collective, there is considerable negotiation required between lawyers of each party to the case for it to be effective as a collective action, and it remains in the discretion of the court to allow it.[463]

v. Switzerland

There is no class action available in Switzerland, nor may NGOs file claims on the basis of the social purpose for which they were established. However, Swiss law allows victims to cede their right to file civil claims to an association, as was done by five Roma victims of deportation during the Second World War with the Gypsy International Recognition and Compensation Action (GIRCA), to whom these individual victims ceded their rights to seek reparation from the firm IBM for its alleged complicity in crimes against humanity committed by the Nazis.[464]

ISSUE 9: THE STRUCTURE OF THE CORPORATE GROUP

A classic obstacle in transnational litigation against businesses is that corporate groups are organized as a network of distinct legal entities, with variable degrees of influence exercised by the parent company over its subsidiaries (in the presence of an investment nexus), by one business on its business partner (in the presence of a contractual nexus), within joint ventures and consortium,

and by other corporate structures. Indeed, the UNGPs recognized the diversity of corporate organization by referring to them as "business enterprises."[465]

This section will describe the various approaches the jurisdictions studied have taken on this issue. It shall identify (i) under which conditions the corporate veil may be lifted and (ii) under which conditions one business may be held liable for the conduct of another with which it has a business relationship (of a contractual nature).

The doctrine of limited liability holds that, in principle, the shareholders in a business may not be held liable for the debts of that business beyond the level of their investment.[466] It also holds that the legal personality of one business is distinct from the legal personality of another business, even if the latter business is wholly owned and controlled by the first business. The history behind this doctrine is well documented: the protections exist so that investors can invest in businesses without fear of liability, encouraging economic growth.[467] Such investor protections extend to parent companies that are the sole or major shareholder of subsidiary companies.[468] These limited liability protections protect parent companies from liability for torts, including for human rights abuses engaged in by their subsidiaries abroad.

International law reinforces this distinction as the State where a business is incorporated is considered to determine the "nationality" of the business. Accordingly, it has long been asserted that "[a] subsidiary is a separate legal entity and therefore necessarily distinct from its parent . . . as a matter of international law, parent and subsidiary are each subject to the exclusive jurisdiction of their respective [States]."[469] This view is largely based on the decision of the International Court of Justice in the *Barcelona Traction Case*.[470] However, in that case, the Court did note:

> Forms of incorporation and their legal personality have sometimes not been employed for the sole purposes they were originally intended to serve; sometimes the corporate entity has been unable to protect the rights of those who entrusted their financial resources to it; thus inevitably there have arisen dangers of abuse, as in the case of many other institutions of law. Here, then, as elsewhere, the law, confronted with economic realities, has had to provide protective measures and remedies in the interests of those within the corporate entity as well as of those outside who have dealings with it: the law has recognized that the independent existence of the legal entity cannot be treated as an absolute. It is in this context that the process of "lifting the corporate veil" or "disregarding the legal entity" has been found justified and equitable in certain circumstances or for certain purposes. The wealth of practice already accumulated on the subject in municipal law indicates that the veil is lifted, for instance, to prevent the misuse of the privileges of legal personality, as in certain cases of fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations . . . . In accordance with the principle expounded above, the process of lifting the veil, being an exceptional one admitted by municipal law in respect of an institution of its own making, is equally admissible to play a similar role in international law.[471]

Indeed, there is now substantial State practice of extending national law to regulate the conduct of corporate nationals operating extraterritorially through foreign subsidiaries, such as in areas of competition law, shareholder and consumer protection, and tax law.[472] In relation to bribery and corruption, States have concluded treaties imposing obligations on them to regulate extraterritorial conduct of corporate nationals and their subsidiaries.[473] However, this practice has not been extended to the protection of human rights in relation to the activities of businesses operating (whether as themselves or by a subsidiary) outside the territory or jurisdiction of the business's home State. Thus this creates barriers to judicial remedies, which will be considered here.

Direct Duty of Care by a Parent Company

A different avenue, separate from traditional corporate veil piercing, consists of abandoning the idea of linking the behavior of the subsidiary to the parent altogether, and to focus instead on the direct liability of the parent company arising from the failure to exercise due diligence in controlling the acts of its subsidiaries, over which it may exercise control. The OECD Guidelines on Multinational Enterprises appear to follow this approach, where they state that they "extend to enterprise groups, although boards of subsidiary enterprises might have obligations under the law of their jurisdiction of incorporation. Compliance and control systems should extend where possible to these subsidiaries."[474] This formulation amounts to imposing on a parent company a duty to monitor the activities of the subsidiary, consistent with the emerging notion that parent companies have a due diligence obligation to ensure that human rights are complied with within their sphere of influence. This notion of corporate responsibility and due diligence is a central piece of the Guiding Principles and involves a duty to identify, prevent, and mitigate human rights impacts that are directly linked to businesses' operations, products, or services by their business relationships, even if they have not contributed to those impacts. The Guiding Principles are clear that they "apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership, and structure."[475]

This approach creates an incentive for the parent company to ensure that its subsidiaries respect human rights. In contrast, a doctrine requiring that claimants bring forward elements justifying the lifting of the corporate veil creates an incentive for the parent company to remain at arm's length from the activities of its subsidiary, in order not to be held liable for its behavior.

A. UNITED STATES

One of the largest barriers to a judicial remedy victims face is the lack of liability on the part of the parent company over which the home State has personal jurisdiction in relation to its subsidiary's actions, due to limited liability statutes. Incorporation law in the United States is governed by each of the separate states.

Plaintiffs can seek to overcome this limited liability by proving the active involvement of parent companies, or can seek to "pierce" the corporate veil[476] and have the parent company be held

liable by proving close relationships between the parent and subsidiary (alter ego),[477] often times establishing similar boards of directors, common policy makers, common policies, common decision-making and the like.[478] Plaintiffs can allege parent company liability under similar theories such as agency,[479] the joint venture theory,[480] or enterprise theory.[481] Human rights practitioners have had some success in piercing the corporate veil and or in overcoming limited liability of parent companies, but it has been limited.[482]

Where the plaintiffs are not able to establish such direct participation, pierce the corporate veil, or otherwise prove sufficient facts to hold the parent company liable, victims will often be without a remedy for human rights abuses.

Corporate structure has implications for evidence in transnational human rights litigation as well. With regard to discovery and obtaining documents necessary for litigation (discussed *supra*), the discovery process and access to public documents have for the most part provided sufficient information concerning the relationships between parents and subsidiaries based in the United States.[483] However, obstacles remain. For example, parent companies over which the courts have jurisdiction may deny any involvement in subsidiaries' actions, yet often will not produce information regarding the subsidiaries, including information regarding their relationships to the subsidiaries.[484] Unless a plaintiff can establish both that the parent company has information only it knows, and knows specifically what it is looking for, a court will typically refuse any discovery order.

B. CANADA

The limited liability of the parent company is one of the largest barriers to victims seeking accountability in Canada for human rights abuses abroad. In Canada, most litigation against the parent company is based on the direct involvement in the acts or on "piercing the corporate veil." To pierce the corporate veil in Canada, the plaintiff must show that the parent had complete control or domination over the subsidiary and that the incorporation was done for an improper purpose in order to hide the fraud, or where the plaintiffs can prove that the subsidiary has acted as the authorized agent for the parent. Moreover, avoiding liability is not considered an improper purpose. Thus, piercing the corporate veil is very difficult.

The issue of limited liability and piercing the corporate veil was recently discussed in *Choc, et al v. HudBay Minerals, Inc.*, a case alleging that the security personnel at HudBay Mineral's former mining project in Guatemala engaged in numerous abuses including the killing of an outspoken critic, the shooting of another man, and rape of numerous women during the security personnel's, police's, and military's removal of them from their ancestral village.[485] In that case, the court rejected HudBay Minerals' argument that the case against it should be dismissed due to the fact of its limited liability regarding its Guatemala subsidiary's action.[486] The court first found that the plaintiffs properly alleged that the subsidiary was acting as an authorized agent of HudBay Minerals, and thus if

plaintiffs can establish this at trial, it could pierce the corporate veil. The court also found that the plaintiffs had alleged HudBay Mineral's direct involvement in some of the wrongful conduct, and thus, it could be liable for its own actions.[487]

C. EUROPEAN STATES

The Brussels I and Rome II Regulations relate to the "domicile" of a business. This is specifically defined as being the business's "statutory seat," "central administration," or "principle place of business."[488] This extends the jurisdiction of a European Union Member State beyond simply incorporation of a business within its State.

Whether or not the "corporate veil" can be lifted, and whether or not a parent company can be held liable for the conduct of the subsidiaries that it controls or ought to control shall depend on the law applicable to the case. But the principle of limited liability remains the dominant one, and under most legal systems, only exceptionally will it be possible to lift the corporate veil. Consistent with this doctrine, the liability of the parent company may not be engaged solely on the basis of the fact of the control it exercises on the subsidiary, where the latter commits human rights violations or contributes to such violations. This may make it difficult for victims of the conduct of the subsidiary to seek reparation by filing a claim against the parent company.

i. France

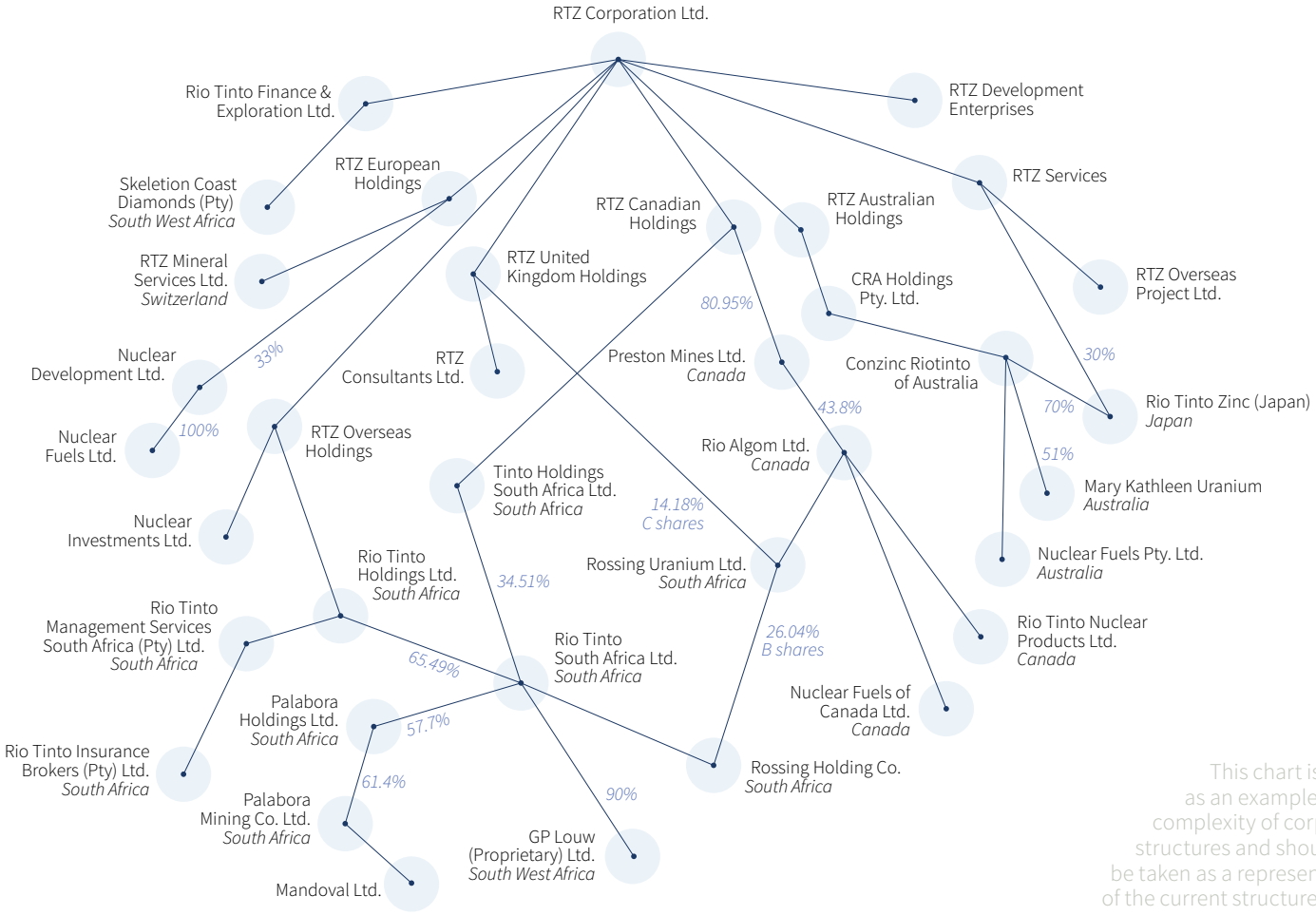
The strict interpretation of the limited liability principle in cases concerning human rights violations abroad has been reported as the most significant barrier to access to effective judicial remedy in France. Nevertheless, it appears that self-imposed obligations by businesses, such as codes of conduct, may trigger their legal liability. In the *ERIKA* case, French courts found Total SA criminally and civilly liable for the consequences of the oil spill from the ERIKA oil tanker that split apart in 1999 off the coast of Brittany. French judges justified the liability of the parent company partly on its voluntary practice of vetting oil tankers contracted by its subsidiaries.[489]

ii. The Netherlands

The issue of limited liability is illustrated by the position adopted by the courts in the Netherlands after several claims were brought against some businesses in the Shell group. The Court ultimately held that under the applicable Nigerian tort law, parent companies have no obligation to prevent their subsidiaries from inflicting damage on others through their business operations.[490] Insofar as the claim against the parent company is concerned, this case illustrates the obstacles that can result from the doctrine of limited liability, combined with the legal organization of the corporate group into separate legal entities.

COMPLEXITY OF THE CORPORATE FORM

This diagram depicts the corporate structure of RTZ Corporation, Ltd., as it existed at one point. The company, known better today as Rio Tinto Group, has completed several mergers and acquisitions, resulting in a very dynamic and complex structure.



This chart is given as an example of the complexity of corporate structures and should not be taken as a representation of the current structure of the company concerned.

iii. United Kingdom

As noted above, the "domicile" of a business is now the relevant test for being able to bring a claim against it. The main issue in this area has become about control and about the duty of care of the parent company. A claimant will aim to show control by the parent company of the subsidiary and/or a direct duty of care by the parent company. This is usually because the parent company is domiciled in the United Kingdom while the subsidiary company is not. Because of the complexity of the corporate group, it can be difficult to determine that the parent company has a duty of care.

The identification of the relevant defendant business can be very difficult and complex.[491] While in some cases the sole defendant may be the parent company within the forum State, in other instances the defendants may be the parent company in the forum State as well as a subsidiary company based in another State, or there could be a number of subsidiaries or other businesses that are defendants. For example, in *Guerrero v. Monterrico*, the Peruvian mine-operating business was initially named as the second defendant. However, when it became clear that the absence of a treaty between Peru and the United Kingdom made it difficult to enforce any U.K. court decision, the Peruvian business was removed as a defendant.[492]

After the proper parent company is identified, the court must determine the duty of care of a parent company. The U.K. Court of Appeal in *Lubbe v. Cape* set out this test:

> Whether a parent corporation which is proved to exercise de facto control over the operations of a (foreign) subsidiary and which knows, through its directors, that those operations involve risks to the health of workers employed by the subsidiary and/or persons in the vicinity of its factory or other business premises, owes a duty of care to those workers and/or other persons in relation to the control which it exercises over and the advice which it gives to the subsidiary company?[493]

The most recent U.K. decision on the duty of care issue is *Chandler v. Cape plc*,[494] which was based on a claim against a U.K. parent company for injury (asbestosis contracted as result of exposure to asbestos dust) suffered by employees of a subsidiary company. While the issue was largely about U.K. businesses, the U.K. Court of Appeal held that in appropriate circumstances, the law may impose on a parent company a duty of care in relation to the health and safety of its subsidiary's employees. The Court held that:

> [I]f a parent company has responsibility towards the employees of a subsidiary there may not be an exact correlation between the responsibilities of the two companies. The parent company is not likely to accept responsibility towards its subsidiary's employees in all respects but only for example in relation to what might be called high-level advice or strategy.[495]

The Court held that the following factors could give rise to such a duty:

> [In] appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health

> and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[496]

In that case, the Court found that the parent company did have a duty of care.[497] The Court

> emphatically reject[ed] any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees.[498]

This decision indicates that it is possible for a parent company to have a duty of care depending on the particular facts. However, as *Chandler* was in relation to a U.K. subsidiary, it is uncertain if the courts will apply these principles to actions that occurred extraterritorially.

iv. Switzerland

Swiss law recognizes the notion of a "group of companies" ("Konzern"), where different businesses (as separate legal entities) are linked to one another by investment or contractual links, often under a single direction.[499] However, even in the presence of such a group of businesses, the conduct of subsidiaries cannot be not imputed to the parent company.[500] The conduct of the subsidiary may be imputed to the parent company, however, if the parent company interferes in the conduct of its subsidiary, giving direct instructions so as to become, in fact, an organ of the subsidiary. This requires that its interference is deep and direct enough, going beyond a general influence on broad policy decisions, and going beyond the normal role of the parent company, as a shareholder, in the decisions of the subsidiary.[501]

In addition, Article 2 al. 2 of the Swiss Civil Code prohibits abuse of rights—where the corporate form is abused, the principle of "transparence" or "looking through" (*Durchgriff*) will apply, and thus it will be possible for the plaintiff to "lift the corporate veil" in order to reach the parent.[502] However, the Federal Tribunal imposed very strict conditions for this doctrine to be invoked.[503] The practical possibilities of lifting the corporate veil are therefore quite limited.

ISSUE 10: REMEDIES: REACH AND ENFORCEMENT

The victims of human rights violations by business wish to have appropriate reparation for the harm to them. In almost all instances this has been through monetary compensation, where a claim is successful or settled. Some courts have also provided injunctive relief. This section looks at the way that remedies, particularly compensation to victims, have been approached in the jurisdictions considered.

A. UNITED STATES

U.S. courts typically award monetary compensatory damages (to compensate for the injury) in tort cases. Punitive damages (damages meant to punish or deter behavior) are also available in ATS and TVPA cases, and in fact, in ATS cases that have resulted in a judgment, punitive damages were awarded.[504] Courts also have the power to issue injunctions to stop certain behavior.

B. EUROPEAN STATES

The Rome II Regulation requires that the type of remedies, including the character and amount of damages, are to be determined on the basis of the law where the harm occurred.[505] The available remedies might not be always appropriate, in particular where the maximum amount of compensation is too low to cover the costs of the litigation. In the exceptional circumstances where the application of the law where the harm occurred to determine the amount of damages would lead to denial of justice, the courts may apply Article 26 of the Rome II Regulation, which allows them to refuse application of foreign law if it is manifestly incompatible with the public policy of the forum.[506] Simple inadequacy of remedy would likely not justify the use of this exception.

In cases concerning environmental damage, Article 7 of Rome II Regulation enables the person seeking compensation for damage to choose to base his claim on the law of the State in which the event giving rise to the damage occurred.[507] It this particular context, however, it remains unsettled whether such event might be, for example, a decision adopted by the business's management, or whether the courts would interpret this provision as to cover only physical events, such as industrial accident, ship breakdown, etc.

In the rare occasions where the courts would apply the law of the forum State, European civil law States enable plaintiffs to pursue compensatory damages and injunctions.[508] Compensatory damages, however, might be disproportionate to real costs of the litigation. The combined effect of unavailability of punitive damages and class actions and absence of effective public financing for this type of cases in European civil law States make it financially unfeasible for victims of human rights violations to pursue such litigation. This problem is further exacerbated by the lack of criminal prosecution of these extraterritorial cases, which might otherwise provide an alternative for victims' access to remedy.

i. United Kingdom

The U.K. courts usually award monetary compensatory damages in tort cases. Punitive damages are not available in U.K. courts. As of 2012, four out of five of the business and human rights disputes cases litigated in U.K. courts have reached a final conclusion and resulted in payments to claimants, compared to two default judgments and thirteen settlements from approximately 180 claims in the United States brought under the ATS.[509] Of the settlement figures that have been publically released,

settlements from U.K. cases are more favorable than in the United States, with the settlement in the U.S. Unocal case of $US30 million compared to a settlement from the U.K case against Trafigura of £30 million as well as legal fees.[510]

A range of procedural and other issues can occur during litigation, which can require courts to make other orders. For example, the defendant business may seek to put its assets out of reach of the court.[511] In the lead up to the *Sithole v. Thor Chemicals* case, it emerged from documents that Thor's parent company had undertaken a demerger which involved transfer of its subsidiaries (valued at £19.55 million) to a newly formed business, Tato Holdings Limited.[512] Thor wrote to the U.K. Legal Services Commission, which was funding the claimants' representation, arguing that continued public funding of the case was futile in light of the restructuring. Two weeks before the start of the three-month trial, an application to the court was made on behalf of the claimants for a declaration under Section 423 of the Companies Act 1986 that the "predominant purpose" of the demerger was to defraud creditors, such as the claimants, and it was thus void. Thor and its chairman disputed that this was the purpose, but the U.K. Court of Appeal held that in the absence of information to the contrary, the inference that the demerger of Thor was connected with the present claims was "irresistible."[513] The Court ordered Thor to pay £400,000 into court within seven days and to disclose documents concerning the demerger. The case was settled on the first day of trial.[514]

CASE STUDY

Guerrero v. Monterrico Metals plc

Aside from monetary damages, courts can order injunctions or equitable relief where necessary. For example, in *Guerrero v. Monterrico Metals plc,*[515] Monterrico had decided to relocate its corporate headquarters to Hong Kong and accordingly announced an intention to delist from the AIM London Stock Exchange.[516] Because the relocation was for commercial reasons unconnected with the claims, there was no possibility of a Section 423 application.[517] Therefore, the *Monterrico* claimants applied for, and succeeded in obtaining, a worldwide freezing injunction over £5 million of the business's assets from the U.K. High Court. An ancillary freezing injunction in aid of the U.K. injunction was also obtained in the High Court of Hong Kong.[518] This enabled the plaintiffs to proceed with their case and prevented their claims from becoming futile.

For more about this case, please refer to the full case study, which is located in the Appendix.

IV. CONCLUSIONS

Access to a remedy for the violation of one's human rights is a core requirement of human rights protection. This is reinforced by the UNGPs, which identify access to a remedy as one of the three pillars of the international business and human rights framework. A State's duty to provide access to a judicial remedy for victims of human rights abuses by businesses is a vital element of these Guiding Principles. To date, little has been done by any jurisdiction to fulfill this obligation, and victims continue to face barriers that at times can completely block their access to an effective remedy.

The mapping exercise presented in this Report was based on consultations with those in the field and our research in relevant States. It demonstrates that States are generally not fulfilling their obligation to provide access to effective judicial remedies to victims of human rights abuses by businesses that occur outside the territory of the forum State. The Report identifies many barriers to judicial access that limit the ability of victims of human rights abuses to have their claims against businesses heard by courts and obtain enforceable remedies. Such barriers exist across all the jurisdictions considered, despite differences in legislation, the approaches of courts, human rights protections at the national level and legal traditions.

These barriers impact victims' access to judicial remedies from the beginnings of the drafting of a claim, in which identifying the business and the victims is crucial, to deciding whether to pursue a claim in a civil or a criminal proceeding, to the nature of the claim itself (e.g., a tort action or a human rights petition). Indeed, only the ATS currently enables a claim to be made in international human rights terms, which, with the reduced access as a consequence of the Kiobel decision, means that many of the cases will be brought as general tort claims that do not reflect the nature

and realities of human rights abuses (such as torture, extrajudicial killing, etc.). The barriers' impact extends throughout the court process, including in relation to substantive matters of jurisdiction, applicable law, and the duty of care of a parent company, to procedural matters of standing, time limitations, and disclosure of documents. Even at the end of the judicial proceedings, there remain barriers to obtaining effective reparation for the victims of the human rights abuse. Throughout this process, there are also barriers restricting the activities and effectiveness of the claimants' lawyers in terms of gathering of evidence, accessing information, obtaining legal fees, ensuring victims' security, and limited resources. Above all, there is an evident disparity of resources between businesses and victims that affects the capacity for equal access to justice within all the legal systems.

These barriers have been overcome in only some instances and, in those cases it has usually been as a result of innovative approaches adopted by lawyers, the patience of victims, and a willingness to engage by perceptive judges. To recognize and overcome these barriers also requires an understanding of a complex combination of public international law, private international law, comparative law, and constitutional law, as well as national and international human rights law. Even with international cooperation and highly-skilled advocates, this is a very difficult task.

In order to ensure effective judicial remedy for victims of corporate related human rights abuse, there is a range of actions States must take. This requires more—and more effective—regulation by States, both through legislation and other processes, as well as clear policy decisions in support of access to effective judicial remedy.

Required regulatory and legislative changes include the introduction of and amendment to legislation in these States to enable access to judicial remedies for these types of cases. Legislation must apply to the extraterritorial conduct by businesses and to the actions of their subsidiaries and other parts of their business enterprises. There should be legislation and other regulation (including of court procedures) to enable victims to have standing and bring collective actions, to extend statutes of limitations and to ensure that there are no limitations for certain abuses of human rights, to enable quicker and easier disclosure of documents, and to enable lawyers to have their legal fees reimbursed to reflect the difficulties associated with litigating these cases. The general approach adopted by the European Union in terms of the Brussels I and Rome II Regulations (with some suggested amendments) should be followed across all developed States, so that the barrier of *forum non conveniens* is removed and there is clarity as to the applicable law. Courts should also be prepared to consider issues relating to the duty of care of parent companies, without the blinkered obstacle of the limited liability of businesses, as the reality today is that businesses act globally as business enterprises. This concept is recognized in both UNGPs and the OECD Guidelines for Multinational Enterprises.

Above all, there must be consistency across all the States in their approach human rights violations by business and their liability. This would prevent inconsistency between States and their courts, incompatibility between systems and mechanisms, forum shopping by victims, and corporate decision-making to avoid particular remedies. States must also make strong and consistent policy

decisions to reassert that the human rights of victims matter more in relation to corporate power than has been the case so far. Victims of human rights abuses by business, wherever they occur, require full and effective access to judicial remedies. In order to provide this, States should examine the barriers in their jurisdiction and consider the range of actions they can take to alleviate them, including the recommendations suggested in this Report.

RECOMMENDATIONS

A. SUMMARY OF RECOMMENDATIONS

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

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

1. Ensure that controlling entities within business enterprises have a legal duty with regard to all parts of the enterprise for human rights impacts.

There are multiple obstacles to access to judicial remedy in the transnational context, which combine to make access to justice for victims exceptionally difficult and frequently impossible. The complex corporate structures and value chains that characterize the organization of modern business are at the heart of these obstacles; practically speaking, victims have to deal with the combined effect of the twin principles of separate legal personality and limited liability, limitations on extraterritorial jurisdiction, and evidentiary burdens. Establishing that a business enterprise is liable for adverse human rights impacts caused by deficiencies in its group's operations is a complex, time-consuming, and costly exercise invariably undertaken in the context of litigation. At the same time, the local multinational enterprise's group entity or business partner often

remains out of reach of the home State court's jurisdiction, and may not be held accountable in the host State due both to the weak capacities of many judicial systems across the world and, sometimes, to the protection of foreign investors' rights. Legislation imposing minimum due diligence standards on the controlling entities within business enterprises, for example on their headquarters companies, would clarify their legal responsibility and significantly reduce the need for costly litigation.

The principle of limited liability and the separation of legal personalities within a business enterprise as well as the complex organization of the value chain should not constitute a barrier to engaging a business enterprise's liability for human rights impacts arising from the conduct of its group. To that effect, the duty of the business enterprise to exercise due diligence with regard to all aspects of the group to ensure the business enterprise does not directly or indirectly cause or contribute to human rights impacts, should be clearly affirmed. This should be seen as part of the due diligence necessary to meet the corporate responsibility to respect human rights, as set out in the UNGPs. The concept of corporate responsibility to respect human rights amounts to imposing on the controlling entities within the business enterprise a duty to avoid causing or contributing to adverse human rights impacts through its own activities, and to address such impacts when they occur. Additionally, there is a duty to identify, prevent and mitigate impacts that are directly linked to the enterprise's operations, products, or services by its business relationships, even if the companies forming the enterprise have not directly contributed to those impacts. In contrast to the limited liability approach, this incentivizes the business enterprise to ensure that the group entities and business partners comply with human rights.

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

2. Enable victims of business' human rights violations to bring a case in the business's home State.

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

3. Enact legislation to limit or remove financial barriers that prevent victims from bringing and prosecuting a case.

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

4. Develop and enhance criminal laws to hold businesses accountable for their involvement in extraterritorial human rights violations.

In every jurisdiction there is a potential to improve access to remedy through the mechanisms of criminal law. The details of the recommendations for reform will differ depending on the situation in each jurisdiction. Criminal prosecution of businesses for their involvement in crimes amounting to human rights violations is possible and often appropriate. Yet currently it often remains a remote possibility. To address this, steps should be taken to clarify standards of corporate liability in the criminal and extraterritorial contexts, to define the mandate of public prosecutors to pursue such cases, and to make sufficient resources available to enable them to do so. Any decision by public prosecutors not to take action should be amenable to judicial review at the request of the victims.

B. SPECIFIC RECOMMENDATIONS FOR EACH OF THE JURISDICTIONS REVIEWED

RECOMMENDATIONS FOR POLICY MAKERS IN THE UNITED STATES

Recommendations regarding ensuring a remedy for abuses that occur extraterritorially:

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

Amending the ATS to clarify that it pertains to conduct occurring abroad is the clearest way to move forward in reducing the barrier *Kiobel* has erected. Although such legislation may be very

challenging to achieve in the current Congress, arguments for such legislative changes do exist.

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

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

Alternatively, amending the ATS itself or adding a note to the statute defining what sorts of activity "touches and concerns" the United States could reduce the extraterritorial barrier erected by *Kiobel*.[519] This would still limit ATS litigation over events that occurred outside of the United States, but it would allow a broader definition of "touch and concern" than has been applied in post-*Kiobel* litigation before the District Courts. As another alternative, Congress should consider enacting a "jurisdiction by necesity" statute allowing for subject matter jurisdiction for claims under the ADS where the court can attain personal jurisdiction over the business, and there is no other suitable jurisdiction where the victims can reasonably obtain a remedy.

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

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

Amending the TVPA so that legal persons (including businesses) can be defendants, as opposed to "individuals" would rectify many of the barriers regarding extraterritoriality. The TVPA is a specific cause of action for extraterritorial human rights violations that Congress has enacted. This might be palatable to some policy makers because there already exists an inherent limitation to TVPA claims, given that the TVPA applies only to those "acting under actual or apparent authority, or color of law, of any foreign nation," as opposed to any business working abroad. Thus, even if such a change were made, only those businesses which are actively working under

authority of a foreign State and engaging in human rights violations while doing so could be potential defendants. In addition, ideally, any such amendment should also clarify that legal persons can be defendants in such cases where they have conspired with, or aided and abetted, such actions along with foreign governments. Finally, in order to rectify the limitation on human rights cases for extraterritorial conduct post-*Kiobel*, any amendment expanding the TVPA to allow for legal persons to be defendants should also include more types of violations than those currently allowed under the TVPA, torture and extrajudicial killing. For example, the TVPA should be expanded to allow for violations such as war crimes generally, forced disappearance, ethnic cleansing, and cruel, inhuman and degrading treatment.

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

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

Given that most corporate legal matters are addressed by the individual states, state legislatures should enact or amend existing state statutes both to criminalize extraterritorial violations of international human rights law by businesses, and provide for parallel private rights of action against such businesses for the violations.[520] States should also ensure that with the private rights of action, the choice of law—the applicable law—in these cases should be customary international law for purposes of the underlying violation, and the law of the forum state with regard to other matters.

4. Clarify choice of law.

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

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

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

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

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

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

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

Businesses, especially transnational businesses, universally retain insurance to cover various liabilities of the business. Such insurance often covers the costs of defense as well as any award

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

Recommendations regarding statute of limitations:

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

State legislatures should be encouraged to amend their statute of limitations, which limit the time in which victims may bring cases, by increasing the statute of limitations for human rights claims or for torts that occur abroad. In addition, both state and federal lawmakers should be encouraged to amend any statutes to ensure that there is no statute of limitations for certain crimes, such as genocide, war crimes, and crimes against humanity. In fact, the American Bar Association, in August 2013, passed a resolution taking this position.[521]

Recommendations regarding vicarious liability of businesses:

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

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

Recommendations regarding structure of the business and limited liability:

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

Lawmakers in the various states within the United States should enact changes to state limited liability statutes, removing the limitation on liability for parent companies with wholly-owned subsidiaries operating abroad, especially where there are tort claims involved. There is an increasing recognition that it is unfair that businesses receive tax and other benefits from using such wholly-owned subsidiaries while being able to avoid liability when those wholly-owned subsidiaries engage in human rights violations. Since 1947, many have advocated a concept known as "enterprise theory," arguing that the entire enterprise benefited the parent company as part of a unified economic scheme and that the entire enterprise should thus be held liable for the human rights violations.[522]

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

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

Recommendations regarding economic viability:

11. Allow for the recoupment of attorney fees.

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

> There are also roughly two hundred statutory exceptions [to the general rule], which were generally enacted to encourage private litigation to implement public policy. Awards of attorneys' fees are often designed to help to equalize contests between private individual plaintiffs and corporate or governmental defendants. Thus, attorneys' fees provisions are most often found in civil rights, environmental protection, and consumer protection statutes.[523]

12. Amend rules easing the requirements of certifying class.

Whether a case can proceed as a class action is primarily governed by Federal Rules of Civil Procedure. The Supreme Court, in interpreting those rules, made certifying class actions more difficult in the case of *Wal-Mart v. Dukes*.[524] Members of Congress, or members of the various states that have similar rules, should amend the rules to make certification of class actions easier for those cases in which large groups of victims would benefit from such actions. Whether a case proceeds as a class action or not often has a serious impact on whether victims of human rights abuses abroad have access to a judicial remedy. Disallowing a case to proceed as a class action has a disproportionate effect on victims abroad, who have a much more difficult time accessing the courts.

13. Prevent retaliatory actions.

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

Recommendations regarding evidentiary barriers:

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

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

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

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

Recommendations regarding criminal liability:

16. Provide for "command responsibility" in criminal liability statutes; enhance criminal enforcement.

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

Similarly, the federal government should more aggressively seek to prosecute businesses and individuals within businesses for their role in human rights violations that the federal government can currently prosecute, namely, genocide,[525] war crimes,[526] torture,[527] and forced recruitment of child soldiers.

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

Currently, there is no specific mechanism in place that allows for victims of businesses (or their officers) that have been convicted of a human rights crime to receive compensation. Lawmakers should enact measures ensuring such restitution. There is precedent for this. For example, individuals convicted of engaging in international child pornography must pay restitution to the victims.[528] Given the difficulty those abroad have in accessing a civil remedy for criminal conduct by businesses, and given that this recommendation applies only to those businesses or their officers found guilty of a serious crime, this recommendation should not be controversial.

RECOMMENDATIONS FOR POLICY MAKERS IN CANADA

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

However, the following recommendations apply to Canada in particular:

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

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

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

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

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

The "loser pays" doctrine in Canada significantly inhibits victims from accessing judicial remedies in Canada. Canadian lawmakers should consider codifying certain rules allowing plaintiffs in public interest litigation to seek a "no cost ruling," and clarify that such public interest litigation can take place against businesses for human rights abuses abroad. Businesses should anticipate the risks of litigation when operating in foreign States and should be expected to understand that litigation is a cost of doing business abroad. The equities in this equation should be on the side

of victims, especially victims who presumably do not have the financial means to engage in such lawsuits, and their advocates, public interest law groups. Lawmakers could still allow courts to award damages for lawsuits they find to be frivolous, if the concern is that this will cause frivolous lawsuits.

RECOMMENDATIONS FOR POLICY MAKERS IN EUROPE

Recommendations regarding ensuring a remedy for abuses that occur extraterritorially:

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

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

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

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

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

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

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

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

An interpretative communication of the European Commission or a European Parliament resolution should clarify that, consistent with Article 16 of the Rome II Regulation, the law of the forum should be applied instead of the law of the place where harm occurred where the latter law is not sufficiently protective of the human rights of victims. This may be the case, for example, where the law of the State where the harm occurred does not recognize certain human rights, such as core labor rights, or where it severely restricts the ability of victims to bring claims.

Recommendations regarding economic viability of Claims:

24. Reform collective action.

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

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

25. Extend legal aid.

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

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

Recommendations regarding evidentiary burden and due diligence:

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

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

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

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

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

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

28. Reform Access to Evidence.

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

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

Recommendations regarding criminal and administrative liability:

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

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

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

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

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

APPENDIX: CASE STUDIES

Amesys in Libya

History and Background:

Amesys[529] is a French technology business headquartered in Aix en Provence, France,[530] that specializes in "develop[ing] and refin[ing] critical IT systems that enable its customers to protect their digital assets and the physical security of their personnel."[531] Since 2010, the business has been a subsidiary of Groupe Bull.[532] One of the programs developed by Amesys—named "Eagle"—was "designed to help Law Enforcement Agencies and Intelligence organization[s] to reduce crime levels, to protect from terrorism threats[,] and to identify new incoming security danger[s]."[533] It operates by enabling the analysis, monitoring, and retention of internet traffic and then allowing users to turn this collected information into a searchable database that can be integrated with other intelligence and surveillance systems.[534] As such, the software makes it possible for users "to display and to analyze the intelligence relating to an investigation in a visual form . . . [allowing users] to directly visualize . . . connections between suspects [and] their communications."[535]

Although the international community was increasingly embracing the Gaddafi regime in Libya in the early 2000s,[536] the State remained a "highly repressive online environment, which included harsh punishments for any criticism of the ruling system."[537] In 2007, Amesys "signed a contract with the Libyan authorities"[538]—reportedly worth more than 26 million euros[539]—to deliver "analysis hardware concerning a small fraction of the Internet lines installed [in Libya] at the time (a few thousand)."[540] Subsequently, the "relevant hardware"[541] was delivered in 2008, several data and monitoring centers were set up in Libya, and the Amesys program purportedly became operational in the State in 2009.[542] Allegedly, the repressive Gaddafi regime used Amesys's software to monitor, collect, and analyze all electronic communications of anti-Gaddafi activists, journalists, and critics living inside and outside of Libya.[543] A number of Gaddafi's critics who were arrested, tortured, and imprisoned by the regime were later shown to have been under government surveillance using Amesys's Eagle program.[544]

According to Amesys, "[a]ll Amesys'[s] business dealings comply rigorously with the legal and regulatory requirements set out in international, European[,] and French conventions."[545] In 2012,

Amesys divested from Eagle and sold it to Advanced Middle East Systems, later known as Celebro and tied to French business Nexa Technologies.[546]

The Case and Allegations:[547]

In October 2011, the Fédération Internationale des Ligues des Droits de l'Homme (FIDH) and the Ligue des Droits de l'Homme (LDH) filed a criminal complaint in France against Amesys, alleging that the business was complicit in grave violations of human rights committed by members of the Gaddafi regime.[548] The complaint further alleged that, in addition to providing the Libyan government with the Eagle software and equipment, Amesys also supplied ongoing technical support and expertise.[549] In May 2013, five victims—including one woman and four men who reside in Libya and who were arrested and tortured during detention—were admitted as "parties civiles" to the lawsuit.[550] During interrogation, these victims were shown excerpts of their electronic communications, which led them to believe that the Eagle program had identified them for arrest.[551] Although Amesys admitted that its "contract was related to the making available of analysis hardware" to the Libyan government in 2007,[552] it "very strongly denie[d] the accusation of 'complicity in torture.'"[553]

Barriers in Pursuing Remedy:

Despite the speed with which this case seems to have proceeded since the criminal complaint was filed in October 2011, the plaintiffs have faced a number of barriers in pursuing remedy. These include concerns about a lack of impartiality on the part of the Paris prosecutor's office, obstacles in accessing evidence, security concerns while investigating in a post-conflict setting, communication issues with victims, and other practical hindrances.

The Paris prosecutor's office announced in April 2012 that it would not open an investigation into this case, stating that the alleged acts did not qualify as criminal.[554] This would have represented the end of the case, but the investigating judge stepped in and ordered an investigation into whether Amesys and its management could be held criminally liable.[555] Consequently, the Paris Tribunal de Grande Instance opened a judicial investigation in May 2012, seven months after the case was filed.[556] The Paris prosecutor then appealed this decision; however, in January 2013, the Court of Appeal rejected this appeal.[557] FIDH publicly stated that there have been "road blocks erected by the Paris [p]rosecutor's office" throughout the case and suggested that the prosecutor was "reluctant to allow an impartial and independent inquiry into this matter."[558] The newly formed Paris Court section specializing in crimes against humanity, genocide, and war crimes now manages the case.[559]

Beyond these challenges presented by the Paris prosecutor's office, the ongoing security situation in Libya has made proceeding with the case even more difficult and costly. In 2011, researchers from Human Rights Watch (HRW) and the Wall Street Journal (WSJ) obtained a cache of archive documents from an abandoned internet monitoring center in Tripoli.[560] The materials provided

documentary evidence of the role of Amesys's Eagle program, including manuals and surveillance files on individual Libyan citizens that bore the Amesys logo.[561] The surveillance files included e-mails dating from February 2011, after the Libyan uprising had begun.[562] Without the WSJ and HRW's recovery of these materials, it is highly likely that a case would never have been brought against Amesys because some of these materials were subsequently destroyed during the ensuing conflict.[563]

In addition to the destruction of Amesys materials during the Libyan conflict, there have been issues in this case regarding the ability of the "parties civiles" to fully participate in the legal action based on the difficulty in bringing them to France to testify before the court.[564] Furthermore, FIDH and LDH had to identify appropriate partners within the local Libyan civil society with whom they could work on the case, which proved to be a challenge given Libya's complex political situation.[565]

Language differences were also an impediment, as many of the case materials were in English or Arabic and needed to be translated to ensure their relevance to the claim.[566] Moreover, gathering statements from victims was complicated because the need for simultaneous translation was compounded by the individuals' difficulty in talking freely about the unspeakable torture they had suffered.[567] FIDH and LDH met many individuals who could have been potential civil complainants, but only five of these chose to proceed.[568] Many were not willing or not able to talk about the torture they had suffered,[569] and many of those still living in Libya had genuine concerns about revealing their identities in legal documents where their names could not be kept confidential.[570]

Anvil Mining in the Democratic Republic of Congo

History and Background:

Anvil Mining—headquartered in Perth, Australia and listed on the Toronto and Sydney Stock Exchanges—operated the Dikulushi copper mine in Katanga Province in the Democratic Republic of Congo (DRC) from 2002 until the business was sold to Minmetals in 2011.[571] The town of Kilwa—situated 50 kilometers from the mine—served as the primary export point for the Dikulushi mine.[572]

On 14 October 2004, the Congolese army (FARDC) entered Kilwa after "a small-scale rebellion."[573] As a result, Anvil Mining "stopped operations at the Dikulushi Mine and moved 25 non-essential staff from the mine site to Lubumbashi [while] maintain[ing] security staff[,] including the Group Security Manager and the Mining Manager on site."[574] The business chartered three planes to evacuate the "non-essential" staff and, on the return flights, transported around 150 FARDC soldiers into the area.[575] Additionally, "three of Anvil Mining's drivers drove the [business's] vehicles used by the FARDC"[576] to transport the troops to Kilwa.

Within forty-eight hours, over seventy civilians—including women and children—were massacred.[577] Twenty-eight were summarily executed and buried in mass graves.[578] It is alleged that Anvil Mining's trucks were used to transport the corpses of those who had been executed.[579] The FARDC also allegedly committed a number of other human rights abuses against the civilians in Kilwa, including rape, torture, illegal detention, the destruction of homes, and looting.[580] After the incident, the soldiers remained in Kilwa for another nine months.[581] Anvil Mining also allegedly provided food rations to the army and paid their wages.[582]

Anvil Mining admitted that it had provided the military with logistical support and "contributed to the payment of a certain number of soldiers."[583] However, in 2005, the business stated that it was compelled to provide this assistance.[584] The United Nations Mission in the Democratic Republic of Congo (MONUC) stated that the version of events provided to its investigators by Anvil Mining appears to contradict earlier statements made by the business.[585]

One of the victims, Pierre Kunda Musopelo—who was Police Chief in Kilwa at the time—explained in an interview with Rights and Accountability in Development (RAID):

> When I reached Kilwa[,] I was arrested and beaten . . . I was then shut up in a small room with about 48 other people. We were jammed in so tightly no one could move or sit down. It only could hold ten people. It was hot and we were unable to breathe—four people died.[586]

Kunda was taken to Lubumbashi and was held captive and tortured for an entire month.[587] He was charged with treason and tried by a military court, but was acquitted in April 2005 and released.[588] Following his release, Kunda never physically recovered and died in November 2009.[589] Kunda's twenty-two-year-old daughter, Dorcas Monga, was seven months pregnant and engaged to be married when she was raped and sexually assaulted by three FARDC soldiers who knew that she was the daughter of the Police Chief.[590] Monga was left paralyzed after giving birth and was ultimately transferred to the hospital in Lubumbashi, where she died at the end of 2004.[591]

The Case and Allegations:

The Association canadienne contre l'impunité (ACCI) filed a petition for certification as a class action with the Quebec Superior Court in Montreal, Canada against Anvil Mining in November 2010.[592] ACCI alleged that the business:

> [A]cted in furtherance of its commercial interests during the events at Kilwa[,] but with a total lack of respect for the human rights of the victims. Anvil Mining provided logistical help to the Armed Forces of the Democratic Republic of Congo. In doing so[,] and in its subsequent silence, Anvil became an accomplice of the crimes committed against the citizens of Kilwa.[593]

Anvil Mining contested the certification, arguing that it had no establishment in Quebec at the time of the event and that the dispute neither arose in Quebec nor was related to the business's activities in Quebec.[594] The business also moved to dismiss the case on the grounds of *forum non conveniens*.[595]

Judge Benoît Emery of the Quebec Superior Court ruled in favor of ACCI, finding that "the text of the Article, case law[,] and common sense demonstrate that what is relevant is not when the events happened but when the application is filed."[596] He also found there was a sufficient link between Quebec and Anvil Mining's operations in Kilwa based on the fact that Anvil Mining was "a Quebec company . . . incorporated in Canada, and [with] its principal premises . . . in Quebec."[597] On the issue of *forum non conveniens*, Judge Emery stated:

> [T]he law requires proof that the Quebec court is clearly inappropriate and that another forum is manifestly more appropriate to hear the case should the present court, in exceptional circumstances, declare itself not competent. Where several courts are equally

> appropriate or suited for hearing the case, without any one court having a particular advantage, there must then exist a presumption in favour of the court chosen by the party making the request: that court should *ipso facto* prevail if no other forum is clearly more appropriate.[598]

In his ruling in favor of ACCI, Judge Emery further stated: "everything indicates that if the Tribunal dismissed the action on the basis of article 3135 C.C.Q.,[599] there would exist no other possibility for the victims to be heard by civil justice."[600]

Anvil Mining appealed this judgment to the Court of Appeal, which ruled for the business.[601] The court found that the plaintiffs had failed to satisfy the necessary requirements of jurisdiction because Anvil Mining did not have an office in Quebec at the time that the underlying abuses occurred.[602] According to the court, because Anvil Mining's Montreal office had no involvement in the decisions leading to the business's alleged participation in the Kilwa massacre, the case could not be brought in Quebec.[603] In addition, the court declined to exercise jurisdiction under the forum of necessity doctrine,[604] finding that the victims had not proven that they were unable to seek justice in Australia.[605] However, Justice André Forget of the Court of Appeal stated:

> It is regrettable to note that citizens have so much difficulty obtaining justice. Despite all of the sympathy that must be felt for the victims and the admiration that the NGOs' involvement within the [ACCI] inspires, I am of the opinion that the legislation does not make it possible to recognize that Quebec has jurisdiction to hear this class action.[606]

Believing that the Court of Appeal had erred in its judgment, ACCI subsequently asked the Supreme Court of Canada to review the case. However, in November 2012, the Supreme Court refused to grant leave to appeal.[607]

Barriers in Pursuing Remedy:

The Canadian case against Anvil Mining followed the failure of both the Congolese judicial system and the Australian criminal system to provide remedy for the victims of the Kilwa massacre. In the DRC, the plaintiffs faced difficulty in bringing their claims because of irregularities within the Congolese judicial system, significant barriers in lawyers' access to victims, and threats and intimidation.[608] In this particular case, the barriers to justice in the DRC directly affected the plaintiffs' ability to pursue remedy in Australia and in Canada, as discussed below.

Following a 2005 documentary by the Australian Broadcasting Corporation,[609] the Australian Federal Police (AFP) opened an investigation into Anvil Mining's complicity in war crimes and crimes against humanity in the DRC.[610] A year later, a military prosecutor in the DRC indicted the FARDC Colonel and eight of his men for breaches of the Geneva Convention.[611] In addition, three expatriate employees of Anvil Mining were charged "as perpetrators, conspirators, or accomplices in one of the modes of criminal participation under Articles 5 and 6 of the Military Penal Code."[612]

However, the trial in the DRC was characterized by a lack of impartiality and independence on the part of the courts, political interference, a lack of cooperation on the part of the military authorities, and many other irregularities.[613] The trial and its outcome were called into question by a number of independent experts, including the United Nations Commissioner for Human Rights, the United Nations Special Rapporteur on the Independence of Judges and Lawyers, and MONUC.[614] All of the defendants were found not guilty of war crimes or other crimes, "despite the presence at the trial of substantial eye-witness testimony and material evidence pointing to the commission of serious and deliberate human rights violations."[615] The victims' claims, as *parties civiles*, were rejected,[616] and their attempts to appeal the decision were rejected summarily by the Congolese military courts in December 2007.[617]

From the beginning of this legal action, threats and intimidation were made against those who were involved in the case, as well as those who undertook investigations relating to the case.[618] The Congolese lawyers representing the plaintiffs received death threats,[619] and MONUC reported "potential key witnesses had been warned by the soldiers not to cooperate with MONUC."[620] Moreover, the "human rights organization ASADHO/Katanga was subjected to threats and intimidation following its investigation into the Kilwa incident."[621]

In August 2007, the AFP dropped its investigation, citing the acquittal of the suspects in the DRC military tribunal.[622] RAID then requested that the AFP clarify the scope and nature of the investigation, but the AFP declined this request.[623] Sixty-one victims—with the assistance of an Australian law firm—then filed "a preliminary application to the Western Australian Supreme Court on behalf of the victims seeking disclosure of documents," as they were considering launching a civil action against the business.[624] The defendants, however, questioned the validity of the plaintiffs' lawyers' representation agreements.[625] As a result, the plaintiffs' lawyers were required to return to the DRC to reconfirm these agreements.[626] When they attempted to do so, the DRC Government hindered their efforts by preventing "a group of Congolese human rights defenders from flying to Kilwa."[627] After this failed attempt to gain access to the victims, and with concerns about the security of Congolese lawyers, the Australian law firm representing the plaintiffs withdrew from the case.[628]

CACI in Iraq

History and Background:

CACI International, Inc. (CACI)—headquartered in Arlington, Virginia, U.S.A.[629] and listed on the New York Stock Exchange—"is an information technology company"[630] that "provides information solutions and services in support of national security missions and government transformation for Intelligence, Defense, and Federal Civilian customers."[631] From 2003 until 2005, CACI operated in Iraq as a contractor for the U.S. government, providing it with "intelligence analysts and interrogators" at the Abu Ghraib prison, among other facilities.[632]

In 2004, U.S. media outlets published photographs showing U.S. military personnel committing human rights abuses against detained Iraqi civilians at Abu Ghraib.[633] In these photographs, prisoners were shown hooded, naked, and undergoing physical and sexual abuse.[634] CACI has stated no employees were involved in that activity.[635] Eleven military personnel were subsequently convicted and sentenced by court martial, then dishonorably discharged from the U.S. army.[636] However, despite reports incriminating a number of civilian contractors—including a file with the Army Criminal Investigative Division (CID) that stated that a U.S. Attorney had sought "a federal indictment against one of the civilian subjects" in 2005[637]—no civilian has been indicted for the abuses committed at Abu Ghraib.

The Case and Allegations:[638]

In June 2008, four Iraqi plaintiffs who had been detained by the U.S. military at Abu Ghraib during various periods between 2003 and 2008 filed *Al Shimari v. CACI International, Inc.*,[639] a civil lawsuit against CACI in the United States under the Alien Tort Statute (ATS)[640] and under common law tort claims. Their complaint alleged that representatives of the business had conspired with U.S. military personnel who committed war crimes at Abu Ghraib, including torture;[641] cruel, inhuman, or degrading treatment;[642] war crimes;[643] assault and battery;[644] sexual assault and battery;[645] intentional infliction of emotional distress;[646] negligent hiring and supervision;[647] and negligent infliction of emotional distress.[648] Specifically, the plaintiffs alleged that they were deprived of food and water, sexually assaulted, beaten, forced to witness the rape of another prisoner, and

imprisoned under conditions of sensory deprivation.[649] The plaintiffs continue to suffer from physical and psychological injuries stemming from the abuses committed against them at Abu Ghraib.[650]

In a statement released in 2008, CACI rejected the "preposterous allegations" and stated that it "intends to vigorously defend itself and vindicate the company's good name."[651] CACI maintains these allegations are unsubstantiated, uncorroborated, and unproven. Furthermore, the business has said that it "has always taken the Abu Ghraib scandal very seriously . . . [and] abhors and condemns the abuses that occurred [there].[652]

Barriers in Pursuing Remedy:

After approximately five years of legal proceedings before federal court in the Eastern District of Virginia ("District Court"), the CACI case came to a pivotal point in May 2013,[653] when the District Court considered whether to dismiss the plaintiffs' ATS claims in light of the U.S. Supreme Court's 17 April 2013 decision in *Kiobel v. Royal Dutch Petroleum*.[654] The Supreme Court ruled in *Kiobel* that the presumption against the extraterritorial application of U.S. law bars ATS claims that seek relief for violations occurring outside of the United States.[655] However, the Supreme Court also held that, if a claim brought under the ATS "touches and concerns" the United States "with sufficient force," the presumption against extraterritoriality could be overcome, thus allowing a case to proceed.[656]

Prior to the *Kiobel* decision, the plaintiffs in the CACI case had gone through five years of motions and hearings on immunity and non-justiciability issues. In the earlier proceedings, CACI had argued that the case should be dismissed on several grounds including derivative sovereign immunity under the law of military occupation and Coalition Provisional Authority, political question doctrine,[657] preemption, and insufficiency of claims.[658]

In 2009, the District Court rejected CACI's immunity, preemption, and political question arguments, but granted the motion to dismiss in part—dismissing the plaintiffs' claims under the ATS because it found claims against private military contractors to be "too novel" for the court to consider.[659] A 2-1 panel of the Fourth Circuit Court of Appeals then dismissed the case in full, finding that the District Court did not have jurisdiction to hear the claims based on CACI's preemption arguments.[660] However, the plaintiffs were then granted a rehearing within the Fourth Circuit in 2011.[661] The en banc panel dismissed the appeal, reinstating and remanding the proceeding back within the District Court.[662] The plaintiffs then filed—and were later granted—a motion to reinstate their claims under the ATS.[663]

However, as mentioned above, the Supreme Court issued its decision in *Kiobel* while the proceedings in the CACI case were ongoing, leading to the latest dismissal of the plaintiffs' claims. In June 2013, Judge Gerald Bruce Lee of the District Court dismissed the CACI case on *Kiobel* grounds.[664] The District Court determined that, because the alleged abuse took place exclusively in Iraq, the

presumption against the extraterritorial application of the ATS had not been overcome.[665] The plaintiffs filed an opening appeal brief with the Fourth Circuit Court of Appeals in October 2013.[666]

In response to this decision, the Center for Constitutional Rights (CCR)—which is a non-profit legal organization that has been supporting the plaintiffs in the CACI case with private counsel—stated that in their opinion:

> The district court was incorrect to read *Kiobel* in such a narrow and technical way, as its ruling effectively created lawless spaces where even U.S.-based entities can commit torture and war crimes with impunity. The ATS and the *Kiobel* decision cannot be interpreted to provide safe haven in the United States to entities that have engaged in egregious human rights abuses abroad.[667]

Despite some pro bono legal support, the costs of this litigation have been significant, including costs related to evidence collection, experts (including medical experts), depositions, and keeping plaintiffs abreast of case developments.[668] It was also necessary for the plaintiffs and attorneys to meet in a third State at the start of the case, due to security concerns in Iraq, resulting in not only significant travel costs but also in plaintiffs having to take time away from work.[669]

Furthermore, CACI filed a bill of costs under Federal Rule of Civil Procedure 54(d) against the four plaintiffs in August 2013 for the costs that the business incurred during the legal action.[670] The District Court ordered the plaintiffs to pay the business $14,000.[671] Due to the plaintiffs' economic situation, it is unlikely that CACI will recover the costs.[672] As such, this claim by the business has been considered by Baher Azmy, legal director for the Center for Constitutional Rights, to be "an attempt to intimidate and punish"[673] the plaintiffs and to deter others who may be looking to file similar types of cases in the future.

In addition to these financial costs, the plaintiffs in this case have incurred significant emotional and personal security costs. On one occasion, when three of the plaintiffs attempted to attend deposition hearings in the United States, they were barred from boarding the plane.[674] The plaintiffs had been granted appropriate visas, had checked in for their flight, and had already passed through security to the gate.[675] The person accompanying the plaintiffs was forced to fly without them, and the three victims were left behind with airport authorities.[676] Given their previous experiences at the hands of authorities, this must have been an extremely harrowing experience for the plaintiffs. As a result of not being able to travel to the United States, the plaintiffs have not yet been able to formally speak about their experiences.[677]

It has now been a decade since the events at Abu Ghraib. The plaintiffs continue to endure the emotional and physical effects of torture and are unable to move on from these traumatic events whilst the case is ongoing. The case has not yet surmounted the procedural hurdles identified above and may never reach an examination of the facts.[678]

Danzer in the Democratic Republic of Congo

History and Background:

Danzer[679]—a German-owned, Swiss-based business[680]—has been involved in logging in the Democratic Republic of Congo (DRC) since the early 1970s.[681] Most recently, it has maintained this involvement through a wholly-owned subsidiary, Société Industrielle et Forestière du Congo (SIFORCO).[682]

Since 2005, there have allegedly been a number of disputes between SIFORCO and local communities in the areas where it operates, some of which have ended in military and police violence.[683] The most recent alleged dispute occurred in the early morning of 2 May 2011, when Congolese military and police forces entered the village of Bongulu in the Yalisika area[684] and carried out numerous human rights abuses, including rape, arbitrary detention, and the destruction of property.[685]

Under Congolese law, all logging contracts include a "cahier des charges,"[686] which obliges businesses to carry out social projects in the areas in which they are operating.[687] Despite having signed a cahier des charges with Yalisika's traditional chiefs in January 2005, SIFORCO repeatedly failed to fulfill this obligation in the area.[688] In 2009, SIFORCO amended the cahier des charges for the area, providing a new timeline for implementation.[689] However, the work had yet to be carried out by 2011.[690] On 20 April 2011, in an act of protest against the business for its failure to fulfill its obligations to the area and in a misguided attempt to enhance their bargaining power with SIFORCO, several individuals took a small number of tools and equipment belonging to the business.[691]

SIFORCO released a statement in which it claims to have attempted to work with the community to facilitate the return of its property. However, according to the business, these discussions broke down and it "asked the administrative authorities . . . to help resolve the conflict."[692] In the early morning of 2 May, sixty navy and national police officers were deployed to the area.[693] At least one house was burned to the ground by these third parties, sixteen men were beaten, one man allegedly died as a result of one of these beatings, and at least five women were raped, including three children.[694] In addition, fifteen men, including two boys, were taken from Yalisika and arbitrarily

detained in Bumba, the nearest town, for four days before being released without charge.[695] Lastly, a significant amount of property was destroyed by a truck that was allegedly driven by a SIFORCO employee.[696]

The situation is worryingly reminiscent of the Anvil Mining case from 2004.[697] In both cases, the businesses provided the Congolese authorities with trucks and drivers, which were then used in the commission of human rights abuses committed against civilian populations. In this case, SIFORCO provided at least one truck and driver to transport the administrative authorities to the village and to then take villagers to prison,[698] although the business has claimed in a statement that it was under duress as "the local administration insisted to get a vehicle including driver from SIFORCO."[699] Witness testimony also alleged that the business's worksite manager for the area, Klaus Hansen,[700] paid money to the administrative authorities as they transported the villagers to prison.[701] Furthermore, SIFORCO provided these security forces with a meeting room at Kpengbe only days before the intervention of the Congolese authorities.[702]

While the business "does not dispute that the trucks, the fuel[,] and the drivers for the raid were provided by [SIFORCO],"[703] Danzer has stated that it "never intended nor facilitated any violence against the people of the village [of] Yalisika"[704] and that the "incidents happened beyond the control and responsibility of SIFORCO."[705] The business further maintains that it often had "to support [the] local administration by providing logistics such as vehicles or meeting rooms without being informed regarding the purpose" of the administration's use of its trucks and drivers and that it "would have clearly refused the request if they knew the intended purpose with its consequences."[706]

The Case and Allegations:

Following the events of 2 May, the villagers from the Yalisika area—with the support of a local Congolese lawyer—requested a criminal investigation in the DRC against the police and military personnel who were involved in the incident. Despite having received "anonymous phone calls advising him to drop the case,"[707] the victims' lawyer, Maître John Biselele Tshikele, held a press conference in Kinshasa in August 2011,[708] "informing the Congolese people and the international community that they have lodged a formal complaint . . . to ensure strict enforcement of the law."[709] The complaint was filed in Mbandanka—the provincial capital of Equateur province—against the alleged perpetrators, including Klaus Hansen.[710] In early October, Danzer's management attempted to negotiate an out-of-court settlement, which the community rejected.[711] Thereafter, there was little progress in the case until 2013, when the "Military Prosecutor's office started investigations."[712] It is anticipated that a trial against the local police and military personnel "could be organized two months after the closing of the investigation."[713]

Beyond the DRC legal action, the European Center for Constitutional and Human Rights (ECCHR) and Global Witness filed a criminal complaint with the State prosecutor's office in Tübingen, Germany on 25 April 2013.[714] The groups allege that Olof Von Gagern, a senior manager of Danzer

who is both a German national and based in Germany, is guilty under the German Criminal Code of aiding and abetting rape, bodily harm, false imprisonment, and arson.[715] The criminal complaint argued that Von Gagern was responsible for supervising and monitoring SIFORCO staff in the DRC, failed to prevent the staff from aiding and abetting the police force's crimes, and did not give clear instructions to SIFORCO managers that security forces should not become involved in the conflict between residents and SIFORCO.[716]

Reached for comment on the issue in development of this Case Study, Danzer has stated:

> We agree . . . that the incidents which happened in the Yalisika area in 2011 are totally unacceptable, and we sincerely regret that our company was indirectly related to the incidents. Danzer does not deny or dispute the veracity of the allegations, but notes that there are very different sources and information regarding the incident as well as Danzer's role in it . . . . Our team has since been working internally and with a range of partners on identifying and implementing a range of measures to minimize the risk of anything like this every happening again in any area where we have operations.[717]

SIFORCO also responded to a request for comment,[718] and disputed the veracity of the allegations of rape and killing. It acknowledged "inhumane treatment of . . . people and destruction of property" committed by the military, but suggested that the allegations have been exaggerated.[719]

Barriers in Pursuing Remedy:

To establish the liability claim in Germany against Von Gagern, it was vital to identify his role within Danzer, as well as the influence he had on the operations and activities of SIFORCO. This information was not easy to obtain due to the fact that information in the public domain was severely limited. Recently, the DRC set up a new business registry in a new location to store all digitized data.[720] Historical and/or paper documents were not transferred to this new office.[721] The NGOs involved in the case were able to acquire information proving Von Gagern's position on SIFORCO's board and showing the relationship between the parent company and its subsidiary, but only after numerous visits to the business registry in the DRC.[722] Materials establishing Von Gagern's roles and responsibilities in Europe were even harder to obtain. This was exacerbated by the fact that Danzer is a private, family-owned business that is not legally required to release materials into the public domain to the same extent that a listed business is required to.

Cultural issues have also threatened to adversely affect the case. In the DRC, there is a significant stigma attached to rape, making it extremely difficult for the women who were raped in Yalisika to discuss what happened in any public forum. Another obstacle is the community structure in Yalisika, which dictates that the older men within the community traditionally engage in all dialogue and decision-making. In this case, Maurice Ambena, the "chef de groupement" in the village, initially supported the case, yet later changed his mind. He initially instructed the Congolese lawyer, Maître Biselele, to represent himself and the community; yet, when Ambena withdrew his legal action, he also attempted to withdraw the support of the whole community from the entire legal process.[723]

However, the community did not support the withdrawal and instead instructed Maître Biselele to continue.[724] This has had a hugely divisive effect on the community as a whole, including in terms of social cohesion.[725] This can then impact legal strategies as the credibility of witnesses and victims can be influenced by community members who are not immediately affected by the crimes yet are affected by these social divisions.[726]

As with most extraterritorial cases, language issues have also come into play. In Yalisika, the victims only speak the local dialect, so all materials and interviews for the cases had to be translated into French and occasionally into German.[727] This has had negative implications regarding costs, as well as concerns regarding the consistency of testimonies.[728] The consistency issue will likely impact the Prosecutor's assessment of the strength of the claims, and, should the case proceed, Danzer will likely use this to challenge the victims' and witnesses' reliability.

Finally, there is no fully effective system for witness protection in these cases due to security concerns, accessibility,[729] and cost issues. Unfortunately, some victims and witnesses have been threatened and pressured,[730] including through the payment of undisclosed sums of money.[731] It is unclear whether these have been informal settlement agreements or bribes, and it remains unclear who is behind these payments and threats.

Dalhoff, Larsen, and Horneman (DLH) in Liberia

History and Background:

Dalhoff, Larsen, and Horneman (DLH)—headquartered in Copenhagen, Denmark and listed on the Copenhagen Stock Exchange—is one of the largest international timber traders in the world.[732] From 2001 to 2003, DLH was a major buyer of logs from Liberian timber businesses that had been cited by the United Nations (UN) as having engaged in serious criminal activities.[733] Such activities included arms trafficking that violated UN sanctions, corruption, illicit business with then-Liberian President and warlord Charles Taylor, human rights violations, and environmental plunder that contravened local laws.[734]

In 2001, the United Nations Security Council ordered an embargo of blood diamonds and arms trafficking from Liberia in order to curtail the ongoing civil wars in Liberia and Sierra Leone.[735] Timber had become critical in financing Taylor's regime and its ability to arm forces to fight rebel groups in the northwest region of the State.[736] By 2002, the income generated from timber sales had provided a major source of funding for the government's extra-budgetary activities as well, including corruption and the illegal procurement of arms and ammunitions.[737]

At the time, logging businesses operated with impunity in Liberia—all were in breach of national laws relating to their contractual, environmental, and/or financial obligations, and some of their contracts with the Liberian government were even found to be illegal.[738] Moreover, the security forces used by these logging businesses were managed by notorious militia leaders who committed gross human rights abuses against the civilian population while on the logging businesses' payrolls.[739]

The brutality of Liberia's civil wars is undisputed. Civilians were frequent victims of rape, torture, and other acts of extreme violence.[740] An estimated 250,000 people lost their lives,[741] and the State was left without basic political, social, and economic structures in place. Poor governance resulted in virtually non-existent rule of law, an environment rampant with mass corruption, and State looting that left the economy in ruins.[742] It has been ten years since the end of these wars, and the State is still working to rebuild itself.[743]

The Case and Allegations:

From early 2001, Global Witness and Greenpeace engaged with DLH in an attempt to get the business to stop its trade in Liberian conflict timber.[744] In response, the business stated it would stop purchasing logs from businesses that violated human rights or engaged in destructive logging practices and "temporarily suspended" two suppliers. The "boycott was subsequently lifted . . . on the basis of more accurate details contained in new UN reports, and the Security Council of the United Nations has continued to refuse a general blacklisting of the wood sector.[745] DLH then continued to trade with Liberian businesses until UN sanctions on Liberian-sourced timber were implemented in 2003.[746]

Due to the post-conflict situation in the State, there was no possibility of bringing a legal case within Liberia against DLH. However, since DLH's headquarters are located in Copenhagen, Denmark was identified as an appropriate forum. Furthermore, the Danish criminal code had been amended in 2002, enabling businesses to be held liable for the offenses included therein.[747]

France was also identified as an alternative forum for a legal case against DLH because over 25% of Liberian timber exports—much of which was imported by DLH—came through the French ports of Sète and Nantes.[748] Due to various obstacles in bringing the case in Denmark, a group of NGOs and a Liberian lawyer filed a criminal complaint with the French Prosecutor in Nantes in November 2009, alleging that DLH—through DLH France and DLH-Nordisk—were guilty of the crime of "recel" (the selling and/or handling of illegally obtained goods) because the business knew or should have known that its suppliers were operating illegally.[749]

Barriers in Pursuing Remedy:

Prior to bringing the case to the French Prosecutor in Nantes, Global Witness approached the Head of the Danish Special International Crimes Office (SICO), who then passed the case file to the Danish Office of the Prosecutor for Serious Economic Crime (SØK).[750] Global Witness then met with a SØK investigator to outline the nature of its allegations.[751] However, language issues became a barrier early on, as the investigator was not fully proficient in English. Later, Global Witness approached the Danish NGO Nepenthes[752] for additional support.[753] After several months, Global Witness and Nepenthes arranged to meet with the investigator again, with Nepenthes staff members acting as unofficial Danish translators. Because of the earlier language barriers, however, the investigator had misunderstood significant portions of the material provided by Global Witness.[754] He also incorrectly claimed that it was not possible to hold businesses criminally accountable under Danish law.[755]

Because of these barriers in proceeding with the Danish case, France was then assessed to be a more accessible forum. However, since Global Witness was not a French NGO at the time and therefore did not have standing to bring the case under French Law, Sherpa—a French NGO—partnered with Global Witness to proceed with the case.[756] Over the next two years, Global Witness

and Sherpa jointly built the case against DLH under the claim that the business was in breach of the French crime of "recel."

One of the concerns in building the case was access to sufficient evidence to support the French legal complaint. While the abuses implicated in the case were ongoing, Global Witness had collected a significant body of evidence for publication as part of its advocacy campaigns from 2000 to 2004.[757] Because this evidence had not been collected with litigation in mind, however, subsequent investigations in Liberia were necessary to collect additional evidence to support the legal claims.[758] Unfortunately, as a result of the Liberian civil wars, all hard copy evidence had been destroyed, and there were no accessible records of any kind.[759]

By the time that the case against DLH was brought in France, Liberia was relatively stable. However, lingering post-conflict security concerns significantly increased the costs of the investigations.[760] In addition, language differences between Liberia and France increased costs as all of the evidence for the case was in English, Liberia's primary language. As such, key evidence had to be translated into French to ensure that the Prosecutor would be able to fully and easily understand the significance of the materials. Furthermore, the complaint was drafted in English, but had to be subsequently translated into French for filing. All of these translations were extremely expensive—especially within the budgets of the non-profit organizations bringing the case[761]—and caused significant delays on at least two separate occasions due to discrepancies in the texts.[762]

After nearly two years of building the case, Sherpa and Global Witness filed the complaint against DLH with the Prosecutor in Nantes in November 2009.[763] The Prosecutor accepted the complaint and opened an investigation in 2010,[764] but transferred the case to the Prosecutor in Montpellier in 2011.[765] However, after two years without taking any action, the Montpellier Prosecutor informed the complainant in 2013 that he would not make a preliminary inquiry.[766]

To date, there has not been a single successful legal case brought against DLH nor any other timber business for claims relating to the illegal activities and human rights harms that took place during Liberia's civil wars.

Monterrico in Peru

History and Background:

Monterrico Metals PLC[767] (Monterrico) is a resource development business incorporated in the United Kingdom.[768] Monterrico's corporate headquarters is in Hong Kong, and its principle operations are in Peru.[769] In 2002, a Peruvian subsidiary of Monterrico, Minera Majaz, was granted a concession[770] for the Rio Blanco copper mine[771] in the Piura region of the northern part of the State.[772]

As early as 2003, local communities in the area of the copper mine disputed Monterrico's claims that it had approval from two-thirds of the community to start exploration operations, as required under Peruvian law.[773] The majority of these communities rely on farming for their livelihoods; thus, their primary concerns were based on the potential negative environmental impacts of the mining operations, particularly in terms of water usage.[774]

In April 2004, these communities organized a peaceful march to the mine site to express their objections to the business's operations.[775] Police responded by firing tear gas, and the resulting violence left one protester dead and numerous protesters and police officers injured.[776] This violence led to further deterioration in business-community relations.

As a result, the regional government of Piura organized talks between various stakeholders relevant to the mining project, including the surrounding communities.[777] However, these talks broke down in July 2005 due to allegations of State bias in favor of Monterrico.[778] In response, the local communities organized a second march that culminated in several thousand protesters gathering at the mine site on 1 August 2005.[779] Again, the protest descended into violence after the police attempted to disperse the protesters with guns and tear gas.[780] Many demonstrators were injured, including one protester who was killed after being shot in the neck.[781]

Following the protest, at least twenty-eight people—including two women and a teenager—were held for over seventy-two hours on the business's property.[782] The claimants alleged that during their captivity, they were beaten, bound, forced to eat rotten food, and threatened with violence, rape, and death.[783] The two women were sexually assaulted.[784] Monterrico has denied that it was involved in these abuses. Eventually, everyone was released without charge; however, the long-

term impacts of this ordeal remained with the victims. One of the women held captive, Elizabeth Cunya Novillo, said, "The three days of detention were some of the worst of my life. When I was beaten[,] it changed my whole world."[785] Contemporaneous photos released anonymously showed the captives injured and bound with hoods over their heads,[786] as well as police officers posing with some of the women's underwear.[787] In addition, a number of the victims were diagnosed with severe post-traumatic stress disorder by specialists at the Maudsley Hospital and practitioners from Physicians for Human Rights.[788] As one of the victims stated, "What we lived up there was brutal savagery."[789]

In 2006, Peru's National Human Rights Ombudsman (CNDDHH)[790] stated that the business was unlawfully occupying the land around the mine because "there was no requisite consent of the communities."[791] Monterrico disputes this, and issue is the subject of ongoing proceedings in Peru.[792] In spite of these objections, the business proceeded with its exploration operations. In September 2007, over 18,000 people from the three districts that would be most affected by the mine took part in a non-binding referendum held by the local government.[793] The result was a majority vote—with estimates as high as 95%—against the mining operation.[794]

The Case and Allegations:

In 2009, the victims "launched a multimillion-pound claim for damages at the high court in London"[795] against Monterrico and Rio Blanco Copper SA, the business's subsidiary in Peru at the time of the lawsuit. The case was brought under the Peruvian Civil Code[796] for the harm committed against the captives and for negligence on the part of the U.K. parent company.

The claimants alleged, "officers of Rio Blanco or of Monterrico ought to have intervened so as to have prevented the abuse of the Claimants' human rights and/or are otherwise responsible for the injuries which [the Claimants] suffered."[797] The claimants further alleged that Monterrico had "knowledge as to the serious risk of violence, ill-treatment[,] and human rights abuses arising from the police's response to the protest planned for late July/early August 2005" and that "[t]he detention of the Claimants was a joint operation between the Defendants, the police[,] and the Forza mine security guards."[798] They also claimed that "the Defendants authorised the police and their security guards to detain the Claimants on the Defendants' property over the course of three days" and that the business had provided logistical and other support to the police throughout the length of detention.[799]

As further evidence came to light, the victims filed a petition to amend their claim to show that other acts of violence could be considered "as evidence that the mistreatment in 2005 was ordered and orchestrated by Monterrico/Rio Blanco [and] that the actions of the officers of Monterrico/Rio Blanco in July 2005 were part of a larger strategy of intimidation and violence directed against mine opponents."[800] After a two-day hearing, the court allowed the claim to be amended to include these additional allegations of the business's complicity.[801] The business appealed this decision; however, the appeal was dismissed in November 2010.[802]

Throughout the proceedings, Monterrico "vigorously denie[d] that any of its officers or employees were involved in any alleged abuses,"[803] claiming the abuses took place during a police operation over which it had no control. The business also stated that it considered "any allegations to the contrary made by the claimants in the proceedings to be wholly without merit."[804]

U.K. lawyers had only just started investigating the above claim when Monterrico announced its intention to delist from the AIM U.K. stock exchange in May 2009.[805] This announcement came on the heels of the business being sold to Zijin, a Chinese firm,[806] and relocating its headquarters to Hong Kong in 2007.[807] Concerned that this delisting would result in all of Monterrico's assets leaving the United Kingdom and thus make the legal claim futile, the claimants' lawyers applied to the High Court in London for a worldwide freeze of the business's assets.[808] The business argued that the case should be dismissed based on the facts that "the proceedings were brought as part of an orchestrated and continuing political environmental campaign, . . . the events had taken place four years ago [and] had been investigated in Peru, and . . . they were statute-barred in both England and Peru."[809] However, the judge decided that the victims "had established a sufficient case to support a worldwide freezing injunction" of over £5 million.[810] In response, one of the claimants' lawyers stated that "[w]ithout this freezing injunction, access to justice would effectively have been denied."[811]

Fortunately, in this case, the sale and subsequent delisting of the business did not have a negative impact on the case overall as a result of the quick action of the claimants' lawyers. However, the sale of businesses facing allegations of abuse is a challenge that victims seeking redress have faced on a number of occasions.[812]

Barriers in Pursuing Remedy:

In spite of compelling evidence in this case of abuses committed against the protesters, an investigation was not opened in Peru until 2008, when local NGO Fundación Ecuménica para el Desarrollo y la Paz (Fedepaz)[813] filed a complaint with the local prosecutor in Piura.[814] In March 2009, however, the local prosecutor rejected the complaint.[815] Fedepaz then appealed to senior prosecutors, who ruled in April 2009 that the case should be reopened based on the fact that the local prosecutor had failed to sufficiently investigate the case.[816] However, local prosecutors attempted to close the investigation two further times.[817]

There were also numerous allegations of intimidation of the victims and witnesses in this case. For example, the victims alleged that they received death threats[818] and were subject to other forms of intimidation. Julio Vásquez, the reporter who published the photographs showing the victims being tortured, also allegedly received similar threats.[819]

Moreover, the victims and witnesses involved in the case faced potential prosecution for their role in the demonstrations.[820] At around the same time that the victims filed their complaint in Peru, a local civil association filed a case accusing thirty-five environmental and human rights activists

and local politicians of terrorism and extortion for their part in the referendum.[821] That case was initially dropped at the end of 2008,[822] but was reopened a few months later by the police counter-terrorism unit for investigation. Due to a lack of evidence, the prosecutor finally dropped the case in September 2010.[823] The "apparent goal [of this case] was to punish the leaders for exercising their rights of expression and protest, and thereby deter opposition to the project."[824]

There was also a fairly substantial media campaign against the communities and their supporters, in which these individuals were often characterized as terrorists or drug dealers.[825] Monterrico's mine camp manager was even alleged to have labeled the protesters as members of the "Shining Path," a Maoist guerilla organization that was active in the 1980s during Peru's internal conflict and that is now commonly associated with drug smuggling.[826] As a result of the political climate and the failure of local prosecution to hold the business accountable, the victims filed a civil complaint in the United Kingdom.

However, U.K. investigators also experienced intimidation when in Peru and had genuine concerns about ensuring the protection of their witnesses, especially those who had worked with Monterrico.[827] Yet, this intimidation did not prevent at least eighty witnesses—including Monterrico employees—from preparing to testify in a ten-week trial in the High Court of the United Kingdom in 2011.[828] In the end, however, a confidential out-of-court settlement was reached shortly before the scheduled hearing that gave financial compensation to thirty-three of the victims without any admission of liability by the business.[829]

While compensation can represent a form of redress, "[o]ne consequence of [the settlement] is that the full details of the events of August 2005 are unlikely ever to be established or publicly disclosed."[830] In addition, compensation can cause additional problems for the affected people, as it did in this case. The decision by the victims to settle was seen by many as "selling out" and preventing the communities from having their day in court, although that was never the claimants' intention.[831] The confidential nature of the settlement fed into this narrative.[832] In Peru, this has resulted in a significant division among some of the previously tight-knit communities, resulting in a number of the victims feeling the need to move away.[833] There has even been tension among the claimants. The settlement was divided based on the harm committed against each individual, causing some victims to feel pressured into settling to support the others and others to feel guilty for receiving larger sums of money.[834] Although the thirty-three individuals who were detained and tortured during the protest brought the case, there were a number of other people who suffered as a result of the excessive force used by the Peruvian authorities who did not receive any compensation.[835]

There were also disclosure issues throughout the case. While the U.K. disclosure system is deemed to be plaintiff-friendly, it is still not as straightforward as it could be. The law requires parties' search requests to be "reasonable"; however, there is always a battle over how to define this standard. In this case, the debate over "reasonableness" involved negotiating the specific words for searches of Monterrico's electronic documents.[836] In addition, the claimants' lawyers had to undertake

legal proceedings in Sweden to "secur[e] the implementation . . . of a request made by the English High Court for obtaining evidence from the Sweden-based . . . parent company of Forza (Peru), which provided security personnel at the Rio Blanco mine at the time of the alleged human rights violations."[837]

Lastly, the underlying issues that led to these abuses being committed—the construction of the mine and the criminalization of the communities' protests—have never been resolved. Some communities may believe that these types of legal actions might assist with broader campaigns to prevent similar mining projects from going ahead and might create opportunities to raise community concerns in court.[838] As one NGO focusing on the Montericco case expressed:

> [W]elcome as it is for the farmers, this settlement does not address the fact that the criminalisation of protest and threats and violence against activists are on the increase around the world and that, in more and more cases, we are seeing collusion between the police and military authorities and the multinational mining companies. Even in this case, despite the settlement, [the] mine is still going ahead without adequate consultation with the community.[839]

Royal Dutch Shell in Nigeria

History and Background:

Shell Petroleum Development Company of Nigeria (SPDC or Shell Nigeria) is the Nigerian subsidiary of Royal Dutch Shell plc[840] (Shell), an Anglo-Dutch multinational business incorporated in the United Kingdom and headquartered in The Hague, Netherlands.[841] Shell Nigeria and its predecessors operated in Ogoni, Nigeria from 1958 until 1993,[842] when production ceased "in the face of community unrest and violence."[843] However, Shell continues to use its Ogoni pipelines to transport oil produced in other areas of Nigeria. According to a recent United Nations Environment Programme (UNEP) study, the pipelines in Ogoniland—where the village of Goi is located—"are not being maintained adequately"[844] and oil pollution "is widespread."[845]

Oil spills in Niger Delta villages—including Goi in 2004,[846] Oruma in 2005,[847] and Ikot Ada Udo between 1996 and 2006[848]—have reportedly resulted in the loss of hectares of commercially viable trees, fish ponds and nurseries.[849] In addition, these spills have contaminated drinking water sources and damaged other property essential to the villagers' livelihoods.[850] Although Shell Nigeria has attempted to clean up the areas surrounding these villages, the business's efforts were started long after the spills had occurred[851] and have been seen by some to be ineffective.[852] According to the UNEP, the cleanup effort in Goi "[did] not achieve environmental standards [in accordance] with Nigerian legislation, or indeed with SPDC's own standards."[853] Moreover, ongoing leaks in Goi have made cleanup essentially futile, and, following another spill in September 2007, the village has since been deserted.[854] According to claimants in Oruma, the cleanup in their community only consisted of setting oil-sodden soil on fire.[855] Not only were nearby trees of economic value seriously damaged by these fires, but the oil-damaged fish ponds were largely left untouched, causing local residents to abandon fisheries.[856]

The Case and Allegations:[857]

In 2008, claimants of oil spills in the villages of Goi, Oruma, and Ikot Ada Udo—together with Milieudefensie (Friends of the Earth Netherlands[858])—brought a civil lawsuit against Shell and Shell Nigeria in the Netherlands.[859] This was the very first case brought against a Dutch multinational corporation in Dutch courts for environmental damage committed abroad.

The claimants alleged that their "rights [had] been infringed and considerable damage [had been] inflicted on the environment" by the actions of Shell and its subsidiary and that this "damage could have and should have been prevented through prudent pipeline maintenance and management and an adequate response after the oil spill occurred."[860] They further alleged that Shell was liable because, "as the parent company of Shell Nigeria and head of the Shell group, [it] failed to utilize its knowledge and control of Shell Nigeria in such a way as to prevent the oil spill and its consequences."

In terms of the actions of the subsidiary, the claimants alleged that "Shell Nigeria [was] liable for this same damage since it acted in breach of the [statutory and due care] standards it had to observe as operator of the pipeline[s]."[861] Specifically, the claimants believed that the leaks were due to poor maintenance of the pipelines, leading to corrosion and cracking.[862] Moreover, the claimants alleged that inadequate security of the pipelines, which run uncovered through villages, gave easy access for criminals to commit acts of sabotage.[863] The plaintiffs further claimed, however, that even if the cause was sabotage, Shell was responsible under Nigerian law "for the containment and recovery of any spill discovered within [its] operational area, whether or not its source is known" because the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) requires that "the operator shall take prompt and adequate steps to contain, remove[,] and dispose of the spill."[864]

Shell has, in general, accepted "responsibility for paying compensation when [spills] occur as a result of operational failure."[865] Additionally, the business stated that it is "also committed to cleaning up spilt oil and restoring the surrounding land" when spills occur as a result of "illegal activity such as sabotage or theft,"[866] as they claim happened in these cases.[867]

Barriers in Pursuing Remedy:

Limitations in accessing experts, legal analysis, legal support, and finances were all barriers in litigating this case. Although the Nigerian claimants were able to access legal aid in the Netherlands, this support only covered a percentage of the necessary costs of bringing the case.[868] Friends of the Earth Netherlands was ineligible for legal aid and had to expend thousands of euros in legal fees and investigative trips to ensure that all of the plaintiffs were able to bring the strongest case possible.[869] These costs were further increased when the Dutch court applied Nigerian law.[870] This required the plaintiffs' lawyers to gain significant knowledge and understanding of Nigerian law and hire Nigerian legal experts to support the case.[871] Technical experts were also needed to refute Shell's statements that the spills were caused by sabotage; however, many experts from the Ogoni area worked with Shell professionally and were therefore unable or unwilling to testify.[872] Shell, having operated in Nigeria for over fifty years and having greater financial resources than the plaintiffs, was in a stronger position in terms of both its knowledge of applicable Nigerian law and its access to relevant experts in the field.

Another major obstacle that the claimants faced in bringing their claims was difficulty in accessing internal information—from both Shell and Shell Nigeria—regarding the operations of the business.[873]

The plaintiffs' lawyers went to court in an attempt to force Shell to disclose the materials. However, the court found in September 2011 that, under Dutch law, Shell was not required to disclose this information, putting the claimants at a significant disadvantage in terms of accessing evidence necessary to prove their claims.[874] This meant that the plaintiffs only had access to information that was already in the public domain when they entered the proceedings, whereas Shell had access to information pertaining to both sides of the issue. This "seriously affect[ed] the equality of the legal parties," resulting in a "fundamental imbalance in the conduct of the case" and putting the plaintiffs at a significant disadvantage.[875]

The claimants also faced challenges when trying to access publicly available information. In one instance, when attempting to obtain information regarding Shell Nigeria's shareholders via the Corporate Registry office in Nigeria, the plaintiffs were told that this information would only be made available to them if they paid an additional, unlawful sum of money.[876] They refused and were only provided with a limited amount of information.[877] In addition, the claimants allege that they were subject to intimidation.[878]

In addition, the above obstacles were exacerbated by procedural barriers that delayed the case and significantly increased the costs for the plaintiffs.[879] For example, Shell argued that it was not liable for the wrongdoings of its Nigerian subsidiary and that the Dutch courts were not an appropriate forum to address the claim against Shell Nigeria.[880] These issues alone took over ten months to resolve—it was not until December 2009 that the court ultimately decided that "reasons of efficiency justif[ied] a joint hearing of the claims against Shell and Shell Nigeria."[881] Shell further argued that the claims of Friday Alfred Akpan—the plaintiff in the Ikot Ada Udo case—should be postponed on the grounds of "lis pendens,"[882] which is a doctrine that allows the court to stay proceedings due to ongoing litigation in another jurisdiction, however this argument was also eventually rejected.[883] Shell also argued that Friends of the Earth Netherlands did not have sufficient standing to bring the case, but again the court found otherwise.[884] After almost four and a half years, the case was finally heard before the Dutch court.

In January 2013, the court dismissed all claims against Shell and Shell Nigeria from the villages of Goi and Oruma, but found that Shell Nigeria was liable for the spills near the village of Ikot Ada Udo.[885] Consequently, Shell Nigeria was ordered to pay damages to Mr. Akpan,[886] but has appealed this decision.[887] In May 2013, the claimants from Goi and Oruma—together with Friends of the Earth Netherlands—submitted an appeal which disputed, "in its entirety[,] the decision taken by the court" in terms of these two villages.[888] Friends of the Earth Netherlands also submitted an appeal regarding Shell's responsibility as the parent company of Shell Nigeria for the harm done in Ikot Ada Udo.[889] The case remains ongoing, with the appeal hearings likely to start in early 2014.

ENDNOTES

[1] The Guiding Principles on Business and Human Rights refer to the responsibility of "business enterprises" to respect human rights. Special Representative on Business and Human Rights, *United Nations Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, adopted by the United Nations Human Rights Council, U.N. Doc. A/HRC/17/L.17/31 (June 2011), [hereinafter *Guiding Principles*]. The term "business enterprise" refers to the range of corporate structures including corporations, joint ventures, consortium, franchises, etc. For the remainder of this Report, we will use the term "business" to refer to the same.

[2] *Id.*

[3] International Corporate Accountability Roundtable, www.accountabilityroundtable.org (last visited Nov. 15, 2013).

[4] CORE, www.corporate-responsibility.org (last visited Nov. 15, 2013).

[5] European Coalition for Corporate Justice, www.corporatejustice.org (last visited Nov. 15, 2013).

[6] Olivier De Schutter et al, Human Rights Due Diligence: The Role of States (2012) *available at* http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf [hereinafter HRDD Report].

[7] The "United Kingdom" is used throughout for ease of reference, though there are three jurisdictions in the United Kingdom: England and Wales; Scotland; and Northern Ireland. For almost all the relevant issues in this report, the laws are identical or very similar. All the case law in this area has been before English courts.

[8] *Guiding Principles*, *supra* note 1, at princ. 25.

[9] *Id.* at princ. 26.

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

[11] Org. for Econ. Co-operation and Dev., OECD Guidelines for Multinational Enterprises (2011), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf

[12] Kiobel v. Royal Dutch Petroleum Co., 569 U.S. ___, 133 S.Ct. 1659, 1669 (2013).

[13] *Guiding Principles*, *supra* note 1.

[14] *Guiding Principles*, *supra* note 1.

[15] *Guiding Principles*, *supra* note 1, at princ. 25.

[16] *Id.* at princ. 26.

[17] *See, e.g.*, Alastair Mowbray, Cases, Materials, and Commentary on the European Convention on Human Rights (3d ed. 2012).

[18] John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, United Nations Human Rights Council, A/HRC/8/5, paras. 89-90, Apr. 7, 2008.

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

[20] Org. for Econ. Co-operation and Dev., OECD Guidelines for Multinational Enterprises (2011), *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf

[21] Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

[22] "The obligation to *protect* requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food." *Committee on Economic, Social and Cultural Rights, General Comment No. 12: The right to adequate food*, Art. 11, ¶ 15, U.N. Doc. E/C.12/1999/5 (May 12, 1995).

[23] *See* Young, James & Webster v. United Kingdom, 44 Eur. Ct. H.R. (ser. A) ¶ 49 (1981); *see also* X & Y v. Netherlands, 91 Eur. Ct. H.R. (ser. A) ¶ 27 (1985); under the European Social Charter, see Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Eur. Committee Soc. Rts, Complaint No. 30/2005, ¶ 14 (decision on admissibility Oct. 10, 2005) ("[t]he state is responsible for enforcing the rights embodied in the Charter within its jurisdiction. The Committee is therefore competent to consider the complainant's allegations of violations, even if the State has not acted as an operator but has simply failed to put an end to the alleged violations in its capacity as regulator."); under the American Convention on Human Rights, see Velásquez-Rodríguez v. Honduras, Inter-Am.Ct.H.R. (ser. C) No. 4, ¶ 172 (1988) ("An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention."); under the African Charter of Human and Peoples' Rights, see Commission Nationale des Droits de l'Homme et des Libertés v Chad, Afr. Committee on Hum. & Peoples' Rts., Comm. No. 74/92, ¶ 20 (1995) ("The Charter specifies in Article 1 that the States Parties shall not only recognize the rights, duties and freedoms adopted by the Charter, but they should also 'undertake . . . measures to give effect to them.' In other words, if a state neglects to ensure the rights in the African Charter, this can constitute a violation, even if the State or its agents are not the immediate cause of the violation."); *see also* SERAC & CESR v. Nigeria, Afr. Committee on Hum. and Peoples' Rts., Comm. No. 155/96, ACHPR/COMM/A004/1, ¶ 46, (2002) ("The State is obliged to protect right-holders against other subjects by legislation and provision of effective remedies. This obligation requires the State to take measures to protect beneficiaries of the protected rights against political, economic and social interferences. Protection generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws and regulations so that individuals will be able to freely realize their rights and freedoms.").

[24] *See* Trail Smelter Arbitration (U.S. v. Can.), 3 U.N. Rep. Int'l Arb. Awards 1905 (1949); Emmerich de Vattel, The Law of Nations, Or Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns 137 (Carnegie Institute of Washington ed., Charles G. Fenwick trans., 1916) (1758).

[25] Ian Brownlie, System of the Law of Nations: State Responsibility 165 (1983). *See also* Nicola Jägers, Corporate Human Rights Obligations: In Search of Accountability 172 (2002) (deriving from "the general principle formulated in the *Corfu Channel* case—that a State has the obligation not knowingly to allow its territory to be used for acts contrary to the rights of other States—that home State responsibility can arise where the home State has not exercised due diligence in controlling parent companies that are effectively under its control").

[26] Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, Art. 12, ¶ 39, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000); *see also* Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The right to water*, Art. 11-12, ¶ 31, U.N. Doc. E/C.12/2002/11 (Nov. 26, 2002).

[27] Committee on Economic, Social and Cultural Rights, *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, ¶ 5, U.N. Doc. E/C.12/2011/1 (May 20, 2011).

[28] Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by States Parties under Art. 9 of the Convention,* ¶ 17, U.N. Doc. CERD/C/CAN/CO/18 (May 25, 2007).

[29] Thus, the Committee on Economic, Social and Cultural Rights has indicated that the right to an effective remedy may be of a judicial or administrative nature and that "whenever a Covenant right cannot

be made fully effective without some role of the judiciary, judicial remedies are necessary." Committee on Economic, Social and Cultural Rights, *General Comment No. 9: The Domestic Application of the Covenant*, ¶ 9, U.N. Doc E/C.12/1998/24 (Dec. 3, 1998). The Human Rights Committee has stressed the importance of both judicial and administrative mechanisms in providing remedies under the International Covenant on Civil and Political Rights, emphasizing the need for judicial remedies in cases of serious violations of the International Covenant on Civil and Political Rights. *See* Bithashwiwa & Mulumba v. Zaire, Hum. Rts. Comm. No. 241/1987, U.N. Doc. CCPR/C/37/D/241/1987, ¶ 14 (Nov. 29, 1989) (where the Committee considered that the State had to provide the applicants with an effective remedy under article 2(3) of the Covenant on Civil and Political Rights, and "[i]n particular to ensure that they can effectively challenge these violations before a court of law . . . "). The Committee on the Elimination of Discrimination against Women takes the view that effective protection includes: effective legal measures, including penal sanctions, civil remedies and compensatory remedies, preventive measures and protective measures. Committee on the Elimination of Discrimination against Women, *General Recommendation No 19: Violence Against Women*, ¶ 24(t), U.N. Doc A/47/38 (1992). In regional contexts, the right to a "judicial" remedy is enshrined in article XVIII of the American Declaration of the Rights and Duties of Man and article 25 of the American Convention on Human Rights. American Declaration of the Rights and Duties of Man, OEA/ser. L./V./ II.23, doc. 21 rev. 6 (1948); American Convention on Human Rights, July 18, 1978, 1144 U.N.T.S. 123. The jurisprudence of the Inter-American Court has held that victims must have a right to judicial remedies in accordance with the requirements of due process of law. *See* Velasquez Rodriguez v. Honduras, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 91 (June 26, 1987). The African Commission on Human and Peoples' Rights has asserted that "everyone has the right to an effective remedy by the constitution, by law or by the Charter," meaning that an effective remedy can only be truly effective if there is a judicial remedy. African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle C(a), *available at* http://www.achpr.org/instruments/fair-trial/ (last visited Nov. 13, 2013). The European Court of Human Rights has indicated that while the right to an effective remedy under article 13 of the European Convention on Human Rights does not require a judicial remedy in all instances, whichever remedy is provided must offer adequate guarantees, and although the scope of the Contracting States' obligations vary depending on the nature of the applicant's complaint, the remedy required by article 13 must be "effective" in practice as well as in law. Conka v. Belgium, Judgment, App. No. 51564/99 Eur. Ct. H.R., ¶ 75 (Feb. 5, 2002).

30 United Nations General Assembly, *United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Rights Law and Serious Violations of International Humanitarian Law*, G.A. Res. 60/147, art. 3, U.N. Doc. A/RES/60/147 (Mar. 21, 2006) [hereinafter *Principles and Guidelines on Reparation*]. *See also* Economic and Social Council, *United Nations Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, U.N. Committee H.R. Res. 2005/81, Principle 31, U.N. Doc. E/CN.4/2005/102/Add.1 (Apr. 21, 2005) [hereinafter *Impunity Principles*] ("Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.").

31 Maastrict Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, principle 38, Maastrict, Netherlands (Feb. 29, 2012) [hereinafter Maastricht Principles].

32 *Principles and Guidelines on Reparation*, *supra* note 30, at Art. 22(b): ("[Satisfactions should include] verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations.").

33 Olivier De Schutter, International Human Rights Law: Cases, Materials and Commentary, ch. 4 (Cambridge University Press 2010).

34 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, art. 2(3), Dec. 16, 1966, 999 U.N.T.S. 171; Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, art. 13-14, June 26, 1987, 1465 U.N.T.S. 85; International Convention on the Elimination of All Forms of Racial Discrimination, art. 6, March 7, 1966, 660 U.N.T.S. 195; The Convention on the Rights

of the Child, art. 39, Nov. 20, 1989, 1577 U.N.T.S. 3; American Convention on Human Rights, art. 25, 63(1), July 18, 1978, 1979 U.N.T.S. 144; African Charter on Human and People's Rights, art. 7(1)(a), June 27, 1981, 1988 U.N.T.S. 217; Arab Charter on Human Rights, art. 12, 23, Sept. 15, 1994; European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, 13, Nov. 3, 1950, 213 U.N.T.S. 221.

[35] *Guiding Principles*, *supra* note 1, at princs. 2-10 (operationalizing the duty of State to protect human rights), 26.

[36] A Special Rapporteur of the United Nations Commission on Human Rights noted in this regard: "The violations committed by the transnational corporations in their mainly transboundary activities do not come within the competence of a single State and, to prevent contradictions and inadequacies in the remedies and sanctions decided upon by States individually or as a group, these violations should form the subject of special attention. The States and the international community should combine their efforts so as to contain such activities by the establishment of legal standards capable of achieving that objective." Commission on Human Rights, *The Realization of Economic, Social and Cultural Rights: Final Report on the Question of the Impunity of Perpetrators of Human Rights Violations (Economic, Social and Cultural Rights)*, ¶ 131, U.N. Doc. E/CN.4/Sub.2/1997/8 (June 27, 1997).

[37] *Guiding Principles*, *supra* note 1.

[38] The International Corporate Accountability Roundtable (ICAR) and the Danish Institute for Human Rights (DIHR) jointly launched the National Action Plans (NAPs) Project in August 2013 to provide significant support and guidance for progress by States towards effective implementation of their duty to protect human rights under the UNGPs through the development of NAPs. The NAPs Project Report is due for release in March 2014. For more on the NAPs Project, see *Launch of the National Action Plans (NAPs) Project*, International Corporate Accountability Roundtable, (Aug. 26, 2013), http://accountabilityroundtable.org/analysis/launch-of-the-national-action-plans-nap-project/.

[39] Foreign & Commonwealth Office, Good Business: Implementing the UN Guiding Principles on Business and Human Rights, 2013, Cm. 8695 (U.K.), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/236901/BHR_Action_Plan_-_final_online_version_1_.pdf [hereinafter U.K. NAP].

[40] *Id.* at 6.

[41] 28 U.S.C. § 1350. The Alien Tort Statute provides that, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." The courts have held that with regard to claims for violations of treaties, Congress must enact legislation providing a specific cause of action. ***See*** Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1298 (3d. Cir. 1979). This is not the case with violations of certain claims under customary international law. *See* International human rights and humanitarian law: Treaties, Cases, and Analysis 250 (Francisco Forrest Martin ed.) (2011).

[42] The Torture Victim Protection Act of 1991, 28 U.S.C. § 1350, n. 2. The TVPA provides that, "An individual who, under actual or apparent authority, or color of law, of any foreign nation—(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death." The TVPA also has an exhaustion requirement, and a statute of limitations of 10 years. *Id.*

[43] Lawsuits alleging violations of human rights through state law claims filed in state court include *Doe v. Unocal*, Nos. BC 237 980, BC 237 679 (Cal. App. Dep't Super. Ct. June 7, 2002) (order granting summary judgment for defendants in part, granting summary adjudication for defendants in part and denying in part), *available at* http:// www.earthrights.org/files/Legal%20Docs/Unocal/TortLiabilityMSARuling.pdf (case ultimately resulted in a settlement before trial); *Bowoto v. Chevron Texaco Corp*., No. CGC-03-417580 (Cal. App. Dep't Super. Ct. Feb. 20, 2003), *available at* http://webaccess.sftc.org/minds_asp_pdf/Viewer/DownLoadDocument.asp?PGCNT=0; and *Doe I v. Wal-Mart Stores, Inc.,* No. CV 05-7307 AG(MANx), 2007 WL 5975664, at *1 (C.D. Cal. Mar. 30, 2007) (removed to federal court).

[44] 28 U.S.C. § 1332. One example of a claim alleging state law but in federal court due to diversity of citizenship was *Linder v. Portocarrero*, 963 F.2d 332 (11th Cir. 1992). Diversity jurisdiction is the term used in

civil procedure to refer to the situation in which a U.S. federal court has subject matter jurisdiction to hear a civil case because the parties come from different states. *Jurisdiction*, Black's Law Dictionary (9th ed. 2009).

[45] For a good discussion regarding human rights claims brought under state law in either state court or in federal court under diversity jurisdiction, see Paul Hoffman and Beth Stephens, *International Human Rights Cases Under State Law and In State Courts,* 3 UC Irvine L. Rev. 9 (2013).

[46] The language of the TVPA refers to "individuals," which in 2012 the Supreme Court clarified includes only natural persons. *See* Mohamad v. Palestinian Authority, __U.S. ___, 132 S.Ct. 1702 (2012). In one case, the 11th Circuit did find an action under the TVPA and the Alien Tort Statute could be sustained against a business. *See* Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1247, 1250-53 (11th Cir. 2005).

[47] 630 F.2d 876 (2d Cir. 1980).

[48] *Id.* at 878. In order to hear a claim, a court must still have *personal* jurisdiction over any defendant. Burnham v. Super. Ct. of Cal., 495 U.S. 604 (1990).

[49] Result of author Skinner's Westlaw search, October 23, 2014.

[50] 542 U.S. 692, 693-695 (2004).

[51] *Id.* at 725. Some have argued that the test set forth in *Sosa* is the test for customary international law norms; others have argued the test is something even narrower.

[52] *Id.* at 727-28.

[53] *Id.* at 733, n. 21.

[54] *Kiobel*, 133 S.Ct. 1659 (2013).

[55] The presumption against extraterritoriality was used, starting in the early 19th Century, to limit the reach of piracy and federal customs laws. William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 Berkeley J. Int'l Law 85, 85 (1998). The Supreme Court in 2010 held that when a statute provides for extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms. Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 130 S. Ct. 2869, 2883 (2010).

[56] *Kiobel*, 133 S.Ct. at 1669 (2013)

[57] *Id.*

[58] *Id.* at 1669, 1673. The Supreme Court granted certiorari on the question of whether businesses can be liable for violations of international human rights law at all, after the Second Circuit ruled that they cannot. Kiobel v. Royal Dutch Petroleum Co., 132 S. Ct. 472 (2011). The Supreme Court declined to address this question, instead ordering reargument and deciding the case on extraterritoriality grounds. There still exists a circuit split on the corporate liability question. For more on corporate liability, both civil and criminal, see the discussion in Issue 3.

[59] Consultation, in Washington, D.C. (June 24, 2013).

[60] *Id.*

[61] In fact, four Supreme Court justices (Justices Breyer, Ginsburg, Kagan, and Sotomayor), believe the ATS has extraterritorial application. These Justices still would have dismissed the case, but find jurisdiction if "(1) the alleged tort occurs on American soil, (2) the defendant is an American national, or (3) the defendant's conduct substantially and adversely affects an important American national interest, and that includes a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Kiobel*, 133 S.Ct. at 1671 (Breyer, J., concurring). A fifth justice leaves open the possibility that serious violations of international law which could meet the "touch and concern" requirement. *Id.* at 1669 (Kennedy, J., concurring). Thus, it is important to note a majority of courts may well find that such serious violations of international law which harms individuals, even by non-nationals "touch and concern" the United States with sufficient force to overcome the presumption against extraterritoriality of the ATS.

[62] Cases which have been found, at the time of this Report, to have survived the *Kiobel* "touch and

concern" standard are *Mwani v. Laden*, 2013 WL 2325166 (D.D.C. May 29, 2013); *Sexual Minorities Uganda v. Lively*, 2013 WL 4130756 (D.Mass. Aug. 14, 2013); and *Ahmed v. Magan*, 2013 WL 4479077 (S.D.Ohio Aug. 20, 2013). Notably, none of these cases were against a business.

[63] In light of *Kiobel*, federal courts have dismissed several cases: *Sarei v. Rio Tinto, PLC*, 722 F.3d 1109, 1110 (9th Cir. Jun 28, 2013) (affirming a lower case dismissal after noting *Kiobel*); *Giraldo v. Drummond Co., Inc.,* 2013 WL 3873960 (N.D.Ala. July 25, 2013); *Chen Gang v. Zhao Zhizhen*, 2013 WL 5313411 (D.Conn. Sept. 20, 2013); *Mohammadi v. Islamic Republic of Iran*, 2013 WL 2370594 (D.D.C. May 31, 2013); *Al Shimari v. CACI Int'l, Inc*., 1:08-CV-827 GBL/JFA 2013 WL 3229720 (E.D.Va. June 25, 2013); *Ahmed-Al-Khalifa v. Travers*, 2013 WL 3326212 (D.Conn. July 01, 2013); *Tymoshenko v. Firtash*, 2013 WL 4564646 (S.D.N.Y. Aug. 28, 2013); *Adhikari v. Daoud,* 2013 WL 4511354 (S.D.Tex. Aug. 23, 2013); and *Kaplan v. Cent. Bank of Islamic Republic of Iran,* 2013 WL 4427943 (D.D.C. Aug. 20, 2013).

[64] Al Shimari, 2013 WL 3229720 at *1.

[65] *Id.* at *8.

[66] Brief for Plaintiffs-Appellants, Al Shimari v. CACI Int'l, Inc., 1:08-CV-827 GBL/JFA (4th Circ. Oct. 29, 2012), (No. 13-1937), 2013 WL 3229720, *available at* http://ccrjustice.org/files/2013-10-29_Al-ShimariPlaintiffs-Appelants_Opening_Brief.pdf.

[67] Often, cases brought under the ATS also allege violations of state tort law, so these claims are not particularly novel.

[68] Similarly, federal courts that would have diversity jurisdiction will employ the choice of law analysis of the forum state in which it sits. For a more in depth discussion of barriers arising out of choice of law analysis, see the discussion in Issue 6.

[69] *See* Burnham v. Superior Court, 495 U.S. 604, 611 (1990) ("[B]y the common law[,] personal actions, being transitory, may be brought in any place, where the party defendant may be found . . .," quoting Joseph Story, Commentaries on the conflict of laws §§ 554, 543 (1846).

[70] Kiobel v. Royal Dutch Petroleum, 133 S.Ct. 1659, 1666 ("Under the transitory torts doctrine, however, 'the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place,'" quoting Cuba R.R. Co. v. Crosby, 222 U.S. 473, 479 (1912) (majority opinion of Holmes, J.)).

[71] *See* Restatement (Second) of Conflict of Laws § 6 (1971).

[72] Burnham v. Super. Ct. of Cal., 495 U.S. 604, 610-11 (1990).

[73] International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945).

[74] Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 95 (2d Cir. 2000).

[75] *Id.*

[76] 644 F.3d 909, 922-23 (9th Cir. 2011).

[77] DaimlerChrysler AG v. Bauman, 571 U.S. _____ (Jan. 14, 2014)

[78] *See, e.g.,* Julian G. Ku, *Customary International Law in State Courts*, 42 Va. J. Int'l L. 265 (2001); Curtis A. Bradley & Jack Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 834, 870 (1997). State courts throughout the 1800s applied certain aspects of the law of nations to cases before them, typically cases that arose out of the law of war. Many of these cases were brought under state tort law, however, the courts looked to customary international law—typically the law of war—in determining rights and defenses of the defendant, demonstrating that such was seen as part of their common law. *See, e.g.,* Cochran v. Tucker, 43 Tenn. (3 Cold.) 186 (1866) (court looked to the law of war with regard to belligerent rights finding that such rights did not allow attacks on civilians); Hedges v. Price, 2 W. Va. 192 (1867); Caperton v. Martin 4 W. Va. 138 (1870); Johnson v. Cox, 3 Ky. Op. 559 (1869); Ferguson v. Loar, 68 Ky. 689 (1869); Bryan v. Walker, 64 N.C. 141 (1870); Koonce v. Davis, 72 N.C. 218 (1875). As another example, the Oregon Supreme Court has said, "When our nation signed the Charter of the United Nations we thereby became bound to the following principles (art. 55, subd. C, and *see* art. 56): 'Universal

respect for, and observance of human rights and fundamental freedoms for all distinction as to race, sex, language, or religion.'" Namba v. McCourt, 204 P.2d 569, 579 (Or. 1949).

79 The foreign affairs preemption doctrine stands for the proposition that the power over foreign affairs is reserved to the federal government and "that state laws may not intrude 'into the field of foreign affairs which the Constitution entrusts to the President and the Congress.'" Zschernig v. Miller, 389 U.S. 429, 432 (1968).

80 Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1187-888 (C.D. Cal. 2005) (dismissing the state claims after finding that California had only a weak interest in the plaintiffs' claims, which was easily overcome by the foreign policy concerns stated in the State Department's Supplemental Statement of Interest).

81 Bill C-300 (Historical) Corporate Accountability of Mining, Oil, and Gas Corporations in Developing Countries Act, 40th Parliament, 3rd Session (2010), *available at* http://openparliament.ca/bills/40-3/C-300/. For background on the bill, *see Bill C-300 Backgrounder*, Canadian Network on Corporate Accountability (Sept. 3, 2010), http://cnca-rcrce.ca/issuesbill-c-300backgrounder/.

82 Bill C-323, An Act to Amend the Federal Courts Act (International Promotion and Protection of Human Rights) 41st Parliament, 1st Session (2011), *available at* http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?billId=5138027&Mode=1&Language=E. It was most recently introduced again in October 2013. See https://openparliament.ca/bills/41-2/C-323/ (last accessed November 21, 2013).

83 § 1. The Federal Court's jurisdiction can be exercised over claims involving genocide; slavery or slave trading; extrajudicial killing or the disappearance of an individual; torture or other cruel, inhuman or degrading treatment or punishment; prolonged arbitrary detention; war crimes or crimes against humanity; systematic discrimination; a consistent pattern of gross violations of internationally recognized human rights; forced prostitution and other unlawful sexual activity against those under the age of 18; forced conscription of those under the age of 18 into armed forces or paramilitary groups; rape, sexual slavery, forced prostitution; wanton destruction of the environment that directly or indirectly initiates severe and widespread damage to an ecosystem; transboundary pollution among others. *Id*. § 2.

84 John Terry & Sarah Shody, *Could Canada Become a New Forum for Cases Involving Human Rights Violations Committed Abroad?*, 1(4) Commercial Litigation & Arbitration Rev. 63, 64 (2012) (highlighting the increase in recent cases filed in Canada for tort claims stemming from human rights abuses committed abroad). The article discusses that the Canadian Supreme Court will have to address how the principles established in *Club Resorts Ltd. v. Van Breda* apply to cases involving human rights abuses by businesses committed abroad. *Id.* The Supreme Court of Canada's decision in *Club Resorts*, in which the Court listed four presumptive connecting factors in tort actions that, when present, establish a "real and substantial connection" and give jurisdiction to a court. The four factors are (a) the defendant is a resident or is domiciled in the province; (b) the defendant conducts business in the province; (c) the tort was committed in the province; and (d) a contract connected with the dispute was made in the province. The Court emphasized that these "connecting factors" are not the only ones that can establish a connection between the tort claim and the province. Club Resorts Ltd. v. Van Breda, [2012] 1 S.C.R. 572 (Can.).

85 Consultation via phone, June 19, 2013.

86 Council Regulation 44/2001, 2001 O.J. (L012), [hereinafter the Brussels I Regulation]. The Brussels I Regulation consolidated the European Community Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 into European Community law; its principles were extended to EFTA States by the Lugano Convention of 1988. For the last consolidated version of the Brussels Convention, see 1998 O.J. C 27/1. Subsequently, Regulation 2001 O.J. (L 12/1) entered into force on 1 March 2002. The subject of judicial cooperation in civil matters entered Community law with the changes brought to the Treaty of Rome by the Treaty of Amsterdam of 2 October 1997, which entered into force on 1 May 1999. For more on the relationship between the 1968 Brussels Convention and the Brussels I Regulation, *see* Brussels I Regulation, art. 68. For more on the Brussels I Regulation see Hélène Gaudemet-Tallon, Compétence et exécution des jugements en Europe (2002); Wendy Kennett, *The Brussels I Regulation*, 50 I.C.L.Q. 725, 725 (2001); J. Droz and H. Gaudemet-Tallon, *La transformation de la Convention de Bruxelles du 27 septembre 1968 en règlement du Conseil concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, 90 Revue Critique de Droit

International Privé 601, 601 (2001); Arnaud Nuyts, *La Communautarisation de la Convention de Bruxelles*, 120 Journal des Tribunaux 913, 913 (2001); Guus E. Schmidt, *De EEX-Verordening: de Volgende Stap in het Europese Procesrecht*, N.I.P.R. 150 (2001); Nadine Watté, Arnaud Nuyts and Hakim Boularbah, "Le Règlement 'Bruxelles I' Sur la Compétence Judiciaire, la Reconnaissance et L'exécution des Décisions en Matière Civile et Commerciale," 90 Journal des Tribunaux-Droit Européen 161, 161 (2002).

87 Regarding the use of this basis for jurisdiction in transnational human rights litigation, see Gerritt Betlem, *Transnational Litigation Against Multinational Corporations Before Dutch Civil Courts*, in Liability of Multinational Corporations under International Law 283 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Aukje A.H. Van Hoek, *Transnational Corporate Social Responsibility: Some Issues with Regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of their Suppliers*, in Social Responsibility in Labour Relations: European and Comparative Perspectives 147 (Frans Pennings, Yvonne Konijn, & Albertine Veldman eds. 2008).

88 HRDD Report, *supra* note 6 at 54.

89 Rechtbank's-Gravenhage [District Court of The Hague], 30 Dezember 2009, docket no. 330891/HA ZA 09-579, (Vereniging Milieudefensie/Royal Dutch Shell PLC) (Neth.). For more information about this case, please also refer to the case study, *infra* Appendix.

90 *Id.*

91 Cass. Civ. 1ère, 19 November 1985, Cognacs and Brandies, JDI 1986; Cass. Civ. 1ère, 23 May 2013, Prieur.

92 Robert Grabosch, *Rechtsschutz vor deutschen Zivilgerichten gegen Beeinträchtigungen von Menschenrechten durch transnationale Unternehmen*, in Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht 69 (Ralph Nikol, Thomas Bernhard, & Nina Schniederjan, eds. 2013). However, as Grabosch notes, this is a rather unusual situation, and questions have been raised as to whether it was compatible with the sovereignty of other States, particularly, in civil liability cases, of the State where the damage occurred. The German courts and most of the German doctrine consider that Germany is not exercising extraterritorial jurisdiction in a way that is in violation of international law, because the link to Germany remains substantial and the extraterritorial jurisdiction "reasonable." In part out of a concern for the restrictions that international law imposes on extraterritorial jurisdiction, however, the Federal Court of Justice has held that "§ 23(1) requires a nexus between the subject matter and the forum." While such nexus can be found in the presence of a contractual relationship, for instance where a German buyer or principal has ordered goods to be produced or infrastructure to be constructed abroad and the supplier claims payment, it is unclear whether it would be considered present in other circumstances.

93 Rv, art. 7(1) (Neth.).

94 Sv 9(b)-(c) (Neth.). This rule of criminal procedure has not often been applied in the Netherlands, and in any case not (yet) against a corporate defendant. However, a well-known case was the assumption of jurisdiction over civil claims brought by Iraqi pilots who asserted that they could not receive a fair trial if forced to bring their claims before the courts in Kuwait. Amsterdam Subdistrict Court, 27 April 2000, 2000 Nederlands Internationaal Privaatrecht 315, 472 (Saloum/Kuwait Airways Corp.) (Neth.); Amsterdam Subdistrict Court, 5 January 1996, 1996 Nederlands Internationaal Privaatrecht 145, 222. The *forum necessitatis* rule will only be applied in exceptional cases such as the absence of a foreign court due to natural disasters or war, or where plaintiffs cannot expect to receive a fair trial due to discriminatory legal rules. The provision is closely connected to the right to a fair trial guaranteed by Article 6 of the European Convention on Human Rights. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 6, Nov. 3, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights]. In March 2012, this rule provided a basis for the assumption of jurisdiction by The Hague District Court over a civil claim brought by a foreign plaintiff in relation to his unlawful imprisonment and torture in Libya. In this case, the only connection to the Netherlands was the plaintiff's presence in the Netherlands. This case concerned a claim for damages brought by a Palestinian doctor who claimed to have suffered damages following unlawful imprisonment for eight years in Libya for allegedly infecting children with HIV/AIDS. The place of residence of the defendants was unknown. The court relied on the *forum necessitatis* rule that allows Dutch courts to exercise jurisdiction over civil claims that would not normally fall under the ordinary bases for jurisdiction but where bringing those claims outside the Netherlands is simply impossible, either legally or

practically. Rechtbank's-Gravenhage [District Court of The Hague], 21 Marsch 2012, LJN: BV9748 (El-Hojouj/ Unnamed Libyan Officials) (Neth.).

95 Yao Essaie Motto v. Trafigura Ltd., [2011] EWHC 90206.

96 *Guerrero v. Monterrico Metals plc* [2009] EWHC 2475. For more information on this case, please see also the case study, *infra* in the Appendix.

97 In the case of *Gypsy International Recognition and Compensation Action (GIRCA) v. IBM*, GIRCA alleged that IBM had been complicit in the crimes against humanity committed against the Roma by the Nazis. The business's alleged conduct would have occurred at the Geneva headquarters of IBM between 1933 and 1945. In a landmark judgment of 22 December 2004, the Federal Court (Tribunal Fédéral), the highest court in the State, recognized that the Swiss courts had jurisdiction to hear the case. Bundesgericht [BGer] [Federal Supreme Court] Dec. 22, 2004, 131 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 153 (Switz.). The case could not proceed to the merits, however, because in April 2005, the First Instance Court (Tribunal de première instance) dismissed the claim, finding that too much time had elapsed since the harm occurred. Both the Geneva Court of Appeal and the Federal Court affirmed this decision. Bundesgericht [BGer] [Federal Supreme Court] Aug. 14, 2006, 132 Entscheidungen des Schweizerischen Bundesgerichts [BGE] III 661, 668 (Switz.). Nevertheless, the GIRCA case set an important precedent for the filing of claims against businesses operating in Switzerland that allegedly have committed or have been complicit in violations of human rights outside of Swiss national territory.

98 Bundesgesetz über das International Privatrecht [IPRG], Loi fédérale sur le droit international privè [LDIP], Legge federale sul diritto internazionale privato [LDIP] Dec. 18, 1987, RS 291, arts 2. & 60 (Switz.) [hereinafter LDIP].

99 Andreas Bucher & Andrea Bonomi, Droit International Privé 177-179 (2004).

100 Victor Manuel Diaz, Jr., *Litigation in U.S. Courts of Product Liability Cases Arising in Latin America, Panel Talk Before the Miami Conference, Key Concepts in Product Liability Law in Latin America Today, in Miami Conference Summary of Presentations,* 20 Ariz. J. Int'l & Comp. L. 47, 93 (2003) (John F. Molloy ed.) (referencing the study.).

101 *See* Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 (1992)). In *Sarei v. Rio Tinto*, the Ninth Circuit found it was not appropriate to recognize an exhaustion requirement under the ATS. Sarei v. Rio Tinto, 487 F.3d 1193, 1213 (Ninth Cir. 2007).

102 These are the elements of the *forum non conveniens* doctrine first outlined by the Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

103 *See, e.g.,* Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283 (11th Cir. 2009). With regard to relevant factors, the courts consider the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive; and the enforceability of a judgment if one is obtained in the United States. The burden is on the defendant to establish an adequate, alternate remedy is possible in the home State.

104 This is not been a barrier with regard to cases pursuant to the TVPA, given that Congress has given a cause of action for violations of the TVPA in federal courts, indicating it believes U.S. courts are an appropriate forum for cases occurring abroad. Consultation, in Washington, D.C. (June 24, 2013).

105 Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

106 Bhopal v. Union Carbide Corporation, 809 F.2d 195 (2d Cir. 1987).

107 James B. Stewart, "Legal Liability: Why Suits for Damages Such as Bhopal Claims Are Very Rare in India," Wall St. J., Jan. 23, 1985 (quoting Y.V. Chandrachud, Chief Justice of the Supreme Court of India).

108 Andrew Buncombe, *The Cursed Children of Bhopal*, Indep. (London), Nov. 19, 2008, *available at* http:// www.independent.co.uk/news/world/asia/the-cursed-children-of-bhopal-1024600.html; *see also* Oxford Pro Bono Publico, Univ. of Oxford, Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse 174 (2008), *available at* http:// www.reports-and-materials.org/Oxford-Pro-Bono-Publico-

submission-to-Ruggie-3-Nov-08.pdf.

109 *See* Oxford Pro Bono Publico, *supra* note 108, at 174. For another example of a settlement that has been evaluated as providing ineffective remedy for some victims, see the Monterrico case study, *infra* Appendix.

110 For additional cases where state courts have declined jurisdiction over cases involving foreign plaintiffs where the court found that an alternative forum was available, see Forum non conveniens doctrine in state court as affected by availability of alternative forum, 57 A.L.R.4th 973 §11[b]. For those cases where state courts declined jurisdiction even where the court also found that an alternative forum was unavailable, *see Forum non conveniens Doctrines – Alternative forum unavailable – Jurisdiction denied* 57 A.L.R. 973 §12[b].

111 Dow Chem. Co. v. Castro Alfaro, 786 S.W.2d 674 (Tex. 1990), *superseded by statute*, Tex. Civ. Prac. & Rem. Code Ann. § 71.051 (West 2009).

112 Ciba-Geigy Ltd. v. Fish Peddler, Inc., 691 So. 2d 1111, 1118 (Fla. Dist. Ct. App. 1997).

113 *See* Scotts Co. v. Hacienda Loma Linda, 2 So.3d 1013, 1015 (Fla. Dist. Ct. App. 2008).

114 *Ciba-Geigy Ltd*., 691 So. 2d at 1118).

115 *Id.* at 1017-18.

116 Aldana v. Del Monte Fresh Produce N.A., Inc., 578 F.3d 1283 (11th Cir. 2009).

117 *Id.* (Court found that district court did not abuse its discretion when dismissing the case on *forum non conveniens* grounds).

118 *See Aldana v. Fresh Del Monte Produce*, Int'l Rts. Advocates http://www.iradvocates.org/case/latin-america-guatemala/aldana-v-fresh-del-monte-produce (last visited Nov. 22, 2013).

119 *Id.*

120 *Id.*

121 Aguinda v. Texaco, Inc., 303 F.3d 470 (2d Cir. 2002).

122 *See Amicus Briefs in Chevron/Ecuador Litigation*, EarthRights International http://www.earthrights.org/publication/amicus-briefs-chevron-ecuador-litigation (last visited Nov. 22, 2013).

123 *See Texaco/Chevron lawsuits*, Bus. & Hum. Rts. Resource Centre http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador (last visited Nov. 15, 2013).

124 *See* Barrett, Paul M., *Ecuadorian Court Cuts Chevron's Pollution Bill in Half*, BloombergBusinessweek http://www.businessweek.com/articles/2013-11-13/ecuadorian-court-cuts-chevrons-pollution-bill-in-half (last accessed November 19, 2013).

125 *Id.*

126 *See Texaco/Chevron lawsuits*, Bus. & Hum. Rts. Resource Centre http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TexacoChevronlawsuitsreEcuador (last visited Nov. 15, 2013).

127 Republic of Ecuador v. Chevron Corp., 638 F.3d 384 (2d Cir. 2011).

128 Chevron v. Donziger, 11-cv-00691 (U.S. Dist. Ct., So. Dist. of N.Y.).

129 This case was in trial at the time of the publication of this report.

130 Chevron Corp. v. Naranjo, 667 F.3d 232 (2d Cir. 2012).

131 *See* Mikos Manolis et al., *The Doctrine of Forum Non Conveniens: Canada and the United States Compared*, FDCC Q. 6 (2009), *available at* http://www.vermettelaw.com/uploads/tmp_files/13_151d956c246254e0e78ae164de21cea0.pdf (internal citations omitted).

[132] Court Jurisdiction and Proceedings Transfer Act, S.B.C., ch. 28 § 11. The statue reads, (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum, (b) the law to be applied to issues in the proceeding, (c) the desirability of avoiding multiplicity of legal proceedings, (d) the desirability of avoiding conflicting decisions in different courts, (e) the enforcement of an eventual judgment, and (f) the fair and efficient working of the Canadian legal system as a whole.

This statute was intended to codify the common law test. *See* Teck Cominco Metals Ltd. v. Lloyd's Underwriters, [2009] 1 S.C.R. 321 ¶ 22 [2009] SCC 11 (Can.). In addition, the Uniform Law Conference of Canada proposed a uniform Act to govern issues related to jurisdiction and to the doctrine of *forum non conveniens* (see Court Jurisdiction and Proceedings Transfer Act, S.B.C., c. 28 ("CJPTA") that reads substantially the same. *See* Club Resorts Ltd. v. Van Breda, [2012] 1 SCR 572 ¶¶ 40-41, [2012] SCC 17 (Can.).

[133] Van Breda Club Resorts Ltd. v. Van Breda, [2012] 1 SCR 572 ¶¶ 101-112.

[134] Prior to this case, the provinces were divided as to who had the burden on this issue—defendants or plaintiffs. Manolis, *supra* note 131, at 9, 33.

[135] *Van Breda*, [2012] 1 SCR 572 ¶ 109.

[136] *Id.* ¶ 110.

[137] Civil Code of Québec, S.Q. 1991 c. 1 s. 3135, (Can.).

[138] Recherches International du Quebec v. Cambior, Inc., [1998] Q.J. No. 2554 (Can. Que. S.C.).

[139] Bil'in (Village Council) c. Ahmed Issa Yassin, 2009 QCCS 4151, 2009 R.J.Q. 2579 ¶ 175-76 (Can.).

[140] Motion Introducing a Suit, Bil'In (Village Council) &. Ahmed Issa Yassin v. Green Park Int'l, Inc, No. 500-17-044030-081 (Superior Court, Province of Quebec, District of Montreal July 7, 2008).

[141] *Bil'In*, [2009] QCCS 4151 ¶ 335.

[142] Ass'n Canadienne Contre l'Impunité (A.C.C.I.) v. Anvil Mining Ltd., [2011] QCCS 1966 (Can. Que.) [hereinafter Anvil Mining I].

[143] *Id.*

[144] Choc v. Hudbay Minerals, Inc., [2013] ONSC 1414 (Can. Ont.).

[145] *See* Choc v. HudBay Minerals Inc. & Caal v. HudBay Minerals Inc., http://www.chocversushudbay.com/ (last visited Nov. 22, 2013).

[146] Consultation via phone, June 19, 2013; emails on file with author Skinner.

[147] See the list of factors *supra* note 132. None lists adequate forum or futility.

[148] *See* Lawrence Collins, *Forum non conveniens and the Brussels Convention*, 106 L.Q.R. 535 (1990); Richard Fentiman, *Jurisdiction, Discretion and the Brussels Convention*, 26 Cornell Int'l L.J. 59, 73 (1993); Trevor C. Hartley, *The Brussels Convention and Forum Non Conveniens*, 17 Eur. L.. Rev. 1992, (17(6), 553-555; Wendy Kennett, *Forum non conveniens in Europe*, 54 Cambridge L. J. 552, 555 (1995); Hélène Gaudemet-Tallon, *Le forum non conveniens, une menace pour la Convention de Bruxelles?*, Revue critique de Droit int'l privé 491, 510 (1991); Marongiu Buanaitu, *Forum Non Conveniens Facing the Prospective Hague Convention and E.C. Regulation on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, Riv. Di. Dir. Eur. 3 (1999); Peter North, "La liberté d'appréciation de la compétence (jurisdictional discretion) selon la Convention de Bruxelles, Mélanges François Rigaux 383 (1993); and Arnaud Nuyts, L'exception de forum non conveniens: étude de droit international privé comparé 187 (2002).

[149] *See* Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United*

Kingdom Asbestos Cases, 50 Int'l & Comp. L.Q. 1, 12-13 (2001).

150 *But see* Case C-190/89, Marc Rich & Co. AG v. Società Italiana Impianti PA, 1991 E.C.R. I-3855.

151 Case C-412/98, Group Josi Reinsurance Co. SA v. Universal Gen. Ins. Co. (UGIC), 2000 E.C.R. I-05925, ¶ 34.

152 *Id.* ¶ 53

153 *See* European Parliament resolution on the Commission Green Paper on Promoting a European framework for corporate social responsibility (COM(2001) 366 – C5-0161/2002 – 2002/2069(COS)) (2002) (drawing "attention to the fact that the 1968 Brussels Convention as consolidated in Regulation 44/2001 enables jurisdiction within the courts of EU Member States for cases against companies registered or domiciled in the EU in respect of damage sustained in third countries; calls on the Commission to compile a study of the application of this extraterritoriality principle by courts in the Member States of the Union; calls on the Member States to incorporate this extraterritoriality principle in legislation").

154 Lubbe v. Cape plc, [1998] C.L.C. 1559, [1998] EWCA Civ. 1351 (Eng.).

155 Richard Meeran, Liability of Multinational Corporations: A Critical Stage in the UK, in Liability of Multinational Corporations under International Law 251, 258-61 (Menno T. Kamminga & Saman Zia-Zarifi eds., 2000); Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Cases*, 50 Int'l & Comp. L.Q. 1 (2001); Richard Fentiman, *Stays and the European Conventions: End-Game?*, 60 Cambridge L.J. 10 (2001).

156 Lubbe v. Cape plc, [1998] C.L.C. 1559, [1998] EWCA Civ. 1351 (Eng.).

157 In the second judgment by the Court of Appeal (of 29 November 1999), Pill L.J. expressly noted that the plaintiffs – who, indeed, did not wish the proceedings to be delayed while a reference would be made to the European Court of Justice – had not pursued their contention that Article 2 of the 1968 Brussels Convention deprived the English court of any discretion to stay an action brought against a defendant domiciled in the United Kingdom. Lubbe v. Cape plc, [2000] 1 Lloyd's Rep. 139 (Eng.).

158 *Id.* ¶ 15. This formulation by Lord Bingham of Cornhill, although it seems to be inspired by the terms of the *Civil Jurisdiction and Judgments Act 1982* which introduced the 1968 Brussels Convention in the U.K. national legal order (the ***Act*** mentions that "Nothing in the Act shall prevent a court in the United Kingdom from staying, striking out or dismissing any proceedings on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention" (Civil Jurisdiction and Judgments Act 1982, 1982, c. 27, art. 49)), in fact postulates that either the Brussels Convention will be applicable, or the doctrine of *forum non conveniens* will apply. However, this delimitation of the respective scope of application of the two rules was not, in fact, what Article 49 of the *Civil Jurisdiction and Judgments Act* had intended. Rather, this provision did not exclude that the Brussels Convention could refer back to the principles from national law (including the doctrine of *forum non conveniens* in the United Kingdom), on certain questions it did not rule on itself.

159 Case C-128/01, Owusu v. Jackson, 2005 E.C.R. 1-1383.

160 *See, e.g.,* Bodo Cmty. v. Shell Petroleum Dev. Co. of Nigeria, [2012] EWHC (QB) HQ11X01280 (Eng.), Motto & Others. v. Trafigura Ltd., [2011] EWHC 90201 (Costs) (Eng.).

161 Michael Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. Irvine L.Rev. 127, 137 (2013).

162 Ass'n Canadienne Contre l'Impunité (A.C.C.I.) c. Anvil Mining Ltd., 2011 QCCS 1966 (Can. Que.). For more information, see the Case Study, *infra* Appendix.

163 *Id.*

164 *Commission Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, COM (2009) 175 final (April 21, 2009); *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Regulation and Enforcement of Judgments in Civil and Commercial Matters*, COM (2010) 748 final (Dec. 14, 2010).

165 *Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Regulation and Enforcement of Judgments in Civil and Commercial Matters*, COM (2010) 748 final (Dec. 14, 2010), at 8.

166 *Id.*

167 *See* Cass. Civ. 1ère, 19 November 1985, Cognacs and Brandies, JDI 1986; Cass. Civ. 1ère, 23 May 2013, Prieur.

168 Loi fédérale sur le droit international privè [LDIP] Dec. 18, 1987 (Switz.).

169 Article 3 of the LDIP states: "Lorsque la présente loi ne prévoit aucun for en Suisse et qu'une procédure à l'étranger se révèle impossible ou qu'on ne peut raisonnablement exiger qu'elle y soit introduite, les autorités judiciaires ou administratives suisses du lieu avec lequel la cause présente un lien suffisant sont compétentes." *Id.* at art. 3.

170 Arrêts du Tribunal Fédéral Suisse [Federal Court] May 22, 2007, 4C.379/2006 (Switz.) (excluding the application of this provision to the case of a Tunisian having been granted asylum in Switzerland, and seeking reparation for international crimes committed in Tunisia against a Tunisian residing in Italy at the time of the event: "en l'espèce, le demandeur se plaint d'actes de torture qui auraient été commis en Tunisie, par des tunisiens domiciliée en Tunisie, à l'encontre d'un tunisien résidant en Italie. L'ensemble des caractéristiques de la cause ramène en Tunisie, sauf la résidence en Italie à ce moment-là. Les faits de la cause ne présentent donc aucun lien avec la Suisse, si bien que la question de savoir si le lien avec ce pays est suffisant ou non ne se pose pas. Dans ces circonstances, il n'est pas possible d'admettre la compétence des tribunaux helvétiques, sauf à violer le texte clair de l'art. 3 LDIP. Que le demandeur ait ensuite choisi de venir en Suisse ne peut rien y changer, car il s'agit d'un fait postérieur à la cause, et qui n'en fait du reste pas partie.").

171 Bernard Dutoit, Commentaire de la loi fédérale du 18 décembre 1987 (2005).

172 18 U.S.C. § 1091.

173 18 U.S.C. § 2441.

174 18 U.S.C. § 2340A.

175 18 U.S.C. § 2442.

176 1 U.S.C. § 1.

177 18 U.S.C. § 2. As of yet, none of the human rights statutes or other general criminal statutes allow for liability under a "command responsibility" theory, wherein upper level officers may be held responsible for the abuses of those they supervise, where they know about such abuses and fail to stop them. *See* Amy J. Sepinwall, *Failures to Punish: Command Responsibility in Domestic and International Law*, 30 Mich. J. Int'l L. 251, 261 (2009).

178 The Department of Justice established the HRSP in 2009, after Congress enacted the Human Rights Enforcement Act of 2009. The office also may prosecute crimes related to human rights violations, including fraud. Human Rights and Special Prosecutions Section, U.S. Dept. of Justice http://www.justice.gov/criminal/hrsp/ (last visited Nov. 16, 2013).The Human Trafficking Prosecuting Unit of the DOJ's Civil Rights Division, prosecute human trafficking cases. *Human Trafficking Prosecution Unit*, U.S. Dep't. of Justice. http://www.justice.gov/crt/about/crm/htpu.php (last visited Nov. 16, 2013).

179 Apparently, the only conviction of a specific human rights violation thus far was against Chuckie Taylor for torture. *See* U.S. Dep't. of Justice Criminal Div., Human Rights & Special. Prosecutions Section 2 *available at* http://www.justice.gov/criminal/hrsp/additional-resources/2012/HRSP-Brochure-HRV-Rev-912.pdf (last modified Sept. 2012).

180 Consultation, in Washington, D.C. (June 24, 2013).

181 *See* Press Release, Department of Justice, Chiquita Brands International Pleads Guilty to Making Payments to a Designated Terrorist Organization and Agrees to Pay $25 Million Fine, (Mar. 19, 2007), *available at* http://www.justice.gov/opa/pr/2007/March/07_nsd_161.html.

[182] The ATS lawsuit alleges, inter alia, that by funding the AUC, Chiquita aided and abetted human rights abuse including extrajudicial killings, war crimes, and other international law violations. The criminal component of this case in which Chiquita pled guilty was not prosecuted by HRSP, but by another division within DOJ. 18 U.S.C. § 2339A-B. Doe v. Chiquita Brands Int'l, Inc., Case No. 12-14898-B (11th Circ. 2013).

[183] Office for Victims of Crime, *Victim Compensation*, Office of Just. Programs, http://ovc.ncjrs.gov/topic.aspx?topicid=58 (last visited Nov. 16, 2013).

[184] *Crime Victim Compensation*, Catalog of Fed. Domestic Assistance, https://www.cfda.gov/?s=program&mode=form&tab=step1&id=64527cda3113be6597c4cd105368de71 (last visited Nov. 16, 2013).

[185] The only exception is for victims of international terrorism who are U.S. contractors. Int'l Terrorism Victim Expense Reimbursement Program, *Who Is Eligible?*, Office of Justice Programs, http://www.ojp.usdoj.gov/ovc/itverp/eligibility.html (last visited Nov. 16, 2013).

[186] See 18 U.S.C. § 1801; § 2441; § 2340A; § 2442.

[187] 18 U.S.C. § 1091.

[188] *See, e.g.*, Council Framework Decision 2002/629/JHA, art. 6(2), 2002 O.J. (L 203) 1 [hereinafter Council Framework Decision-Combatting Terrorism], *amended by* Council Framework Decision 2008/919/JHA, 2008 O.J. (L 330) 221; Council Framework Decision 2002/629/JHA, 2002 O.J. (L 20) 1; Council Framework Decision 2004/68/JHA, 2004 O.J. (L 13) 44; Council Decision 2000/375/JHA, 2000 O.J. (L 138) 1. Even before the adoption of the Lisbon Treaty, the European Community adopted so called Green Crimes Directive, justifying it by the need ensure the effective implementation of a Union policy in an area which has been subject to harmonized rules, *see* Council Directive 2008/99, 2008 O.J. (L 328) 28-37 (EC).

[189] Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

[190] *Id.*

[191] *See* Council Framework Decision-Combatting Terrorism, *supra* note 188; Report from the Commission based on Art. 11 of the Council Framework Decision of 13 June 2002 on Combating Terrorism, SEC (2007) 1463, art. 1-4, 9, COM (2007) 681; Report from the Commission to the Council and the European Parliament Based on Art. 10 of the Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, SEC (2006) 525, COM (2006) 187.

[192] *FIDH and LDH File a Complaint Concerning the Responsibility of the Company AMESYS in Relation to Acts of Torture*, FIDH (July 11, 2013), http://www.fidh.org/en/north-africa-middle-east/Libya/FIDH-and-LDH-file-a-complaint.

[193] Fédération des ligues des droits de L'Homme, Amesys Case: The Investigation Chamber Green Lights the Investigative Proceedings on the Sale of Surveillance Equipment by Amesys to the Khadafi Regime (2013), *available at* http://www.fidh.org/spip.php?page=article_pdf&id_article=12752 [hereinafter FIDH Amesys].

[194] *See* Matt Rice, *A Giant Leap Backwards: Corporations Divesting Toxic Surveillance Companies*, Privacy Int'l (Oct. 25, 2013), https://www.privacyinternational.org/blog/a-giant-leap-backwards-corporations-divesting-toxic-surveillance-companies.

[195] Paul Sonne & David-Gauthier-Villars, *Tech Firm Amesys Faces French Judicial Probe*, Wall St. J., (May 22, 2012), *available at* http://online.wsj.com/news/articles/SB10001424052702304791704577420392081640000.

[196] FIDH Amesys, *supra* note 193.

[197] *Id.*

[198] *Opening of a Judicial Inquiry Targeting Amesys for Complicity in Acts of Torture in Libya*, Fédération internationale des ligues des droits de L'Homme http://www.fidh.org/en/north-africa-middle-east/libya/Opening-of-a-judicial-inquiry (last updated July 11, 2013).

[199] Sr art. 51 (Neth.).

[200] *What does the Public Prosecution Service Do?*, Openbaar Ministrie, http://www.om.nl/vast_menu_blok/english/about_the_public/what_does_the_public/ (last visited Nov. 19, 2013).

[201] *Geen verder onderzoek naar kraanverhuurder,* Openbaar Ministrie, (May 14, 2013), http://www.om.nl/actueel/nieuws-persberichten/@160903/verder-onderzoek/.

[202] International Crimes Act (*Wet Internationale Misdrijven*): Act of June 19, 2003, Staatsblad No. 270 (2003).

[203] *The Case Against Riwal: Corporate Complicity in International Crimes*, Al-Haq, (Oct. 16, 2010), http://www.alhaq.org/advocacy/targets/accountability/71-riwal/307-the-case-against-riwal-corporate-complicity-in-international-crimes-.

[204] The letter of the Dutch public prosecutor explaining its decision to dismiss this case can be found on the website of the NGO Al-haq, a Palestinian human rights NGO on whose behalf the complaint was made to the Dutch prosecutor concerning the activities of Riwal and the parent-company. *See* Letter from Public Prosecutor A.R.E. Schram to Mr. B.C.W. van Elijck (Translation from Dutch Original) 3 (May 13, 2013), *available at* http://www.alhaq.org/images/stories/Brief_Landelijk_Parket_13-05-2013_ENG__a_Sj_crona_Van_Stigt_Advocaten.pdf [hereinafter "Letter from Public Prosecutor"].

[205] Nadia Bernaz, *Investigative or Political Barriers? Dutch Prosecutors Dismisses Criminal Complicity Case Against Riwal*, Rights as Usual (May 29, 2013), http://rightsasusual.com/2013/05/investigative-or-political-barriers-dutch-prosecutor-dismisses-criminal-complicity-case-against-riwal/.

[206] Letter from Public Prosecutor, *supra* note 204, at 3.

[207] *Id.*

[208] *Id.*

[209] For more information, see the DLH case study, *infra* Appendix.

[210] For more information, see the Amesys case study, *infra* Appendix.

[211] *See* David Ormerod & The Right Hon. Lord J. Hooper, Blackstone's Criminal Practice 162 (2012).

[212] Corporate Manslaughter and Corporate Homicide Act, 2007, c,19 § 28 (U.K.).

[213] Press Release, U.K. Home Office, Human trafficking: Tough sentences to help end modern slavery, (Oct. 18, 2013) *available at* https://www.gov.uk/government/news/human-trafficking-tough-sentences-to-help-end-modern-slavery .

[214] *See* Serious Crime Act, 2007, c.27 §§ 44-46, 52 (U.K.). Under Section 52 and paragraph 2 of Schedule 4 of the Serious Crime A, a person who through his actions in the United Kingdom encourages or assists the commission of conduct which constitutes an offence in the territory in which that conduct occurs will be guilty of an offence under the SCA. In such a case there is no requirement for the conduct that was encouraged or assisted to constitute an offense in the United Kingdom.

[215] *Id.* § 53.

[216] Org. Econ. Co-operation & Dev., OECD Working Group on Bribery Annual Report 2008 43 (2008), *available at* http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/44033641.pdf. The U.K. Was criticized for failing to comply with the requirements of the OECD Anti-Bribery Convention.

[217] Report from the Commission based on Art. 9 of the Council Framework Decision of 22 July 2003 on combating corruption in the private sector, COM (2007) 328 final (June 18, 2007).

[218] Bribery Act, 2010, c. 23 (Eng.). The Bribery Act 2010 came into force in the UK on 1 July 2011. For the guidance to the Act, *see* Ministry J., The Bribery Act 2010 – Guidance (2010), *available at* http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

[219] *Id.* § 1.

[220] *Id.* § 2.

[221] *Id.* § 6.

[222] *Id.* § 12(2). The U.K. courts will have jurisdiction over a person with a close connection to the United Kingdom. *Id.* § 12(2)(b). Furthermore, a person is also defined as an individual ordinarily resident in the United Kingdom, or a body incorporated under the law of any part of the United Kingdom. *Id.* § § 12(4)(g); 12(4)(h).

[223] *Id.* § 12(1).

[224] *Id.* § 7.

[225] *Id.* § 7(5). This section defines a relevant commercial organization as, (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.

[226] *See* C.H. Brants-Langeraar, *Consensual Criminal Procedures: Plea and Confession Bargaining and Abbreviated Procedures to Simplify Criminal Procedure*, 11.1 Elec. J. Comp. L. *1, *9, *available at* http://www.ejcl.org/111/art111-6.pdf; Consultative Council of European Judges (CCJE) and Consultative Council of European Prosecutors, *Bordeaux Declaration – Judges and Prosecutors in a Democratic Society*, CM(2009)192, *available at* https://wcd.coe.int/ViewDoc.jsp?id=1560897&site=CM#P30_883.

[227] Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings, 2001/220/JHA, 2001 O.J. (L 82).

[228] This information must comprise at least information about: types of support and services or organizations available for victims; places and formalities for reporting an offence as well as the ensuing procedures; conditions for obtaining protection; conditions for access to legal or other advice and aid; requirements for receiving compensation; arrangements available for non-residents. The EU Member States should ensure that communication difficulties regarding understanding of and involvement in criminal proceedings are minimal for victims that have the status of witnesses or parties to the proceedings. *Id.*

[229] Council Directive 2004/80/EC of 20 April 2004 relating to Compensation to Crime Victims, 2004 O.J. (L 261) 15.

[230] 2010 O.J. (L 315) 57.

[231] John H. Langbien, *Controlling Prosecutorial Discretion in Germany*, 41(3) U. Chi. L. Rev. 439, 463 (1974).

[232] Brants-Langeraar, *supra* note 226, at *10.

[233] Kerstin Braun, *Giving Victims a Voice: On the Problems of Introducing Victim Impact Statements in German Criminal Procedure*, 14(9) German L. J. 1889, 1891 (2013).For examples of prosecutors declining to pursue these types of cases, see the DLH and Amesys case studies, *infra* in the Appendix.

[234] For examples of prosecutors declining to pursue these types of cases, see the DLH and Amesys case studies, *infra* Appendix.

[235] *France*, European Justice, https://e-justice.europa.eu/content_rights_of_victims_of_crime_in_criminal_proceedings-171-FR-maximizeMS-fr.do?clang=fr&idSubpage=1&member=1 (last visited Nov. 26, 2013).

[236] C. pén. 40-2; C. pr. pen. 40-3 (Fr.).

[237] Consultation, in Brussels (May 15, 2013).

[238] *See* Council of Europe, Victims: Support and Assistance 241 (2008).

[239] *Bribery Act, Supra* note 218.

[240] *Id.* § 9.

[241] *Consents to Prosecute – Principle*, Crown Prosecution Serv., http://www.cps.gov.uk/legal/a_to_c/consent_to_prosecute/ (last visited Nov. 19, 2013).

[242] Strafgesetzbuch [StGB], Code penal suisse [Cp], Codice penale svizzero [Cp] [Criminal Code], Dec. 21, 1937, RS 311, art. 102 (Switz.).

[243] *Id.* § 102(1).

[244] *Id.* § 260(3).

[245] *Id.* § 260(5).

[246] *Id.* § 305(1).

[247] *Id.* § 322(3).

[248] *Id.* § 322(5).

[249] *Id.* § 102(2).

[250] *Id*.

[251] The "law of nations" is generally equated with customary international law. The Estrella, 17 U.S. 298, 307-308 (1819) (referring to non-treaty-based law of nations as the "the customary . . . law of nations"); Flores v. Southern Peru Copper Corp.**,** 414 F.3d 233, 237 n.2 (2d Cir. 2003).

[252] Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004).

[253] *Id.* at 725.

[254] As discussed *infra*, judges differ on whether international law or domestic law proves the rule of decision for other aspects of claims brought under the ATS, such as whether businesses can be liable, whether aiding and abetting is cognizable claim, and in determining the standards for aiding and abetting.

[255] For example, state courts throughout the 1800s applied certain aspects of the law of nations to cases before them, typically cases that arose out of the law of war. Many of these cases were brought under state tort law, however, the courts looked to customary international law – typically the law of war – in determining rights and defenses of the defendant, demonstrating that such was seen as part of their common law. *See, e.g.,* Cochran v. Tucker**,** 43 Tenn. 186 (1866) (court looked to the law of war with regard to belligerent rights finding that such rights did not allow attack on civilians); Hedges v. Price, 2 W.Va. 192 (1867); Caperton v. Martin, 4 W. Va. 138 (1870); Johnson v. Cox, 3 Ky. Op. 599 (1869); Ferguson v. Loar, 68 Ky. 689 (1869); Bryan v. Walker, 64 N.C. 141 (1870); and Koonce v. Davis, 72 N.C. 218 (1875).

As another example, the Oregon Supreme Court has said that "When our nation signed the Charter of the United Nations we thereby became bound to the following principles (Article 55, subd. c, and see Article 56): 'Universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.'" Namba v. McCourt**,** 204 P.2d 569, 579.

[256] In *Sosa*, the Supreme Court noted that under the ATS, one question "is whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732, n. 20.

[257] Kiobel v. Royal Dutch Petroleum, 621 F.3d 111, 145 (2010).

[258] Kiobel v. Royal Dutch Petroleum, Co.**,** 133 S.Ct 1659, 1663 (noting that the Court granted certiorari to consider the corporate liability question, and acknowledging it answered a different question regarding the extraterritorial application of the ATS).

[259] *See id.* at 1669.

[260] *See, e.g.*, Doe v. Exxon**,** 654 F.3d 11, 41 (D.C. Cir. 2011), vacated on other grounds in light of *Kiobel*, 2013 WL 3970103 (D.C. Cir. 2013) (rejecting the Second Circuit s analysis that businesses cannot be liable under the ATS); Sarei v. Rio Tinto, 671 F.3d 736, 747 (9th Cir. 2011), vacated on other grounds in light of Kiobel, 133 S.Ct. 1995 (2013) (declining to follow the Second Circuit and finding businesses can be liable under the ATS); Sinaltrainal v. Coca–Cola Co**.,** 578 F.3d 1252, 1263 (11th Cir. 2009) ("In addition to private individual liability, we have also recognized corporate defendants are subject to liability under the ATS and may be liable for violations of the law of nations."); Romero v. Drummond Co., Inc**.,** 552 F.3d 1303, 1315 (11th Cir.2008) ("The text of the Alien Tort Statute provides no express exception for corporations, and the law

of this Circuit is that [ATS] grants jurisdiction from complaints of torture against corporate defendants."); Al–Quraishi v. Nakhla, 728 F. Supp. 2d 702, 753 (D. Md. 2010) ("There is no basis for differentiating between private individuals and corporations [under the ATS]...."); In re S. African Apartheid Litig., 617 F.Supp.2d 228, 254–55 (S.D.N.Y. 2009) (Scheindlin, J.) (rejecting argument that corporate liability cannot be imposed under the ATS); In re XE Servs. Alien Tort Litig., 665 F.Supp.2d 569, 588 (E.D.Va.2009) ("Nothing in the ATS or *Sosa* may plausibly be read to distinguish between private individuals and corporations; indeed, *Sosa* simply refers to both individuals and entities as 'private actors.' ... [T]here is no identifiable principle of civil liability which would distinguish between individual and corporate defendants in these circumstances." (internal citations omitted)); In re Agent Orange Prod. Liab. Litig., 373 F.Supp.2d 7, 58 (E.D.N.Y. 2005) ("A corporation is not immune from civil legal action based on international law."); Presbyterian Church of Sudan v. Talisman Energy, Inc., 374 F.Supp.2d 331, 335 (S.D.N.Y. 2005) ("Talisman's argument that corporate liability under international law is not ... sufficiently accepted in international law to support an ATS claim is misguided."); Talisman, 244 F.Supp.2d 289, 319 (S.D.N.Y. 2003) ("A private corporation is a juridical person and has no *per se* immunity under U.S. domestic or international law.... [W]here plaintiffs allege *jus cogens* violations, corporate liability may follow."); cf. In re S. African Apartheid Litig., at *2 (S.D.N.Y. Dec. 31, 2009) (denying motion for certification of interlocutory appeal, because there are not "substantial grounds for disagreement on the issue of whether ATS extends liability to corporations").

261 "The idea that corporations are "persons" with duties, liabilities, and rights has a long history in American domestic law." *Kiobel*, 621 F.3d at 117, n. 11 (citing N.Y. Cent. & Hudson River R.R. Co. v. United States, 212 U.S. 481, 492 (1909).

262 *See* Abdelrazik v. Att'y Gen. of Canada & Cannon, [2010] T-1580-09 (F.C.) (Statement of Claim)(Can..), *available at* http://ccij.ca/webyep-system/program/download.php?FILENAME=74-4-at-File_Upload_6.pdf&ORG_FILENAME=Abdelrazik_Judgment%28Aug30-10%29.pdf.

263 R v. Hape, 2007 SCC 26, 2 S.C.R. 292 (Can.).

264 *Id.* ¶¶ 35-36, 39 ("In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary.") The case was not a human rights case, but involved criminal money laundering.

265 Bil'in (Village Council) c. Ahmed Issa Yassin, 2009 QCCS 4151, 2009 R.J.Q. 2579 ¶ 175-76 (Can.).

266 *Id.*

267 *Forum non conveniens* is discussed in more detail, *supra* Issue 2.

268 For studies comparing the status of the European Convention on Human Rights in different national legal orders, *see* Fundamental Rights in Europe: The ECHR and Its Member States, 1950-2000 (Robert Blackburn and Jörg Polakiewicz eds., 2001); A Europe of Rights: The Impact of the ECHR on National Legal Systems (Helen Keller and Alec Stone Sweet eds., 2008).

269 One claim in the *Ocensa Pipeline Litigation* was for a breach of a contract. *See* Arroyo v. BP Exploration Co. (Colom.) Ltd. [2010] EWHC 1643 (QB) (May 6, 2010) (U.K.).

270 In order to make out a negligence claim in the United Kingdom there are a number of key elements:

The defendant acted or omitted to act.

The act or omission caused loss and damage to the claimant.

In all the circumstances the defendant owed a duty of care to act or not to act. In this regard: (a) the damage must be reasonably foreseeable; (b) there must be a sufficient relationship of proximity between the claimant and defendant; (c) it must be just, fair and reasonable to impose liability on the defendant.

The defendant's actions or omissions breached the duty of care in that they were below the standard of care objectively expected in the circumstances.

The loss and damage was sufficiently foreseeable and of a type which U.K. law recognizes.

See Clerk & Lindsell on Torts ch.8 (M. Jones and A. Dugdale, eds. 2010) [hereinafter Clerk & Lindsell].

271 This is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of his ownership or occupation of land or of some easement, profit or other right used or enjoyed in connection with land (a private nuisance); or a right belonging to him as a member of the public (a public nuisance). *See* Clerk & Lindsell, *supra* note 270, at ch. 20.

272 This includes assault, battery and false imprisonment, committed negligently or intentionally. There is also a tort of intimidation, where there is a threat of violence. *See* Stroud Milsom, *Trespass from Henry III to Edward III*, 74 L. Q. Rev. 195, 207-10, 407, 561, (1958).

273 This could be due to a breach of confidence or misuse of personal information. There is also a possible claim under Article 8 of the ECHR ("Everyone has the right to respect for his private and family life, his home and his correspondence.") European Convention on Human Rights, *supra* note 94, at art. 8.

274 This arises in the limited situation where a person who, for his own purposes, brings on his land and collects and keeps there anything "non-natural" likely to do harm if it escapes is *prima facie* answerable for all the damage which is a foreseeable consequence of the escape, regardless of whether he is at fault. Cambridge Water Co. v Eastern Countries Leather Plc [1994] 2 AC 264 (U.K.). *See also* Mehta v Union of India, A.I.R. 1987 SC 965 (India).

275 These primarily relate to employment issues or product liability, including the Employers Liability Defective Equipment Act 1969, the Occupiers Liability Act 1984, the Environmental Protection Act 1990, and some consumer protection legislation.

276 Occasionally the ECHR has been referred to in arguments but it has not been decisive. *See* Lubbe v. Cape plc, 4 All ER 268 (HL) 277, U.K. House of Lords (2000). Also note that in *Yukos Capital SARL v. OJSC Rosneft Oil Co.*, the UK Court of Appeal held that they could investigate the allegation of lack of independence of the Russian courts. Yukos Capital SARL v. OJSC Rosneft Oil Co. (No 2) [2012] EWCA Civ 855, [2013] 1 All ER (Comm) 327. As to the possibility of reliance on Article 6 (fair trial) of the ECHR see note 94, *supra*.

277 Guerrero v. Monterrico Metals plc [2009] EWHC 2475 (QB). For more information on this case, please see also the case study, *infra* in the Appendix.

278 This is especially true for Guiding Principles 12 and 14. *See* Robert McCorquodale, *Waving Not Drowning: Kiobel Outside the United States*, 107 Am. J. Int'l L. (forthcoming Dec. 2013).

279 *Compare, e.g.,* Khulumani v. Barclay Nat. Bank, 504 F.3d 254, 268, 277 (2007) (Katzmann, C.J., concurring) (looking to international law and finding liability exists for aiding and abetting, and also finding that it requires practical assistance with the purpose to violate norm) *with id.* at 336-37, (Korman, J., concurring in part, dissenting in part) (looking to international law to determine norm, and finding that the determination of whether aiding and abetting liability exists is to be determined on a case by case basis; and where it does exist, it requires substantial assistance with knowledge of the common purpose).

280 Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009).

281 Doe v. Exxon, 654 F.3d 11, 32, vacated on other grounds in light of *Kiobel*.

282 *Id.*, at 33-35, 39.

283 *Khulumani*, 504 F.3d at 284, 288-89 (J. Hall, concurring).

284 Halberstam v. Welch, 705 F.2d 472 (D.C. 1983).

285 Restatement (Second) of Torts § 876(b) (1979).

286 IT-04-81-A (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

287 SCSL-03-01-A (10766-11114) (Special Court for Sierra Leone Sept. 26, 2013).

288 It is possible that some courts will find that knowledge with substantial assistance is evidence of purposeful intent even if they adopt the purpose.

289 U.S. courts have found that the ten-year statute of limitations applicable to claims under the Torture

Victim Protection Act applies to claims under the ATS. *See, e.g.*, Chavez v. Carranza, 559 F.3d 486, 492 (6th Cir. 2009); Jean v. Dorelien, 431 F.3d 776, 778 (11th Cir. 2005); Van Tu v. Koster, 364 F.3d 1196, 1199 (10th Cir. 2004); Papa v. United States, 281 F.3d 1004, 1012-13 (9th Cir. 2002).

290 *See, e.g.*, *Chavez* 559 F.3d at 492 ("Likewise, the justifications for the application of the doctrine of equitable tolling under the TVPA apply equally to claims brought under the ATS. Congress provided explicit guidance regarding the application of equitable tolling under the TVPA. The TVPA 'calls for consideration of all equitable tolling principles in calculating this [statute of limitations] period with a view towards giving justice to plaintiff's rights.'"); *Jean*, 431 F.3d at 778 ("However, this statute of limitations is subject to the doctrine of equitable tolling.").

291 *See, e.g.*, Cal. Civ. Proc. Code § 355.1 (West 2013); N.Y.C.P.L.R. 215 (McKinney 2006).

292 *See, e.g.*, Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/Conf. 183/9 (1998).

293 Barton Legum, Resolution 107A, A.B.A. Sec. Int'l. L. Rep. (*adopted by the House of Delegates* August 2013).

294 Commission Regulation 864/2007, art. 4, 2007 O.J. (L 199) 40. [hereinafter Rome II Regulation].

295 U.N. General Assembly, *Report of the International Law Commission Fifty-third Session*, art. 6, U.N. Doc. A/56/10 (Aug. 21, 2001) [hereinafter *ILC Articles*]. *See also* Robert McCorquodale & Penelope Simons, *Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law*, 70 Mod. L. Rev. 598 (2007).

296 *ILC Articles*, *supra* note 295, at art. 5.

297 James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries 74, 91-121 (Cambridge Univ. Press 2002).

298 *See ILC Articles*, *supra* note 295, at art. 11. Businesses may wish their actions to be attributable to the State in order to avoid national legal claims, and yet at the same time claim that they are private entities.

299 U.N. Gen. Assembly, *Report of the International Law Commission*, 81, U.N. Doc. A/56/10, 53d Sess. (2001) ("[A] receiving state is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure or to regain control over it."). *See also* Case Concerning United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), 1980 I.C.J. 3 ¶¶ 2, 8(a), 63, 68-71.

300 In *Samantar v. Yousuf*, 560 U.S. 305 (2010), the United States Supreme Court held that the Foreign Sovereign Immunities Act does not apply to individual officers, but also held that such officers may still be protected by foreign sovereign immunity as a matter of federal common law.

301 580 F.3d 1, 9, (D.C. Cir. 2009). A panel of the Fourth Circuit Court of Appeals had also made this same ruling with regard to *Al Shimari* before that decision was overturned by the entire Fourth Circuit, en banc, on the grounds that it did not have jurisdiction to hear the appeal. Al Shimari v. CACI Int'l, Inc., 658 F.3d 413 (4th Cir. 2011), *overruled by* Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012).

302 The court also dismissed the plaintiffs' ATS claims under the theory that no consensus existed as to whether alleged acts of abuse or torture, inflicted upon Iraqi national detainees by private government contractors working for the U.S. military in Iraq, violated settled norms of international law. *Saleh*, 580 F.3d at 15. Rather than looking at whether the underlying norms violated customary international law norms, the Court focused on whether contractors could be liable as a matter of customary international law.

303 Al Shimari v. CACI Int'l., Inc., No. 1:08-cv-827 (GBL/JFA), 2013 WL 3229720, at *1, *12, *13 (E.D.Va. June 25, 2013).

304 *Id.* at *15.

305 *Id.* at *12-13.

306 Sosa v. Alvarez-Machain, 542 U.S. 692, 733 n.21 (2004) ("Another possible limitation that we need not

apply here is a policy of case-specific deference to the political branches."). In *Sosa*, the Court pointed to an ATS case involving corporate complicity in South Africa's earlier apartheid policy as an example of a case where the doctrine might preclude the courts from adjudicating a case otherwise properly before them.

307 *See* Corrie v. Caterpillar, 503 F.3d 974, 979–80, 983–84 (9th Cir. 2007); Saldana v. Occidental Petroleum Corp., No. CV 11-8957 PA, at *2-4 (C.D. Cal. Feb. 13, 2012); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1164, 1195 (C.D. Cal. 2005); Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 483–85 (D.N.J. 1999); Burger-Fischer v. Degussa AG, 65 F. Supp. 2d 248, 285 (D.N.J. 1999).

308 *See, e.g.*, Whiteman v. Dorotheum GmbH & Co. KG, 431 F.3d 57, 74 (2d Cir. 2005) (dismissing Nazi-era case against an Austrian business to recover property on basis of both political question and case-specific deference doctrines).

309 *See, e.g.*, *Corrie*, 503 F.3d 974.

310 *See, e.g.*, Doe v. Exxon Mobil Corp., 654 F.3d 11, 89 (D.C. Cir. 2011) (discussing Statement of Interest asserting that "adjudication of this lawsuit at this time would in fact risk a potentially serious adverse impact on significant interests of the United States" and could "diminish our ability to work with the Government of Indonesia" in a case alleging that a U.S. oil company used Indonesian soldiers to commit human rights violations); Presbyterian Church of Sudan v. Talisman Energy, Inc., No. 01 Civ.9882(DLC), 2005 WL 2082846, at *1 (S.D.N.Y. Aug. 30, 2005) (discussing Statement of Interest raising concerns about potential impact on foreign relations in a case alleging that the defendant Canadian oil company aided and abetted human rights violations committed by the Sudanese government); Mujica v. Occidental Petroleum Corp., 381 F. Supp. 2d 1134, 1140 (C.D. Cal. 2005) (discussing Statement of Interest opposing the litigation and attaching an objection to the suit by the Colombian government in a case alleging that a U.S. oil company committed human rights abuses in cooperation with Colombian armed forces).

311 European Convention on State Immunity, June 11, 1976, C.E.T.S. No. 074, *opened for signature* May 16, 1972.

312 The eight States that have ratified the instrument include Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland, and the United Kingdom. *European Convention on State Immunity Chart of Signatures and Ratifications*, Council of Europe Treaty Office http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=074&CM=&DF=&CL=ENG (last visited Nov. 23, 2013).

313 European Convention on State Immunity, art. 6, June 11, 1976, C.E.T.S. No. 074.

314 European Convention on State Immunity, art. 7, June 11, 1976, C.E.T.S. No. 074.

315 Doe v. Unocal, Nos. BC 237 980, BC 237 679 (Cal. App. Dep't Super. Ct. June 7, 2002) (order granting summary judgment for defendants in part, granting summary adjudication for defendants in part and denying in part), *available at* http://www.earthrights.org/files/Legal%20Docs/Unocal/TortLiabilityMSARuling.pdf.

316 Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487 (1941).

317 *See, e.g.*, DP Aviation v. Smiths Industries Aerospace and Defense Systems Ltd., 268 F.3d 829, 845 (9th Cir. 2001).

318 In making a choice of law decision in personal injury cases, the principles a court is to consider are:

a. the needs of the interstate and international systems,
b. the relevant policies of the forum,
c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
d. the protection of justified expectations,
e. the basic policies underlying the particular field of law,
f. certainty, predictability and uniformity of result, and
g. ease in determination and application of the law to be applied.

Restatement (Second) of Conflict of Laws § 6 (1971).

[319] Many, if not most, courts apply the "most significant relationships test" to determine which law to apply. In determining which state has the most significant relationship to the occurrence and parties, the contacts that are to be taken into account in applying these principles are: a) the place where the injury occurred; b) the place where the conduct causing the injury occurred; c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and d) the place where the relationship, if any, between the parties is centered. Restatement (Second) Conflict of Laws, § 145 (1971).

[320] Al Shimari v. CACI Int'l, Inc., __ F.Supp.2d __, 2013 WL 3229720, at *1, 12-13, 15 (E.D.Va. 2013).

[321] *See, e.g.*, Alvarez-Machain v. United States, 331 F.3d 604, 635 (9th Cir. 2003), *overturned on other grounds*, Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

[322] Rome II Regulation, *supra* note 294.

[323] 2007 O.J. (L 199) 40.

[324] Rome II Regulation, *supra* note 294, at art. 4(1).

[325] For example, there are exceptions where the harm is manifestly more closely connected with another State and where the claimant and the business share a common "habitual residence." *See id.* at art. 4(3), 4(2).

[326] *Id.* at art. 16.

[327] Miriam Saage-Maass, Labour Conditions in the Global Supply Chain: What is the Extent and Implications of German Corporate Responsibility? 7 (Friedrich Ebert Stiftung, 2011), citing Bundesarbeitsgerichts [BAG] [Federal Labor Court] Dec. 12, 2001, Entscheidungen des Bundesarbeitsgerichts [BAGE] 100,130 to § 14 I MuSchG and § 3 EFZG.

[328] For other examples, see Grabosch, *supra* note 92, at pp. 84-86.

[329] Rome II Regulation, *supra* note 294, at art. 17.

[330] Guiding Principles, *supra* note 1, at princ. 2.

[331] Rome II Regulation, *supra* note 294, at art. 26.

[332] Kuwait Airways Corp. v. Iraq Airways Co., [2002] 2 A.C. 883 ¶ 18 (Eng.).

[333] Consultation, in Washington, D.C. (June 24, 2013).

[334] *Id.*

[335] U.S. Dep't of Justice, Attorney General Guidelines for Victim & Witness Assistance 12 (May 2012), *available at* http://www.justice.gov/olp/pdf/ag_guidelines2012.pdf.

[336] Consultation, in Washington, D.C. (June 24, 2013).

[337] *See* "Civil Claims Linked to Criminal Claims" text box, *supra* Issue 3.

[338] Wetboek van Burgerlijke Rechtsvordering [Rv] art. 150 (Neth.).

[339] *Id.* at art. 843a.

[340] *See Oruma Subpoena*, Milieudefensie, https://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/subpoena-oruma/viewm (last visited Nov. 14, 2013).

[341] *Id.*

[342] Vereniging Milieudefensie/Royal Dutch Shell plc, Rechtbank 's-Gravenhage [District Court of The Hague], Sept. 14, 2011, docket no. 337050/HA ZA 09-1580 (Neth.) ¶¶ 4.8, 4.11, *available at* http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2011:BU3529.

[343] *Id.* ¶ 4.8.

[344] *Lubbe v. Cape plc* [2000] UKHL 41 ¶ 20.

[345] Civil Procedure Rules 1998 31(12) (U.K.).

[346] *Id.* at Rule 18. Note however that disclosure need only be "proportionate," in particular to the value, complexity, and importance of the case.

[347] Vava & Others v. Anglo American South Africa Ltd. [2012] EWHC 1969 (QB) ¶ 69.

[348] Stoll v. Switzerland, Application no. 69698/01, Decision of 10 Dec. 2007 (Grand Chamber of the European Court of Human Rights). This case involved a Swiss journalist, who published two articles using a confidential strategy paper penned by the Swiss Ambassador to the United States concerning the Swiss government's strategy for negotiations between the Swiss banking industry and the World Jewish Congress over compensation to Holocaust victims for unclaimed wartime assets. Stoll was critical of the Ambassador's position, and the Swiss Press Council (the complaints body responsible for media-related issues) found his articles were in breach of the Council's regulations. The European Court of Human Rights found there was no breach of Article 10 (right to freedom of expression).

[349] The Swiss Code of Civil Procedure entered into effect in 2011. Some of these provisions include the justified refusal to cooperate (Article 162), the right to refuse [to cooperate] (Article 163), and the unjustified refusal (Article 164). ***See*** S.C.P.C. arts 162, 163, 164 (Switz.).

[350] S.C.P.C. art. 163(2) (Switz.).

[351] Indeed, this may be one reason victims decide to proceed in the criminal system rather than the civil system in Europe. In addition to other barriers in the civil system, it is more costly and has different evidentiary requirements that make bringing civil suits difficult.

[352] While the filing fees vary by state, the filing fee for opening a civil action in a United States District Court is $400.00. *See* D. S.C., *FEE SCHEDULE*, http://www.scd.uscourts.gov/Resources/fee.asp (last visited Nov. 22, 1963); D. CONN., *FEE & PAYMENT INFORMATION*, http://www.ctd.uscourts.gov/fee-payment-information (last visited Nov. 22, 2013).

[353] Council Directive 2002/8, 2003 O.J. (L 26) 41 [hereinafter Council Directive 2002/8]. The directive is based on Articles 61(c) and 67 EC. These provisions related to judicial cooperation in civil matters. Following the entry into force of the Lisbon Treaty, Article 81(2)(e) of the TFEU now allows for the adoption of legislative measures, "particularly when necessary for the proper functioning of the internal market, aimed at ensuring ... effective access to justice." Consolidated Version of the Treaty on the Functioning of the European Union art. 81(2)(e), Mar. 30, 2010, 2010 O.J. (C 83) 47.

[354] Council Directive 2002/8/EC, *supra* note 353, at pmbl. ¶ 6.

[355] *Id.* at art. 7 This covers interpretation; translation of the documents required by the court or by the competent authority and presented by the recipient which are necessary for the resolution of the case; and travel costs to be borne by the applicant where the physical presence of the persons concerned with the presentation of the applicant's case is required in court by the law or by the court of that Member State and the court decides that the persons concerned cannot be heard to the satisfaction of the court by any other means.

[356] *Id.* at arts. 3(2) & 6.

[357] *Id.* at pmbl. ¶ 6.

[358] *Id.* at art. 4. Article 4 of the directive provides explicitly that "Member States shall grant legal aid without discrimination to Union citizens and third-country nationals residing lawfully in a Member State." Under the directive, these categories of litigants must be eligible for legal aid in cross-border disputes if they meet the conditions provided for by the directive.

[359] In that regard, its provisions may serve as a source of inspiration for the further interpretation of Article 47 of the Charter of Fundamental Rights of the European Union (the right to effective judicial protection), as well as, the right to an effective remedy as a general principle of EU law derived from Articles 6 and 13 of the European Convention on Human Rights. The Court of Justice of the European Union has regularly affirmed the right to effective judicial protection extends to all rights attributed under EU law. *See* Case C-364/07, Vassilakis and Others v. Dimos Kerkyras, 2008 E.C.R. I-90; Case C-362/06, Sahlstedt and Others v. Commission, 2009 E.C.R. I-2903; Case C-378/07, Angelidaki and Others v. Organismos Nomarkhiaki Aftodiikisi Rethimnis, 2009 E.C.R. I-3071.

[360] The goals of a SLAPP suit are typically to intimidate and silence critics. Typically they are defamations suits, but they can also include other claims, such as fraud and malicious prosecution. Many states (at last count, 27) have enacted anti-SLAPP statutes. Such statutes provide such defendants with procedural and substantive defenses meant to prevent meritless suits from imposing significant litigation costs.

[361] The case was in trial at the time of the publication of this report. Chevron v. Donziger, No. 11 Civ. 0691 (LAK), 2013 WL 5575833, at *1 (S.D.N.Y. Oct. 10, 2013).

[362] Chevron v. Bonifaz, No. 09-05371 CW, 2010 WL 1948681, at *1 (N.D.Cal. May 12, 2010).

[363] *Id.*

[364] Baloco *ex rel.* Tapia v. Drummond Co., 640 F.3d 1338 (11th Cir. 2011).

[365] Doe v. Drummond Co., Inc., No. 7:09–CV–01041–RDP, 2009 WL 9056091, at *1 (N.D.Ala. Nov. 9, 2009).

[366] Giraldo v. Drummond Co., Inc., No. 2:09–CV–1041–RDP, 2013 WL 3873960, at *1 (N.D.Ala. July 25, 2013). This case was recently dismissed pursuant to *Kiobel.*

[367] *See* Drummond Co., Inc. v. Collingsworth, No. 2:11-cv-3695-RDP (N.D. Ala.).

[368] *See* Mike Scarcella, *Human Rights Lawyer Fights Drummond Over Subpoena*, The BLT: The Blog of Legal Times (August 19, 2013, 4:04 PM), http://legaltimes.typepad.com/blt/2013/08/human-rights-lawyer-fights-drummond-over-subpoenas.html.

[369] Godin v. Schencks, 629 F.3d 79 (1st Cir. 2010) (overturning district court); Henry v. Lake Charles Am. Press, LLC, 566 F.3d 164 (5th Cir.2009) (overturning district court); U.S. *ex rel.* Newsham v. Lockheed Missiles & Space Co., Inc., 190 F.3d 963 (9th Cir. 1999) (overturning district court and holding, as matter of first impression, that California's anti-SLAPP statute may be applied in federal diversity suits).

[370] 3M Co. v. Boulter, 842 F .Supp. 2d 85 (D.D.C. 2012).

[371] Intercon Solutions, Inc. v. Basel Action Network, No. 12 C 6814, 2013 WL 4552782, at *1 (N.D.Ill. Aug. 28, 2013).

[372] S. Middlesex Opportunity Council, Inc. v. Town of Framingham, Civil Action No. 07-12018-DPW, 2008 WL 4595369, at *1 (D. Mass. Sept. 30, 2008).

[373] Law No. 91-647 of July 10, 1991, art. 3, Journal official de la République de Française [J.O.] [Official Gazette of France], July 13, 1991, p. 9170 (" . . . à titre exceptionnel, . . . lorsque leur situation apparaît particulièrement digne d'intérêt au regard de l'objet du litige ou des charges prévisibles du procès.); C. péc art. 3.

[374] Law No. 2010-769 of July 8, 2010, art. 15, Journal official de la République de Française [J.O.] [Official Gazette of France], July 10, 2010, p. 12763 ("L'aide juridictionnelle est accordée sans condition de résidence aux étrangers lorsqu'ils sont mineurs, témoins assistés, inculpés, prévenus, accusés, condamnés ou parties civiles.").

[375] These were introduced as § 4a of the Attorney Remuneration Act. Grabosch, *supra* note 92, at 84-86.

[376] Wet op de rechtsbijstand art. 12(1), Stb. 1993.

[377] Oguru et al./ Royal Dutch Shell plc, Rechtbank 's-Gravenhage [RG] [District Court of The Hague], 30 januari 2013, docket no. C/09/330891 (Neth.), *available at* https://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-oguru-vs-shell-oil-spill-goi. *See* case study *infra.*

[378] Consultation, in Brussels (May 15, 2013).

[379] *Id.*

[380] Liesbeth F. H. Enneking, Foreign Direct Liability and Beyond 257 (2012) (quoting a report of the WODC written by Faure and Moerland in 2006 on the issue of the costs of litigating in the Netherlands).

[381] Rv 79(2).

[382] Enneking, *supra* note 380, at 257-258. The Dutch Shell litigation is a case in point. The judgment

was rendered in January 2013 only four years after the proceedings started. Compared to cases in other jurisdictions this must be considered quick.

383 Gedragsregels R. 25, *available at* http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/Netherlands_EN_Code_1_1236161752.pdf (last visited Nov. 23, 2013.)

384 Legal Aid, Sentencing and Punishment of Offenders Act, 2012, c. 10 (Eng.) [hereinafter LASPO]. *See also* Ministry J., Transforming Legal Aid: Delivering a more credible and efficient system (2013), https://consult.justice.gov.uk/digital-communications/transforming-legal-aid (last visited Nov. 23, 2013) (on the latest policy decisions made in September 2013); Jim Duffy, *"Good lawyers save money": Supreme Court President Weighs in on Legal Aid*, U.K. Hum. Rts. Blog (June 19, 2013), http://ukhumanrightsblog.com/2013/06/19/good-lawyers-save-money-supreme-court-president-weighs-in-on-legal-aid/ (for the response of the UK Supreme Court President to the government policies).

385 Courts and Legal Services Act, 1990, c. 41, §§ 58, 58A (Eng.).

386 Civil Rules and Practice Directions, Practice Direction 44, § 9.1 (U.K.).

387 Goldhaber, *supra* note 161, at 131.

388 *See* LDIP, art. 11c (Switz.), *revised by* Zivilprozessordnung [ZPO], Code de procédure civil [CPC], Codice di procedura civile [CPC] Dec. 19, 2008, SR 272, RS 210, annex 1, ch. II(18) (Switz.) (adopted on 19 Dec. 2008) ("L'assistance judiciaire est accordée aux personnes domiciliées à l'étranger aux mêmes conditions qu'aux personnes domiciliées en Suisse.").

389 Child Rights Network Switzerland, Umsetzung der Menschenrechte in der Schweiz. Eine Bestandaufnahme im Bereich Menschenrechte und Wirtschaft 43-44 (2013), *available at* http://www.netzwerk-kinderrechte.ch/index.php?id=71&L=0&tx_ttnews%5Byear%5D=2013&tx_ttnews%5Bmonth%5D=09&tx_ttnews%5Btt_news%5D=305&cHash=6f91cb68b6ef197474f160b3e57be858.

390 Consultation, in Brussels (May 15, 2013).

391 Al Shimari v. CACI Int'l, Inc., --- F.Supp.2d ----, 2013 WL 3229720 (E.D.Va.,2013).

392 Bill of Costs, Al Shimari v. CACI Int'l, Inc. No. 1:08-CV-827 (GBL/JFA) (E.D. Va. Aug. 20, 2013).

393 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Oct. 30, 2001, 2161 U.N.T.S. 447. The Convention was approved on behalf of the European Community on 17 February 2005. Council Decision 2005/370, 2005 O.J. 2005 (L 124) 1.

394 *Id.* at §§ 4, 5 (emphasis added). According to Article 10a of Directive 85/337 and Article 15a of Directive 96/61, which concern respectively the assessment of the effects of certain public and private projects on the environment and integrated pollution prevention and control, both adopted to implement the Aarhus Convention into EU law. *See* Council Directive 85/337, 1985 O.J. (L 175) 40 (EEC) and Council Directive 96/61/ 1996 O.J. (L 257) 26 (EC), *amended by* Directive 2003/35 2003 O.J. (L 156) 17 (EC); *see also* Directive 2011/92, art. 11(4) 2012 O.J. (L 26) 1 (EU) (codifying Directive 85/337) and Art. 16(4) of Directive 2008/1, art. 16(4), 2008 O.J. (L 24) 8 (EC), which both contain provisions identical to those cited.

395 Case C-260/11, Edwards & Pallikarapoulos v. Environment Agency ¶ 33 (2013).

396 *Id.* ¶ 35.

397 *Id.* ¶ 40. Among the factors that national courts may take into account in this regard, are "the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the [public interest, such as the protection of the environment, that the private claim may contribute to,] the complexity of the relevant law and procedure and the potentially frivolous nature of the claim at its various stages." *Id.* ¶ 42. Also taken in to consideration is the existence of a national legal aid scheme or a costs protection regime. *Id.* ¶ 46.

398 For a recent discussion on public interest litigation and costs, *see* Chris Tollefson, *Costs in Public Interest Litigation Revisited,* 39 Advoc. Q. 197(2012).

399 *See* Quebec, An Act Respecting the Class Action, R.S.Q. c.R-2.

400 *See, e.g.,* Rv. 237 art. (Neth.), ZPO art. 91 (F.R.G.), C.P.C. art. 700 (Fra.).

401 Cour d'appel [CA] [regional court of appeal] Versailles, 3e ch., Mar. 22, 2013 (Fr.), *available at* http://www.volokh.com/wp-content/uploads/2013/04/French-Ct-decision.pdf.

402 LASPO, *supra* note 384.

403 *Id.* § 44.

404 Rome II Regulation, *supra* note 294, at arts. 4 & 15.

405 Owen Bowcott, *Legal aid cuts will stop cases like Trafigura, UN Official warns*, Guardian (June 15, 2011, http://www.theguardian.com/law/2011/jun/16/united-nations-legal-aid-cuts-trafigura (citing a letter sent by John Ruggie, the Special Representative of the Secretary-General for Business and Human Rights to the UK Justice Minister Jonathon Djanogly on 16 May 2011).

406 Human Rights Watch, Gold's Costly Dividend: Human Rights Impacts of Papua New Guinea's Porgera Gold Mine (2011), *available at* http://www.hrw.org/sites/default/files/reports/png0211webwcover.pdf.

407 *Id.* at 9.

408 *Id.* at 63, 84-91.

409 *Global Condemnation of Barrick's Effort to Secure Legal Immunity from Rape Victims*, Mining Watch Canada (June 4, 2013), http://www.miningwatch.ca/article/global-condemnation-barrick-s-effort-secure-legal-immunity-rape-victims [hereinafter *Global Condemnation*].

410 *Update on Addressing Violence Against Women in the Porgera Valley (Papua New Guinea)*, Barrick (Oct. 23, 2012), http://www.barrick.com/files/porgera/Update-on-Addressing-Violence-Against-Women-in-the-Porgera-Valley.pdf.

411 *Global Condemnation*, supra *note 409*.

412 *A Summary of Recent Changes to the Porgera Remediation Framework*, Barrick (June 7, 2013) http://www.barrick.com/files/porgera/Summary-of-Recent-Changes-to-the-Porgera-Remediation-Framework.pdf.

413 *Id.* at 4.

414 *Global Condemnation*, supra *note 409*.

415 Guiding Principles, *supra* note 1, at princs. 29, 30 & 31.

416 *Id.* at princ. 29.

417 *Id.*

418 *Id.* at princ. 31, Commentary.

419 U.N. Office of the High Comm'r for Hum. Rts., *Re: Allegations regarding the Porgera Joint Venture remedy framework* (July 2013), http://www.barrick.com/files/doc_downloads/Opinion-of-the-UN-Office-of-the-High-Commissioner-for-Human-Rights.pdf.

420 *Id.*

421 This requirement comes from the "cases and controversies" section of Article III of the U.S. Constitution. The requirement of "injury in fact" for standing is rooted in the separation of the powers and the concept's limitation on the courts' powers. A plaintiff must also show "causation," or that the defendant's conduct was the cause or proximate cause of their injury; and that the harm the victim has suffered could be redressed by a victory in the case. U.S. Const. art. III, § 2.

422 Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977).

423 *See* Powers v. Ohio, 499 U.S. 400, 410 (1991) ("In the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.").

424 *Id.* at 411.

425 Perhaps the largest hurdles with regard to standing are those situations where a family member is suing on behalf of a deceased victim. Defendants often challenge whether the family member has standing to bring the case. Each state has different laws regarding who is allowed to bring a tort action in court on behalf of a victim; federal courts typically apply the law of the state in which they sit. Often, a plaintiff has to set up an estate, and then be appointed the representative of the estate, something that takes time and money (but may be a necessary evil to ensure the proper party is representing the deceased). Some states allow all family members to step in after a certain amount of time has passed and no administrator has been appointed. Moreover, some states allow certain family members to sue on their own behalf for loss of the individual. This is a complex area of the law, and the complexity itself can be a large hurdle.

426 *See, e.g.,* Beanal v. Freeport-McMoRan, Inc., 969 F.Supp. 362, 368 (E.D.La. 1997); In re African-American Slave Descendants Litigation, 304 F.Supp.2d 1027, 1047 (N.D.Ill. 2004); Al-Aulaqi v. Obama, 727 F.Supp.2d 1, 25 (D.D.C. 2010); Yaodi Hu v. Communist Party of China, 2013 WL 634719, * 1 (W.D.Mich. Feb 20, 2013).

427 Cass. 1e civ. [First Civil Chamber], Sept. 18, 2008, No. 06-22.038, Bull. I, No. 201 (Fr.) ("même hors habilitation législative, et en l'absence de prévision statutaire expresse quant à l'emprunt des voies judiciaires, une association peut agir en justice au nom d'intérêts collectifs dès lors que ceux-ci entrent dans son objet social."). The decision is based on Art. 31 of the French Code de procédure civile ("L'action est ouverte à tous ceux qui ont un intérêt légitime au succès ou au rejet d'une prétention, sous réserve des cas dans lesquels la loi attribue le droit d'agir aux seules personnes qu'elle qualifie pour élever ou combattre une prétention, ou pour défendre un intérêt determine."). *See also* Cass. 2e civ. [Second Civil Chamber], May 27, 2004, No. 02-15.700, Bull. II, No. 239.

428 BW 3.305a (Neth.).

429 BW 3.305a(2) (Neth.).

430 Milieudefensie/Royal Dutch Shell, Rechtbank 's-Gravenhage [RG] [District Court of The Hague], 24 februari 2010, RBSGR 2010: BM 1470 (Neth.).

431 Barizaa Manson Tete Dooh/Royal Dutch Shell, Rechtbank 's-Gravenhage [RG] [District Court of The Hague], 30 januari 2013, NO. C/09/337058/Ha ZA 09-1581 (Neth.).

432 *Id.*

433 *Id.*

434 These perceptions reflect the experiences of the plaintiffs' lawyers present at the U.K. project consultation in London. Consultation, in London (May 29, 2013).

435 *See, e.g.,* Washington State Rules of Professional Conduct, R. 1.8(e)(2) (Conflicts of interest).

436 *See, e.g.,* In re South African Apartheid Litigation, 617 F.Supp.2d 228 (S.D.N.Y., 2009); Sarei v. Rio Tinto PLC, 221 F.Supp.2d 1116 (C.D.Cal.,2002).

437 Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011).

438 *Id.* at 2459.

439 Fed. R. Civ. P. 23.

440 131 S.Ct. at 2552.

441 *Id.* at 2550-57.

442 Consultation, in Washington, D.C. (June 24, 2013).

443 *See generally* Fed. R. Civ. P. 23.

444 *See* European Parliament - Directorate General for Internal Policies, *Overview of Collective Redress Schemes in EU Member States* §1.2, IP/A/IMCO/NT/2011-16 (July 2011) *available at* http://www.europarl.europa.eu/document/activities/cont/201107/20110715ATT24242/20110715ATT24242EN.pdf.

445 *Id.* § 1.4.2.

446 Freshfields Bruckhaus Deringer, Briefing—*Consumer class actions in the EU: The Status of the Debate within the Consumer Products and Retail Sector* (April 2009), http://www.freshfields.com/uploadedFiles/SiteWide/Knowledge/Consumer%20class%20actions%20in%20the%20EU.pdf ("The Commission has been keen to stress that US style class actions will not be imported into Europe.").

447 Law No. 92-60 of Jan. 18, 1992, art. L-422, Journal Officiel de la République Française [J.O.] [Official Gazette of France], Jan. 21, 1992, p. 968.

448 *Id.* ("Lorsque plusieurs consommateurs, personnes physiques, identifiés ont subi des préjudices individuels qui ont été causés par le fait d'un même professionnel, et qui ont une origine commune, toute association agréée et reconnue représentative sur le plan national en application des dispositions du titre Ier peut, si elle a été mandatée par au moins deux des consommateurs concernés, agir en réparation devant toute juridiction au nom de ces consommateurs.").

449 C. environ. art. L422-3 (Fr.).

450 C. mon. art. L452-2 et seq. (Fr.).

451 C. sant. art. L252-22 et seq. (Fr.).

452 Email from EU Consultation participant to Filip Gregor (Nov. 15, 2013).

453 *See, e.g.*, C. cons. art. L-422 (Fr.).

454 *Id.*

455 Rechtswörterbuch, *Prozessstandschaft*, http://www.rechtswoerterbuch.de/recht/p/prozessstandschaft/ (last visited Nov. 25, 2013).

456 BW arts. 7.907-7.910; Rv Karts. 1013-1018 (Neth.); Act on the Collective Settlement of Mass Damage Claims, BW arts. 90 7-910, Rv art. 1013 (Neth.). For more on these two mechanisms, *see* Marie-José van der Heijden, Transnational Corporations and Human Rights Liabilities. Linking Standards of International Public Law to National Civil Litigation Procedures ch. VIII (2012).

457 *The Dutch 'Class Action (Financial Settlement) Act' ('WCAM')*, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDYQFjAB&url=http%3A%2F%2Fwww.rijksoverheid.nl%2Fbestanden%2Fdocumenten-en-publicaties%2Fcirculaires%2F2008%2F06%2F24%2Fthe-dutch-class-action-financial-settlement-act-wcam%2Fwcamenglish.pdf&ei=PiGFUvfuHIrMsASO54HICw&usg=AFQjCNEKJxnANseELbp3U98M3Hwvsb4Daw&bvm=bv.56343320,d.cWc (last visited Nov. 25, 2013).

458 *See* John Sorabji, *Collective Action Reform in England and Wales*, *in* Extraterritoriality and Collective Redress 43 (Duncan Fairgrieve & Eva Lein eds., 2012). He notes that there is some specific representative action available in competition law.

459 *See* Duncan Fairgrieve & Geraint Howells, *Collective Redress Procedures: European Debates*, *in* Extraterritoriality and Collective Redress 15, 28-32 (Duncan Fairgrieve & Eva Lein eds., 2012).

460 Civil Procedure Rules 1998 19.6 (U.K.).

461 Civil Practice Direction 19-B – Group Litigation, http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part19/pd_part19b#5.1 (last visited Nov. 11, 2013). *See also* Ministry of Justice, *Group litigation orders*, http://www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders (last visited Nov. 11, 2013).

462 A GLO was ordered in the *Ocensa Pipeline Litigation*. *See* Arroyo & Others v. BP Exploration Co. (Colo.) Ltd., [2010] EWHC 1643 (QB).

463 Consultation, in London (May 29, 2013).

464 Bundesgericht [BGer] [Federal Court] 131 Entscheidungen des Schweizerischen Budesgerichts [BGE] III 153 (Switz.).

465 Guiding Principles, *supra* note 1.

466 Anderson v. Abbott, 321 U.S. 349, 361-2 (1944) ("Normally the corporation is an insulator from liability

on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. Limited liability is the rule not the exception....") (internal citations omitted); Burnet v. Clark, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entitles").

467 *Anderson*, 321 U.S. at 362; *see also* Phillip I. Blumberg, The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality 56-59 (1993).

468 *See* United States v. Bestfoods, 524 U.S. 51, 62 (1998) (acknowledging the shareholder protection applies to parents of subsidiaries); *see also* IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 540 (7th Cir.1998) ("Parents of wholly owned subsidiaries necessarily control, direct, and supervise the subsidiaries to some extent, but unless there is a basis for piercing the corporate veil and thus attributing the subsidiaries' torts to the parent, the parent is not liable for those torts, and cannot be served under the tort provision of the long-arm statute.") (internal citations omitted).

469 Frederick Alexander Mann, The Doctrine of International Jurisdiction Revisited After Twenty Years 56 (1984).

470 Barcelona Traction, Light and Power Co. (Belg. v. Spain), Judgment, 1970 I.C.J. 3 (Feb. 5).

471 *Id.* ¶¶ 56, 58.

472 *See* Muthucumaraswamy Sornarajah, *Linking State Responsibility for Certain Harms Caused by Corporate National Abroad to Civil Recourse in the Legal Systems of Home States*, *in* Torture as Tort 491-512 (Craig Scott ed., 2001).

473 *See, e.g.*, OECD, Convention on Combating Bribery of Foreign Public Officials in International Business Transactions Oct. 31, 2003, 43 ILM 37 (2004). The Convention imposes obligations on States Parties to establish laws and criminal sanctions with respect to the bribery of foreign public officials and officials of public international organizations (Article 16) and to extend liability (whether criminal, civil or administrative) and sanctions to legal persons (Article 26).

474 OECD, Guidelines on Multinational Enterprises chp. II ¶ 9 (2011) *available at* http://www.oecd.org/daf/inv/mne/48004323.pdf.

475 Guiding Principles, *supra* note 1, at General Principles. For discussion on how States can require or encourage businesses to conduct human rights due diligence, see HRDD Report, *supra* note 6.

476 *See* Bestfoods, 524 U.S. at 54 ("But there is an equally fundamental principle of corporate law, applicable to the parent-subsidiary relationship as well as generally, that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf.); *see also* IDS Life Ins. Co. 136 F.3d 537.

477 Alter ego liability exists when a parent or owner uses the corporate form "to achieve fraud, or when the corporation has been so dominated by an individual or another corporation (usually a parent corporation), and its separate identity so disregarded, that it primarily transacted the dominator's business rather than its own . . ." Gartner v. Snyder, 607 F.2d 582, 586 (2d Cir.1979) (interpreting New York law).

478 *See* Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc., 98 F.3d 13, 18 (2d Cir.1996) (In deciding whether to pierce the corporate veil, "[c]ourts look to a variety of factors, including the intermingling of corporate and [shareholder] funds, undercapitalization of the corporation, failure to observe corporate formalities such as the maintenance of separate books and records, failure to pay dividends, insolvency at the time of a transaction, siphoning off of funds by the dominant shareholder, and the inactivity of other officers and directors.").

479 Establishing the agency relationship differs from state to state. "Under the law of both New York and Georgia, principals may be held liable for torts committed by their agents when such agents act within the scope of their agency." Bigio v. Coca-Cola Co., 675 F.3d 163, 175 (2d Cir. 2012).

480 *See, e.g.,* Sarei v. Rio Tinto, 221 F. Supp. 2d 1116, 1128 (C.D. Cal. 2002); Mujica v. Occidental Petroleum Corp, 381 F.Supp.2d 1164, 1172 (C.D. Cal. 2005).

481 Doe v. Exxon Mobil Corp., 573 F.Supp.2d 16, 30 (D.D.C. 2008).

482 *See, e.g.,* Bowoto v. Chevron Texaco Co., 312 F. Supp. 2d 1229, 1235-40 (N.D. Cal. 2004) (refusing to pierce the corporate veil, but holding that the case could proceed under agency law) (A jury trial subsequently resulted in a verdict for defendants). Bowoto v. Chevron Corp., 2009 U.S. Dist. LEXIS 21944 (N.D. Cal. 2009); *In re* South African Apartheid Litigation, 633 F.Supp.2d 117 (S.D.N.Y. 2009) (Classes of South Africans failed to state a claim against a parent company for acts of its subsidiary; although parent allegedly maintained a preferential supply agreement with subsidiary and monitored the use of parent's technology, a principal-agent relationship was not sufficiently alleged with respect to the design and maintenance of computer systems that predated parent's collaborative relationship with the subsidiary, and plaintiffs did not allege that parent had the right to command subsidiary to sever subsidiary's long-term preexisting relationship with the South African government); Exxon Mobil Corp., 573 F.Supp.2d at 30 (finding Exxon Mobile could be liable under an agency theory, but rejecting other theories of liability); Sinaltrainal v. Coca-Cola Co., 256 F. Supp. 2d 1345, 1354 (S.D. Fla. 2003), *aff'd,* 578 F. 3d 1252 (11th Cir. 2009) (rejecting agency theories on the grounds that the parent company had nothing more than a franchise-type relationship with the Colombian entity accused of wrongdoing).

483 Consultation, in Washington, D.C. (June 24, 2013).

484 *Id.*

485 *See* Choc v. Hudbay Minerals, Inc., 2013 ONSC 1414, paras. 4-6 (2013).

486 *Id.* ¶ *49.*

487 *Id.* ¶ 54.

488 Brussels I Regulation, *supra* note 86.

489 Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Jan. 16, 2008, No. 9934895010; Cour d'appel [CA] [regional court of appeal] Paris, 11e ch., Mar. 24, 2010, No. 08/02278; Cass. Crim., Sept. 25, 2012, No. 3439.

490 Oguru et al./ Royal Dutch Shell plc, Rechtbank 's-Gravenhage [RG] [District Court of The Hague], 30 januari 2013, docket no. C/09/330891 ¶ 4.33 (Neth.), *available at* https://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/final-judgment-oguru-vs-shell-oil-spill-goi. *See* Case Study *infra.*

491 Consultation, in London (May 29, 2013).

492 Guerrero v. Monterrico Metals plc, EWHC 2475 (Q.B.) (2009).

493 Lubbe v. Cape plc [2000] 1 WLR 1545 ¶ 6.

494 Chandler v. Cape plc, [2012] EWCA Civ 525 ¶ 66.

495 *Id.* ¶ 66.

496 *Id.* ¶ 80.

497 *Id.* ¶¶ 72-76.

498 *Id.* ¶¶ 69-70.

499 Obligationenrecht [OR] Loi federale completant le Code civile Suisse [CO], Legge federale di complement del Codice civile svizzero [CO] Mar. 30, 1911 SR 220 RS 220, art. 963 al. 1 (Switz).

500 Consultation, in Brussels (May 15, 2013).

501 Obligationenrecht [OR] Loi federale completant le Code civile Suisse [CO], Legge federale di complement del Codice civile svizzero [CO] Mar. 30, 1911 SR 220 RS 220, art. 754 (Switz).

502 Andreas von Planta, *La Théorie de la Transparence*, *in* Responsabilité de l'Actionnaire Majoritaire: Séminaire de l'Association Genevoise de Droit des Affaires 19-26 (Christine Chappuis, et al. eds., 2000).

503 *See* Schweizerisches Bundesgericht [BGer][Federal Court] June 30, 2009, 5A_404/2008 ; Schweizerisches Bundesgericht [BGer][Federal Court] Oct. 28, 2010, 4A_263/2010 (where the Federal

Tribunal refused to apply the *Durchgriff* doctrine).

504 *See, e.g.,* Hilao v. Estate of Marcos, 103 F.3d 767, 787 (9th Cir. 1996); Abebe-Jira v. Negewo, 72 F.3d 844, 846 (11th Cir. 1996), *cert. denied*, 519 U.S. 830 (1996); *see also* Beth Stephens, Judith Chomsky, Jennifer Green, Paul Hoffman and Michael Ratner, International Human Rights Litigation in U.S. Courts 526 (Martinus Najhoff 2008), (1996).

505 Rome II Regulation, *supra* note 294.

506 *Id.* at art. 26.

507 *Id.* at art. 7.

508 Consultation, in Brussels (May 15, 2013).

509 Michael D. Goldhaber, *Corporate Human Rights Litigation in Non-U.S. Courts: A Comparative Scorecard*, 3 U.C. Irvine L. Rev. 127, 131 (2013).

510 *Id.*

511 The Author thanks Richard Meeran for this example.

512 Sithole v. Thor Chemicals Holding Ltd., (2000) A2/2000/2894 (A.C.) (appeal taken from Q.B.).

513 *Id.*

514 *Id.*

515 Guerrero v. Monterrico Metals plc, EWHC 2475 (Q.B.) (2009).

516 *Id.* ¶ 28.

517 Section 423 orders "shall only be made if the court is satisfied that [transactions were] entered into… for the purpose (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him or (b) otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make." Insolvency Act, 1986, c. 45 §423 (Eng.).

518 *Guerrero*, HCMP 1736/2009.

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

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

521 ABA Resolution, 107A, enacted August 12, 2013.

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

523 CRS Report for Congress, Awards of Attorney Fees by Federal Courts and Federal Agencies (June 20, 2008), *available at* http://www.fas.org/sgp/crs/misc/94-970.pdf.

524 Wal-Mart v. Dukes, 131 S.Ct. 2541 (2011).

525 18 U.S.C. § 1091.

526 18 U.S.C. § 2441.

527 18 U.S.C. § 2340A.

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

529 Amesys was created in 2007 when two businesses—i2e and Artware—combined. *See Historique*, Bull:

Amesys, http://www.amesys.fr/index.php/fr/amesys/historique (last visited Nov. 12, 2013).

530 *Contact*, Bull, http://www.amesys.fr/index.php/fr/contact (last visited November 25, 2013).

531 Amesys Press Release, Bull (Sept. 1, 2011), *available at* http://www.wcm.bull.com/internet/pr/new_rend.jsp?DocId=673289&lang=en.

532 *See Bull Confirms Its Resilience and Consolidates Its New Dimension with the Acquisition of Amesys*, Bull (Feb. 11, 2010), http://www.wcm.bull.com/internet/pr/new_rend.jsp?DocId=539635&lang=en; Bull Entre en Négociation Exclusive en Vue d'Acquérir le Group Amesys, Bull (Nov. 18, 2009), http://www.bull.com/download/investors/20091118_-_Bull_-_Bull_enters_exclusive_negotiations_to_acquire_Amesys_group_-_FR.pdf.

533 Amesys, Eagle Glint Operator Manual 4 (2009), [hereinafter Eagle Manual] *available at* http://www.wikileaks.org/spyfiles/files/0/99_AMESYS-EAGLE-GLINT-Operator_Manual.pdf.

534 *See* Matthieu Aikins, *Jamming Tripoli: Inside Moammar Gadhafi's Secret Surveillance Network*, Wired (May 18, 2012), http://www.wired.com/threatlevel/2012/05/ff_libya/.

535 Eagle Manual, *supra* note 533, at 20, 23-4.

536 According to Amesys, "the contract was concluded at a time when the international community was in the process of diplomatic rapprochement with Libya, which was looking to fight against terrorism and acts perpetrated by Al Qaeda." Amesys Press Release, *supra* note 531*; see* Andrew Solomon, *Circle of Fire*, New Yorker, May 8, 2006, *available at* http://www.newyorker.com/archive/2006/05/08/060508fa_fact_solomon?currentPage=all.

537 Freedom House, Libya (2013), *available at* http://freedomhouse.org/sites/default/files/resources/FOTN%202013_Libya.pdf.

538 Rice, *supra* note 194.

539 *See* Agence France-Presse (AFP), *French Firm Sold Gadhafi Stealth 4X4: Report*, DefenseNews (Sept. 18, 2011), http://www.defensenews.com/article/20110918/DEFSECT04/109180302/French-Firm-Sold-Gadhafi-Stealth-4x4-Report; Jean Marc Manach, Doing Business with Gaddafi: Making Millions and Risking Lives, OWNI.eu (Oct. 13, 2011), http://owni.eu/2011/10/13/doing-business-with-gaddafi-making-millions-and-risking-lives/.

540 Amesys Press Release, *supra* note 531.

541 *Id.*

542 *See* Aikins, *supra* note 534; Paul Sonne & Margaret Coker, *Firms Aided Libyan Spies*, Wall St. J., Aug. 30, 2011, *available at* http://online.wsj.com/news/articles/SB10001424053111904199404576538721260166388.

543 *See* Reporters Without Borders for Freedom of Information, Enemies of the Internet, 2013 Report, Special Edition: Surveillance 6 (2013), http://surveillance.rsf.org/en/wp-content/uploads/sites/2/2013/03/enemies-of-the-internet_2013.pdf; Aikins, *supra* note 534; Manach, *supra* note 539.

544 *See* Aikins, *supra* note 534; *Amesys*, Reps. Without Borders for Freedom Info., http://surveillance.rsf.org/en/amesys/ (last visited Nov. 12, 2013); Margaret Coker & Paul Sonne, *Life Under the Gaze of Gadhafi's Spies*, Wall St. J., Dec. 14, 2011, *available at* http://online.wsj.com/article/SB10001424052970203764804577056230832805896.html; *Freed Libyan Prisoner of Conscience Hails Amnesty International*, Amnesty Int'l (Sept. 5, 2011), http://www.amnesty.org/en/news-and-updates/freed-libyan-prisoner-conscience-hails-amnesty-international-2011-09-05; *Libya: Trial of Human Rights Defender Mr. Jamal Al Haji*, Front Line Defenders (Mar. 11, 2010), http://www.frontlinedefenders.org/node/2411.

545 Amesys Press Release, *supra* note 531.

546 *See Press Release, Bull (Mar. 8, 2012) (on file with ICAR).*

547 The Author of this Case Study, along with the International Corporate Accountability Roundtable, contacted Bull Groupe and Amesys for comment on the allegations contained herein. Bull Groupe responded and clarified that "The Eagle system software has been sold in 2012 and the company is not

involved any longer in this activity." Bull also attached two press releases, one announcing the sale of Eagle, and the other clarifying its perspective on some of the allegations. The latter press release can also be found on Bull's website. Email from Aurélie Negro, Bull to Katie Shay, International Corporate Accountability Roundtable (Nov. 25, 2013) (on file with ICAR). For the second press release, see Amesys Press Release, *supra* note 531.

548 *FIDH and LDH File a Complaint Concerning the Responsibility of the Company AMESYS in Relation to Acts of Torture*, FIDH (July 11, 2013), http://www.fidh.org/en/north-africa-middle-east/Libya/FIDH-and-LDH-file-a-complaint.

549 *Id.*

550 *La Justice Poursuit son Enquête Sur les Activités d'Amesys en Libye*, Le Monde, Jan. 15, 2013, *available at* http://www.lemonde.fr/libye/article/2013/01/15/la-justice-poursuite-son-enquete-sur-les-activites-d-amesys-en-libye_1817115_1496980.html.

551 *See* Nikolaj Nielsen, *Gaddafi-Tainted Firm Scoops EU Contract*, euobserver.com (Sept. 19, 2013), http://euobserver.com/priv-immigration/121449.

552 Amesys Press Release, *supra* note 531.

553 Agence France-Presse (AFP), *French Firm Amesys Probed Over 'Complicity in Torture,'* France 24 (May 22, 2012), http://www.france24.com/en/20120522-libya-france-gaddafi-amesys-war-crimes-technology-firm-court-justice.

554 FIDH, Amesys Case: The Investigation Chamber Green Lights the Investigative Proceedings on the Sale of Surveillance Equipment by Amesys to the Khadafi Regime (2013), http://www.fidh.org/spip.php?page=article_pdf&id_article=12752.

555 Rice, *supra* note 194.

556 Paul Sonne & David-Gauthier-Villars, *Tech Firm Amesys Faces French Judicial Probe*, Wall St. J., May 22, 2012, *available at* http://online.wsj.com/news/articles/SB10001424052702304791704577420392081640000.

557 FIDH Amesys, *supra* note 193.

558 *Id.*

559 *Opening of a Judicial Inquiry Targeting Amesys for Complicity in Acts of Torture in Libya*, *supra* note 198.

560 Sonne & Coker, *supra* note 542.

561 *Id.*

562 *Id.*

563 Telephone and E-mail Interviews with Fédération Internationale des Ligues des Droits de l'Homme (FIDH) (July 24, 2013).

564 *Id.*

565 *Id.*

566 *Id.*

567 *Id.*

568 *Id.*

569 *Id.*

570 *Id.*

571 *See Company Overview of Anvil Mining Limited*, Bloomberg Businessweek, http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=1192450 (last visited Nov. 14, 2013); *China's Minmetal Buys Anvil Mining for $1.3bn*, BBC News (Sept. 30, 2011), http://www.bbc.co.uk/news/business-15121393.

572 News Release, Anvil Mining Limited, Anvil Confirms Denial of Unfounded Allegations (June 21, 2005), *available at* http://www.anvilmining.com/files/2005June212005Allegations.pdf [hereinafter Anvil June 2005 News Release].

573 Press Release, RAID, Congolese Military Judge Calls for the Prosecution of Former Anvil Mining Staff for Complicity in War Crimes (Oct. 15, 2006), *available at* http://raid-uk.org/news/Anvil_15_Oct_06.htm.

574 News Release, Anvil Mining Limited, Advice on Rebel Activity in Village of Kilwa, DRC (Oct. 15, 2004), *available at* www.anvilmining.com/files/2004October15KilwaEvent.pdf.

575 UN Organization Mission in the Democratic Republic of Congo (MONUC), R*eport on the Conclusions of the Special Investigation into Allegations of Summary Executions and Other Violations of Human Rights Committed by the FARDC in Kilwa (Province of Katanga) on 15 October 2004* ¶ 36 (2005), *available at* www.abc.net.au/4corners/content/2005/MONUC_report_oct05.pdf [hereinafter MONUC].

576 *Id.*

577 *See id.* ¶ 24.

578 *Id.* ¶¶ 26-29.

579 *Id.* ¶ 36.

580 *Human Rights: Canadian Mining Company Accomplice of Acts of Violence in DRC*, Trudel & Johnston (June 2011), http://www.trudeljohnston.com/en/recours_collectifs/nos_recours/droit/anvil_mining/index.php [hereinafter Trudel & Johnston].

581 Rights & Accountability in Dev. (RAID) et al., Kilwa Trial: a Denial of Justice 4 (2007), *available at* http://raid-uk.org/docs/Kilwa_Trial/Kilwa-chron-EN-170707.pdf [hereinafter RAID et al.]; MONUC, *supra* note 575 ¶ 36.

582 Canada 40th Parliament Standing Committee on Foreign Affairs & International Development, *Evidence - November 24, 2009* § 0920 (Nov. 24, 2009), http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4255338&Language=E&Mode=1&Parl=40&Ses=2#TOC-TS-0920.

583 MONUC, *supra* note 575 ¶ 36. The business's logistical assistance to the FARDC also included the provision of airplanes that evacuated around 150 FARDC soldiers to the operation zone, the use of Anvil Mining vehicles that were driven by Anvil Mining drivers, and the provision of food rations to the armed forces. *Id.*

584 Press Release, RAID, Trial Begins for Congolese Military and Anvil Mining Ex-Employees Accused of Crimes Related to the October 2004 Kilwa Massacre (Dec. 12, 2006), *available at* http://raid-uk.org/news/Kilwa_Trial_12DEC06.html.

585 *See* MONUC, *supra* note 575 ¶ 40; Anvil June 2005 News Release, *supra* note 574. Anvil continues to claim that it was forced to provide support.

586 RAID & Global Witness, Kilwa Massacre: Stories From the Families of Victims and Survivors 1 (2010), *available at* http://www.globalwitness.org/sites/default/files/library/Kilwa%20Massacre%20-%20Stories%20from%20the%20families%20of%20victims%20and%20survivors%20EN%20-%20November%202010.pdf.

587 *Id.*

588 *Id.*

589 *Id.*

590 *Id.* at 2.

591 *Id.*

592 Kathryn Leger, *Anvil Named in Class-Action Suit: NGOs Say Firm Liable for Role in Congo Massacre*, Montreal Gazette, Nov. 9, 2010, *available at* http://www.ccij.ca/media/ccij-in-the-news/congolese-class-action-media-excerpts.pdf.

593 Trudel & Johnston, *supra* note 580. *See also* Association Canadienne Contre l'Impunité c. Anvil Mining Ltd., [2010] 2011 QCCS 1996 (Can.).

594 Motion By Respondent to Dismiss For Declinatory Exception and to Dismiss on the Ground of *Forum Non Conveniens* ¶¶ 20-21, 23-24, 26-28, Association Canadienne Contre L'Impunité v. Anvil Mining Limited (2011) (No. 500-06-000530-101), *available at* http://www.ccij.ca/webyep-system/program/download.php?FILENAME=74-5-at-File_Upload_13.pdf&ORG_FILENAME=Motion_to_Dismiss_for_Declinatory_Exception_%28FINAL%29.pdf.

595 *Id.* ¶¶ 40-42.

596 Superior Court Judgment ¶ 11, Association Canadienne Contre L'Impunité v. Anvil Mining Limited (2011) (No. 500-06-000530-101), *available at* http://raid-uk.org/docs/KilwaClassAction/Emery_Judgment_en.pdf [hereinafter Superior Court Judgment].

597 *Id.* ¶ 11(c)(3).

598 *Id.* ¶ 11.

599 Article 3135 of the Québec Civil Code (C.C.Q.) allows the court to decline jurisdiction if another forum is more appropriate. Civil Code of Québec, S.Q. 1991, c. 64, art. 3135 (Can.).

600 Superior Court Judgment, *supra* note 596 ¶ 39.

601 *CCIJ's Public Cases and Interventions: Anvil Mining*, Canadian Centre for Int'l Just. (CCIJ), http://www.ccij.ca/programs/cases/index.php?DOC_INST=14 (last visited Nov. 14, 2013).

602 Anvil Mining Limited c. Association Canadienne Contre L'Impunité (2012) (No. 500-09-021701-115) ¶ 93, *available at* http://raid-uk.org/docs/KilwaClassAction/Judgment_QCA.pdf.

603 *Id.* ¶ 104.

604 *Id.* ¶¶ 101-103. In Canada, the forum of necessity doctrine allows courts that do not otherwise have jurisdiction to exercise it in exceptional circumstances, such as when it would be legally or practically impossible for victims to bring their case in another jurisdiction. *Id.* ¶¶ 97-98.

605 *Id.* ¶¶ 101-02.

606 *Id.* ¶ 104.

607 Demande D'Autorisation D'Appel, Association Canadienne Contre L'Impunité c. Anvil Mining Limited (2012) (No. 34733), *available at* http://www.ccij.ca/webyep system/program/download.php?FILENAME=74-6-at-File_Upload_18.pdf&ORG_FILENAME=CAAI_motion_for_leave.pdf; *No Justice in Canada for Congolese Massacre Victims as Canada's Supreme Court Dismisses Leave to Appeal in Case Against Anvil Mining*, Global Witness (Nov. 1, 2012), http://www.globalwitness.org/library/no-justice-canada-congolese-massacre-victims-canada%E2%80%99s-supreme-court-dismisses-leave-appeal.

608 U.N. Office of the High Comm'r for Human Rights, *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003* ¶¶ 63, 869, 904, 1068 (Aug. 2010), *available at* http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf.

609 *Four Corners: The Kilwa Incident* (Australian Broadcasting Corporation television broadcast June 6, 2005), *available at* http://www.abc.net.au/4corners/content/2005/s1384238.htm.

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transfer-kilwa-trial%E2%80%99s-military.

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614 Louise Arbour "expressed concern" at the verdict. Press Release, United Nations, High Commissioner for Human Rights Concerned at Kilwa Military Trial in the Democratic Republic of the Congo (July 4, 2007), *available at* http://www.unhchr.ch/huricane/huricane.nsf/0/9828B052BBC32B08C125730E004019C4?opendocument [hereinafter Arbour Press Release]. Leandro Despouy wrote to the Congolese Government to express concern about impunity and increasing interference in the independence of the military courts. *The Kilwa Appeal – A Travesty of Justice*, Global Witness (May 5, 2008), http://www.globalwitness.org/library/kilwa-appeal-travesty-justice. MONUC stated that "[t]he judicial decision made during the Kilwa case are an illustration of the lack of impartiality and independence within the military justice system... Throughout this case, political interference, a lack of cooperation on the part of the military authorities and many irregularities were observed." U.N. Office of the High Comm'r for Human Rights, *supra* note 608 ¶ 869.

615 Arbour Press Release, *supra* note 614.

616 *The Kilwa Appeal – A Travesty of Justice*, *supra* note 614.

617 *Id.*

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619 *Death Threats/Fear for Safety*, Amnesty Int'l (Apr. 4, 2008), http://www.amnesty.org/en/library/asset/AFR62/002/2008/en/84362c99-0268-11dd-9f22-c78dcd6ee044/afr620022008eng.html.

620 MONUC, *supra* note 575 ¶ 43.

621 *Id.*

622 Liz Barrett, *Anvil Silver Mine and the Search for Accountability*, Publish What You Pay (Aug. 7, 2012), http://www.publishwhatyoupay.org/newsroom/blog/anvil-silver-mine-and-search-accountability.

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625 Requête Pour Autorisation D'Exercer Un Recours Collectif et Pour Être Désignée Repréntante ¶ 2.206, Association Canadienne Contre L'Impunité c. Anvil Mining Limited (2010) (No. 500-06-000530-101), *available at* http://www.trudeljohnston.com/en/recours_collectifs/nos_recours/droit/anvil_mining/docs/procedures/Requete%20autorisation%20recours%20collectif.pdf [hereinafter Requête].

626 April 2008 Press Release, *supra* note 624; Requête, *supra* note 625 ¶ 2.206.

627 April 2008 Press Release, *supra* note 624.

628 Requête, *supra* note 625 ¶ 2.207.

629 CACI International, Inc. is the publicly traded corporation and "parent" of the CACI group of companies. *See Frequently Asked Questions About CACI*, CACI, http://www.caci.com/main_faq.shtml (last visited Nov. 13, 2013).

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631 *CACI Profile*, CACI, http://www.caci.com/about/profile.shtml (last visited Nov. 13, 2013).

632 News Release, *supra* note 630.

633 60 Minutes II and the New Yorker were the first to publish the photographs. *See* Rebecca Leung, *Abuse of Iraqi POWs by GIs Probed*, CBS News (Feb. 11, 2009), http://www.cbsnews.com/stories/2004/04/27/60ii/main614063.shtml; *The Abu Ghraib Pictures*, New Yorker, http://www.newyorker.com/archive/2004/05/03/slideshow_040503 (last visited Nov. 13, 2013).

634 *Torture Scandal: The Images That Shamed America*, Guardian, http://www.theguardian.com/gall/0,8542,1211872,00.html (last visited Nov. 13, 2013); *Blame Widens for Abu Ghraib Abuse*, BBC News, Aug. 26, 2004, http://news.bbc.co.uk/1/hi/world/americas/3596686.stm [hereinafter BBC News].

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636 *See Abu Ghraib Soldier Gets One Year in Jail*, Guardian (May 19, 2004), http://www.theguardian.com/world/2004/may/19/iraq.usa1; Thom Shanker, *The Struggle for Iraq: The Military; 6 G.I.'s in Iraq Are Charged With Abuse of Prisoners*, N.Y. Times, Mar. 21, 2004, *available at* http://www.nytimes.com/2004/03/21/world/struggle-for-iraq-military-6-gi-s-iraq-are-charged-with-abuse-prisoners.html; *Ex-Abu Ghraib Inmates Get $5m Settlement From US Firm*, BBC News (Jan. 8, 2013), http://www.bbc.co.uk/news/world-us-canada-20953889.

637 Katherine Hawkins, *CACI's Forgotten Role in Abu Ghraib (II)*, Huffington Post (Nov. 9, 2013), http://www.huffingtonpost.com/katherine-hawkins/cacis-forgotten-role-in-a_1_b_3847081.html. *See generally* BBC News, *supra* note 634. Furthermore, both the Taguba and Fay/Jones military investigations implicated CACI employees. *See* Article 15-6 Investigation of the 800th Military Police Brigade (2004), *available at* http://www.npr.org/iraq/2004/prison_abuse_report.pdf; Executive Summary: Investigation of Intelligence Activities at Abu Ghraib (n.d.), *available at* http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf. *See also Al-Quarishi et al. v. Nakhla et al.* Ctr. for Constitutional Rights, http://ccrjustice.org/Al-Quraishi-v-Nakhla-L3 (last visited Nov. 21, 2013).

638 The Author of this Case Study, along with the International Corporate Accountability Roundtable, contacted CACI for comment on the allegations contained herein. CACI did not submit a response, but a defense attorney in the case contacted ICAR to discuss the allegations. The case study has been amended to reflect the perspective of the business. Telephone conversation with William Koegel, Jr., Partner, Steptoe & Johnston LLP, and Katie Shay, Legal and Policy Associate, ICAR (Nov. 25, 2013).

639 Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700 (E.D. Va. 2009); Al Shimari v. CACI Int'l, Inc., No. 1:08-CV-827 (GBL/JFA), 2013 WL 3229720 (E.D. Va. June 25, 2013). The *Al Shimari v. CACI* case is distinct from *Saleh et al. v. Titan et al.*, which is another case brought under the Alien Tort Statute (ATS) by former Iraqi detainees against CACI. The plaintiffs in *Saleh et al.* also charged CACI with torture and other illegal acts, but the case was dismissed by a panel of the Court of Appeals for the District of Columbia on 11 September 2009. *Saleh et al. v. Titan et al.*, Ctr. for Constitutional Rights, http://ccrjustice.org/Saleh-v-Titan (last visited Nov. 18, 2013).

640 28 U.S.C. § 1350 (1948).

641 Complaint ¶¶ 81, 86, 90, Al Shimari v. Dugan (S.D. Ohio 2008) (No. 2.08-cv-637), *available at* http://ccrjustice.org/files/Al%20Shimari%20Complaint.pdf. This initial complaint was amended several times. For the final amended complaint, which reflects the dismissal of Timothy Dugan/L-3 Services and CACI International, Inc. as defendants in the case in 2008 and 2013, respectively, *see* Third Amended Complaint, Al Shimari v. CACI Premier Tech., Inc. (E.D. Va. 2013) (No. 08-cv-0827), *available at* http://ccrjustice.org/files/Al%20Shimari%20TAC%20redacted.pdf.

642 *Id.* ¶¶ 93, 100, 104.

643 *Id.* ¶¶ 107, 115, 119.

644 *Id.* ¶¶ 123, 130, 133.

645 *Id.* ¶¶ 138, 139, 145, 149.

646 *Id.* ¶¶ 152, 158, 161.

647 *Id.* ¶ 165.

648 *Id.* ¶ 168.

649 Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 416 (4th Cir. 2011).

650 *Al Shimari v. CACI et al.*, Ctr. for Constitutional Rights, http://ccrjustice.org/ourcases/current-cases/al-shimari-v-caci-et-al (last visited Nov. 13, 2013).

651 *Statement Regarding Baseless CCR Lawsuit*, CACI (May 7, 2008), http://www.caci.com/iraq/ccr_state_5-7-08.shtml.

652 News Release, *supra* note 630.

653 *Al Shimari v. CACI et al.*, *supra* note 650.

654 *Id. Kiobel* was an ATS case in which the plaintiffs alleged that Royal Dutch Petroleum (Shell) was complicit in human rights abuse in Ogoniland, Nigeria. *See* Kiobel v. Royal Dutch Petroleum Co., 133 S.Ct. 1659, 1662 (2013).

655 *Kiobel*, 133 U.S. at 1669.

656 *Id.*

657 Brief for Defendants-Appellees, Al Shimari v. CACI, 658 F.3d 413 (4th Cir. 2010) (No. 09-1335), *available at* https://ccrjustice.org/files/CACI%20Opening%20Brief%2004.05.10.pdf. The political question doctrine dictates that federal courts should not hear cases that deal directly with issues that the U.S. Constitution makes the sole responsibility of the other branches of the U.S. government. Because foreign relations are the sole responsibility of the U.S. Executive Branch, cases challenging the way that the Executive Branch uses that power present political questions that are prohibited from being heard by the federal courts under the political question doctrine. *See Political Question Doctrine*, Legal Info. Inst., http://www.law.cornell.edu/wex/political_question_doctrine (last visited Nov. 13, 2013).

658 Brief for Defendants-Appellees, *supra* note 657 at 16; Larry O'Dell, *Abu Ghraib Contractors Seek Civil Immunity*, NBC News (Oct. 26, 2013), http://www.nbcnews.com/id/39852644/ns/us_news-security/.

659 Al Shimari v. CACI Premier Tech., Inc., 657 F. Supp. 2d 700, 705 (E.D. Va. 2009). In addition to dismissing the plaintiffs' ATS claims, the District Court also dismissed all of the remaining common law claims in the case due to the immunity given to contractors in Iraq under Iraqi law (specifically, under the Coalition Provisional Authority Order 17). *Id.* However, the District Court reinstated the plaintiffs' ATS claims in November 2012. *See infra* note 38.

660 Al Shimari v. CACI Int'l, Inc., 658 F.3d 413, 417, 418 (4th Cir. 2011).

661 *Al Shimari v. CACI et al.*, *supra* note 650.

662 Al Shimari v. CACI Int'l, Inc., 679 F.3d 205 (4th Cir. 2012) (This rehearing was granted in an 11-3 decision).

663 *Id.*

664 Al Shimari v. CACI Int'l, Inc., No. 1:08-cv-827 (GBL/JFA), 2013 WL 3229720, at *1 (E.D. Va. June 25, 2013).

665 *Id.* at *8.

666 Brief for Plaintiffs-Appellants, *supra* note 66; *Al Shimari v. CACI et al.*, *supra* note 650.

667 *No Accountability for Military Contractor's Role in Abu Ghraib Torture, Federal Judge Says*, Ctr. for Constitutional Rights (June 25, 2013), http://www.ccrjustice.org/newsroom/press-releases/no-accountability-military-contractor%E2%80%99s-role-abu-ghraib-torture,-federal-judge-says.

668 Telephone Interview with Center for Constitutional Rights (Oct. 30, 2013).

669 *Id.*

670 *Id.*

671 Marjorie Censer, *Court Grants CACI's Request for Legal Fees*, Wash. Post (Sept. 4, 2013), http://www.washingtonpost.com/blogs/capital-business/post/court-grants-cacis-request-for-legal-fees/2013/09/04/e1b2562c-1567-11e3-804b-d3a1a3a18f2c_blog.html. Bill of Costs, Al Shimari v. CACI Int'l, Inc. No. 1:08-CV-

827 (GBL/JFA) (E.D. Va. Aug. 20, 2013).

672 *Id.*

673 Natasha Lennard, *Abu Ghraib Torture Victims Sued by Contractors*, Salon (Aug. 14, 2013), http://www.salon.com/2013/08/14/abu_ghraib_torture_victims_sued_by_contractors/.

674 *See* Memorandum in Support of Plaintiffs' Motion to Enlarge Time to Complete Plaintiffs' Depositions, Al Shimari v. CACI Int'l, Inc. (E.D. Va. 2013) (No. 08-cv-0827 GBL-JFA), *available at* http://ccrjustice.org/files/232_2013_3_22%20Memo%20in%20support%20of%20EOT%20for%20Plantiffs%20Deps.pdf; Declaration of Baher Azmy, Esq. in Support of Plaintiffs' Motion to Enlarge Time to Complete Plaintiffs' Depositions, Al Shimari v. CACI Int'l, Inc. (E.D. Va. 2013) (No. 08-cv-0827 GBL-JFA), *available at* http://ccrjustice.org/files/273_2013-04-05AzmyDeclCorrectedPlaintiffsMotionforExtentionofTimePlaintiffs'Deposition.pdf; Declaration of Baher Azmy, Esq., Al Shimari v. CACI Int'l, Inc. (E.D. Va. 2013) (No. 08-cv-0827 GBL-JFA), *available at* http://ccrjustice.org/files/2013-05-06_%20(REDACTED)%20Azmy%20Decl_OpptoSanctions.pdf.

675 *See* Memorandum in Support of Plaintiffs' Motion to Enlarge Time to Complete Plaintiffs' Depositions, *supra* note 674; Declaration of Baher Azmy, Esq. in Support of Plaintiffs' Motion to Enlarge Time to Complete Plaintiffs' Depositions, *supra* note 674; Declaration of Baher Azmy, Esq., *supra* note 674.

676 *See* Memorandum in Support of Plaintiffs' Motion to Enlarge Time to Complete Plaintiffs' Depositions, *supra* note 674; Declaration of Baher Azmy, Esq. in Support of Plaintiffs' Motion to Enlarge Time to Complete Plaintiffs' Depositions, *supra* note 674; Declaration of Baher Azmy, Esq., *supra* note 674.

677 *See* Memorandum in Support of Plaintiffs' Motion to Enlarge Time to Complete Plaintiffs' Depositions, *supra* note 674; Declaration of Baher Azmy, Esq. in Support of Plaintiffs' Motion to Enlarge Time to Complete Plaintiffs' Depositions, *supra* note 674; Declaration of Baher Azmy, Esq., *supra* note 674.

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679 Danzer, www.danzer.com (last visited Nov. 8, 2013).

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683 *See generally* Greenpeace, *supra* note 680.

684 "Le Groupement Yalisika" is an area in the Equateur Province in the northern part of the DRC. It is comprised of 27 villages in the territory of Bumba and is home to 10000 residents. Resource Extraction Monitoring (REM), Rapport de Mission 1B, Affaire Yalisika: Observation Indépendante de la mise en Application de la loi Forestière et de la Gouvernance en RDC (OIFLEG - RDC) 1, 5 (2012), http://www.observation-rdc.info/documents/Rapport_REM_001b_OIFLEG_RDC.pdf [hereinafter REM Report].

685 *See* Greenpeace, *supra* note 680, at 1-4.

686 "Cahier des charges" translates to "contractual conditions."

687 These social projects include the construction of roads, the restoration of hospitals and schools, and the establishment of transportation facilities. Government of DRC, 2002b. Loi nº 011/2002 Code Forestière, art. 89, 29th August, Kinshasa.

688 REM Report, *supra* note 684, at 8.

689 *Statement of Danzer Regarding the Occurrences at Yalisika in 2011*, Danzer (Apr. 26, 2013), http://www.danzer.com/Press-Releases-Detail.87.0.html?&tx_ttnews%5Btt_news%5D=482&tx_ttnews%5BbackPid%5D

=80&cHash=fe2864ba8e2f4d7c166fd6787341a164.

690 *See* Katrin Matthaei, *German Court Investigates Raid on Congolese Village*, Deutsche Welle (May 8, 2013), http://www.dw.de/german-court-investigates-raid-on-congolese-village/a-16800263#.

691 *Equateur: Les Victimes de l'Exploitation Forestière de Yalisika Saisissent la Justice*, Digitalcongo.net (Sept. 1, 2011), http://www.digitalcongo.net/article/78055 [hereinafter Digitalcongo]; Greenpeace, *supra* note 680, at 3.

692 *Siforco Statement About the Conflict of Yalisika*, Danzer (June 28, 2011), http://www.danzersino.com/Press-Releases-Detail.87.0.html?&L=%20%20%20%20%25&tx_ttnews%5Bpointer%5D=1&tx_ttnews%5Btt_news%5D=458&tx_ttnews%5BbackPid5D=80&cHash=14e358c09424350874a96f7c9078234f.

693 *See Violations des Droits de l'Homme à l'Encontre de Villageois de la Communauté Bosanga, Suite à des Protestations Contre la Société d'Exploitation Forestière Siforco dans la Province de l'Equateur* ,Greenpeace (June 16, 2011), www.greenpeace.org/africa/global/africa/pulications/RDC_Forets_RAPPEL%20DES%20FAITS.FR.20.06.2011.pdf

694 *Criminal Complaint Against Senior Manager of Danzer*, Special Newsl. (European Ctr. for Constitutional & Human Rights (ECCHR), Berlin, Germany), Apr. 25, 2013, at 3, *available at* http://www.ecchr.de/index.php/danzer-en.html [hereinafter ECCHR Complaint]; Greenpeace, *supra* note 680, at 1-4.

695 Greenpeace, *supra* note 680, at 3-4; *see also Le Groupement Yalisika à Bumba Saisit la Justice*, Le Phare (Sept. 1, 2011), http://www.lephareonline.net/le-groupement-yalisika-a-bumba-saisit-la-justice/.

696 Greenpeace, *supra* note 680, at 2-4.

697 *See* Anvil case study, *infra*.

698 Greenpeace, *supra* note 680, at 3-4.

699 *See* Statement from DanzerGroup to the Greenpeace Report 1 (Nov. 11, 2011), *available at* http://www.fsc-watch.org/docs/Danzer_statement_about_GP_report_09_11_2011.pdf; *Statement of Danzer Regarding the Occurrences at Yalisika in 2011*, *supra* note 689.

700 Klaus Hansen, a Danish national, worked for Danzer for a number of years in a variety of positions. Most recently and at the time of the events in Yalisika, he worked as the branch manager at the basecamp in Engengele (Directeur du site SIFORCO K8). REM Report, *supra* note 684, at 12.

701 *Id.* at 2, 4.

702 *Id*. at 2. Statement by Dieter Haag, Administrator General, SIFORCO, to ICAR (Nov. 26, 2013) (on file with ICAR).

703 Matthaei, *supra* note 690.

704 Statement from DanzerGroup to the Greenpeace Report, *supra* note 699, at 1.

705 *Id.*

706 *Id.*

707 Greenpeace, *supra* note 680, at 1.

708 Digitalcongo, *supra* note 691.

709 Unofficial translation by Greenpeace. *See* Greenpeace, *supra* note 680, at 4.

710 Greenpeace, *supra* note 680, at 5.

711 *Id.* at 1, 5.

712 As of April 2013, these investigations were still ongoing. *Logging and Human Rights in DR Congo*, Avocats Sans Frontières (Apr. 26, 2013), http://www.asf.be/blog/2013/04/26/logging-and-human-rights-in-dr-congo..

713 *Id.*

[714] *See generally* ECCHR Complaint, *supra* note 694. Although this case and the ongoing case in the DRC concern the same facts, the alleged perpetrators are different. The DRC case is against the Congolese authorities involved in the assault, along with one of SIFORCO's worksite managers, Klaus Hansen. They have been charged with crimes against humanity. The German case is against Olof Von Gagern, a German national who is based in Germany and who was employed by Danzer at the time of the Yalisika incident. He is accused of breaching his duty to prevent the crimes of the Congolese authorities. Both cases are of equal importance; however, these parallel proceedings have raised a number of issues regarding the collaboration of all of the NGOs and lawyers working on both cases.

[715] ECCHR Complaint, *supra* note 694, at 3; Matthaei, *supra* note 690. The allegations against Olof Von Gagern are based on the concept of *garantenstellung* (or "guarantor"), which provides for a duty of care towards those who are affected by the actions of one's staff.

[716] ECCHR Complaint, *supra* note 694, at 8.

[717] Letter from Ulrich Grauert, COO Lumber Africa, Danzer, to Amol Mehra, Director, International Corporate Accountability Roundtable (Nov. 25, 2013) (on file with ICAR) *available at* http://accountabilityroundtable.org/wp-content/uploads/2013/11/Danzer-Reply-Letter.pdf.

[718] Email from Gabriel Tagba Munzonzo, SIFORCO, to Amol Mehra, Director, International Corporate Accountability Roundtable (Nov. 26, 2013) (on file with ICAR); Statement by Dieter Haag, Administrator General, SIFORCO, to ICAR (Nov. 26, 2013) (on file with ICAR).

[719] Email from Gabriel Tagba Munzonzo, SIFORCO, to Amol Mehra, Director, International Corporate Accountability Roundtable (Nov. 26, 2013) (on file with ICAR).

[720] Telephone and E-mail Interviews with Global Witness (Nov. 11, 2013).

[721] *Id.*

[722] *Id.*

[723] *Id.*

[724] *Id.*

[725] *Id.*

[726] *Id.*

[727] Telephone and E-mail Interviews with ECCHR (Nov. 12, 2013).

[728] *Id.*

[729] The village of Bongulu is over 200 km from the nearest town of Bumba and over 1000 km from Kinshasa. Infrastructure in the DRC is inadequate, particularly in the rural logging areas, making regular access to victims and witnesses difficult. *See Democratic Republic of the Congo*, UN High Commissioner for Refugees, http://www.unhcr.org/pages/49e45c366.html (last visited Nov. 8, 2013).

[730] Telephone and E-mail Interviews with ECCHR, *supra* note 727.

[731] *Id.*

[732] *See Important Years in Our History*, DLH, http://www.dlh.com/About-the-DLH-Group/History/Timeline.aspx (last visited Nov. 12, 2013); Greenpeace, DLH: A Partner in Global Forest Crime 1-2 (2002), *available at* http://www.greenpeace.org/international/Global/international/planet-2/report/2002/2/dlh-a-partner-in-global-fores.pdf.

[733] The businesses DLH purchased timber from were operated by known associates of Charles Taylor, including Gus Kouwenhoven of the Oriental Timber Company and Mohammed Salamé of the Mohammed Group of Companies, both of whom were sanctioned by the United Nations for their involvement with the Taylor Regime. *See* U.N. Sec. Council, *Note by the President of the Security Council*, ¶¶ 23, 49, 88, 215, 217, 272, U.N. Doc. S/2000/1195 (Dec. 20, 2000), *available at* http://www.un.org/sc/committees/1132/pdf/sclet11951e.pdf; Press Release, Security Council, Expert Panel on Liberia Presents Report to Security Council, with Proposals for Furthering Peace in Mano River Region, U.N. Doc. SC/7196 (Nov. 5, 2001), *available at* http://

www.un.org/News/Press/docs/2001/sc7196.doc.htm; Press Release, Security Council, Security Council Committee on Liberia Adds New Identifying Information in Its Travel Ban List, U.N. Doc. SC/8377 (May 4, 2005), *available at* http://www.un.org/News/Press/docs/2005/sc8377.doc.htm.

734 *See* U.N. Sec. Council, *supra* note 733.

735 S.C. Res. 1343 ¶¶ 5(a), 6, U.N. Doc. S/RES/1343 (Mar. 7, 2001).

736 *See* U.N. Sec. Council, *supra* note 733; S.C. Res. 1408, ¶ 10, U.N. Doc. S/RES/1408 (May 6, 2002).

737 *Id.*

738 In May 2005, the Forest Concession Review Committee in Liberia found "in its case-by-case review that that no concession holder was in compliance with the minimum criteria for being cleared." Forest Concession Review – Phase III: Report of the Concession Review Committee (2005).

739 Global Witness, Logging Off 3, 5, 7, 9 (2008), *available at* http://www.globalwitness.org/sites/default/files/import/logging_off_september_2008.pdf [hereinafter Logging Off]; SAMFU Found., Plunder: The Silent Destruction of Liberia's Rainforest 16 (2002), *available at* http://www.forestsmonitor.org/uploads/2e90368e95c9fb4f82d3d562fea6ed8d/plunder_1_.pdf; Global Witness, Taylor-made 10,11 (2001), *available at* http://www.globalwitness.org/sites/default/files/pdfs/taylormade2.pdf [hereinafter Taylor-made].

740 Toni Randolph, *Liberians in Minnesota Tell Stories of Abuse, Torture*, Minn. Pub. Radio (May 1, 2007), http://minnesota.publicradio.org/display/web/2007/04/30/reconcile.

741 *Liberia Profile*, BBC News Afr. (Oct. 11, 2013), http://www.bbc.co.uk/news/world-africa-13729504 (last visited Nov. 12, 2013).

742 Global Witness, Bankrolling Brutality 4 (2010), *available at* http://www.globalwitness.org/sites/default/files/import/bankrolling_brutality_hi.pdf [hereinafter Bankrolling Brutality]; Olof Drakenberg & Emelie Dahlberg, Dep't of Econ., Göteborg Univ., Draft Liberia Environment and Climate Analysis 1 (2008), *available at* http://www.sida.se/Global/Countries%20and%20regions/Africa/Liberia/Environmental%20policy%20brief%20Liberia.pdf; *Liberia Profile*, *supra* note 741.

743 World Bank, Country Partnership Strategy for the Republic of Liberia for the Period FY13-17, at 2 (2013), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2013/07/29/000112742_20130729094758/Rendered/PDF/746180IDA0R20130019102.pdf.

744 Greenpeace, *supra* note 732, at 7.

745 *Liberia: Danish Company Stops Buying Liberian Lumber*, IRIN (July 19, 2001), http://www.irinnews.org/report/23438/liberia-danish-company-stops-buying-liberian-lumber; Dalhoff Larsen & Horneman A/S, Annual Report 2001, at 19 (2001), *available at* http://www.dlh.com/Investor/Download/Old_annual_reports/~/media/files/Website%20specific%20files/GROUP/IR/UK/annual%20reports%20UK/annual_accounts_2001_english.ashx.

746 DLH, Environmental Policy – Specific Targets and Results 2 (n.d.), *available at* http://www.dlh.com/csr/~/media/files/shared%20files%20cross%20websites/corporate%20responsibility/environment/dlh%20environmental%20policy%202010.ashx (last visited Nov. 12, 2013).

747 Sara Sun Beale & Adam G. Safwat, *What Developments in Western Europe Tell Us About American Critiques of Corporate Criminal Liability*, 8 Buff. Crim. L. Rev. 89, 111 (2004).

748 *See* Logging Off, *supra* note 739, at 12; Taylor-made, *supra* note 739, at 17-18.

749 *International Timber Company DLH Accused of Funding Liberian War*, Global Witness (Nov. 18, 2009), http://www.globalwitness.org/fr/node/3896. For the period relevant to the complaint and until 2007, DLH Nordisk A/S operated in France through two businesses—Indubois and Nordisk Bois.

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751 Telephone and E-Mail Interviews with Global Witness, *supra* note 750.

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753 Telephone and E-Mail Interviews with Global Witness, *supra* note 750.

754 *Id.*

755 *Id.*

756 *See* Bankrolling Brutality, *supra* note 742, at 2. French law previously prohibited nonregistered organizations from being able to bring legal proceedings, hence why partnering with Sherpa on the case was necessary for Global Witness. *See* Kerstin Martens, *Examining the (Non-)Status of NGOs in International Law*, 10 Ind. J. Global Legal Stud. 1, 16 (2003).

757 Telephone and E-Mail Interviews with Global Witness, *supra* note 750.

758 *Id.*

759 *Id.*

760 *Id.*

761 *Id.*

762 *Id.*

763 Over the course of these two years, Global Witness and Sherpa joined forces with Greenpeace France, Amis de la Terre, and Liberian lawyer and activist Alfred Brownell. *See International Timber Company DLH Accused of Funding Liberian War*, *supra* note 749.

764 Telephone and E-Mail Interviews with Global Witness, *supra* note 750.

765 *Id.*

766 *Id.*

767 Hereinafter referred to as "Monterrico."

768 Monterrico Metals PLC, http://www.monterrico.com/s/home.asp (last visited Nov. 8, 2013).

769 *Company Profile*, Monterrico Metals Plc, http://www.monterrico.com/s/CompanyProfile.asp (last visited Nov. 25, 2013).

770 A concession agreement is a "negotiated contract between a company and a government that gives the company the right to operate a specific business within the government's jurisdiction." *Concession Agreement*, Investopedia, http://www.investopedia.com/terms/c/concessionagreement.asp (last visited Nov. 8, 2013).

771 The Rio Blanco copper mine is estimated to have the potential to produce around USD 1 billion per year for at least twenty years. Bank Track, Dodgy Deal: Rio Blanco Copper Mine Peru 1 (n.d.), *available at* http://www.banktrack.org/manage/ajax/ems_dodgydeals/createPDF/rio_blanco_copper_mine (last visited Nov. 8, 2013).

772 *Id.*

773 Political Constitution of Peru, art. 89 ¶ 2; Law No. 24656 (Peru), General Law of Peasant Communities; Law No. 26505 (Peru), Law of Private Investment in the Development of Economic Activities in Homelands and Rural and Native Communities Lands.

774 Int'l St. Crime Initiative, Torture at the Río Blanco Mine—A State-Corporate Crime? ch. 1 (n.d.), *available at* http://www.statecrime.org/testimonyproject/peru# (last visited Nov. 8, 2013).

775 *Id.* at ch. 3.

776 *Id.*

777 *Id.*

778 *Id.*

779 *Id.*

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782 The Devil Operation (Guarango Films 2010).

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784 *Id.*

785 *Id.*

786 *Id.*

787 The Devil Operation, *supra* note 782.

788 *Id.*; *see Photographs Confirm Torture of Peasants Who Protested Against Majaz Mining*, Coordinadora Nacional de Derechos Humanos (Jan. 9, 2009), http://derechoshumanos.pe/2009/01/photographs-confirm-torture-of-peasants-who-protested-against-majaz-mining/.

789 *Majaz Mine is Responsible for Tortures Against Peasants from Ayabaca and Huancabamba*, Diario El Regional De Piura (Coordinadora Nacional de Derechos Humanos), June 7, 2008, at 1, *available at* http://www.business-humanrights.org/Links/Repository/909462.

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791 *Peruvian Torture Claimants Compensated by UK Mining Company*, *supra* note 783.

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837 Meeran, *supra* note 826, at 20. The request was made pursuant to the *European Regulation on Cooperation Between Courts of Member States in the Taking of Evidence in Civil or Commercial Matters*, Council Regulation (EC) No. 1206/2001, art 4.

838 Lawyers involved in this specific case point out, however, that "whilst the legal action could have been utilised as part of a campaign by the communities to stop the mine[,] it was understood by all that this was not the purpose of the legal action, which was to secure compensation for injuries sustained by the individuals who pursued the legal action." Interview with Leigh Day, *supra* note 827.

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[849] Milieudefensie, Milieudefensie vs Shell: The 4 Nigerian Plaintiffs (2013), *available at* http://www.milieudefensie.nl/publicaties/factsheets/factsheet-nigerian-plaintiffs-in-shell-court-case/.

[850] The Goi Case, *supra* note 846; The Oruma Case, *supra* note 847; The Ikot Ada Udo Case, *supra* note 848.

[851] The Environmental Guidelines and Standards for the Petroleum Industry (EGASPIN) states, "Clean-up shall commence within 24 hours of the occurrence of the spill." Richard Steiner, Double Standard: Shell Practices in Nigeria Compared with International Standards to Prevent and Control Pipeline Oil Spills and the Deepwater Horizon Oil Spill 17 (2010), *available at* http://milieudefensie.nl/publicaties/rapporten/double-standard. For spills occurring in the Niger Delta, Shell's cleanup efforts did not begin for thirty-three months in Goi, four months in Oruma, and over eleven months in Ikot Ada Udo. The Goi Case, *supra* note 846; The Oruma Case, *supra* note 847; The Ikot Ada Udo Case, *supra* note 848.

[852] The Oruma Case, *supra* note 847; The Ikot Ada Udo Case, *supra* note 848; Fidelis Allen, *The Enemy Within: Oil in the Niger Delta*, 29 World Pol'y J., Winter 2012-2013, at 46, *available at* http://www.worldpolicy.org/journal/winter2012/enemy-within-oil-niger-delta.

[853] UNEP, *supra* note 844, at 150.

[854] The Goi Case, *supra* note 846.

[855] The Oruma Case, *supra* note 847.

[856] *Id.*

[857] The Author of this Case Study, along with the International Corporate Accountability Roundtable, contacted Royal Dutch Shell and Shell Nigeria for comment on the allegations contained herein. A representative of Shell responded, indicating the company's desire to provide a response, but no response was available at the time of publication. *See* Email from Jonathan French, Senior Spokesman, U.K. Media Relations, Shell International to Katie Shay, Legal and Policy Associate, International Corporate Accountability Roundtable (Nov. 22, 2013) (on file with ICAR). In the event that Shell does furnish a response, it will be made available on the ICAR website, www.accountabilityroundtable.org.

[858] Milieudefensie, https://www.milieudefensie.nl/english (last visited Nov. 14, 2013).

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[860] Statement of Defense in the Motion Contesting Jurisdiction, Oguru et al./Shell Petroleum Development Company of Nigeria, Rechtbank 's-Gravenhage [District Court of The Hague], 8 juli 2009 (Neth.), *available at* http://www.milieudefensie.nl/publicaties/bezwaren-uitspraken/s-the-response-of-milieudefensie-and-the-nigerian-plaintiffs-to-shell2019s-argument-for-non-jurisdiction.

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[865] Mutiu Sunmonu, *An Open Letter on Oil Spills From the Managing Director of the Shell Petroleum Development Company of Nigeria Ltd*, Shell.com (Apr. 8, 2011), http://www.shell.com.ng/aboutshell/media-centre/news-and-media-releases/archive/2011/open-letter-04082011.html.

[866] *Id.*

[867] Royal Dutch Shell plc/Oguru et al., Rechtbank 's-Gravenhage [District Court of The Hague], 13 mei 2009, docket no. 2009/0579 (Neth.), *available at* http://milieudefensie.nl/publicaties/bezwaren-uitspraken/shells-response-to-the-subpoenas.

[868] Telephone Interview with Böhler Franken Koppe Wijngaarden (June 6, 2013).

[869] *Id.*

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[876] Telephone Interview with Böhler Franken Koppe, *supra* note 868.

[877] *Id.*

[878] *Id.*

[879] Legal documents pertaining to this case can be found on the Milieudefensie website. *Documents on the Shell Legal Case*, Milieudefensie, https://www.milieudefensie.nl/english/shell/oil-leaks/courtcase/press/documents/documents-on-the-shell-legal-case (last visited Nov. 14, 2013).

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[881] Oruma et al./Royal Dutch Shell plc, Rechtbank 's-Gravenhage [District Court of The Hague], 30 december 2009, docket no. 330891/HA ZA 09-579 (Neth.), *available at* http://milieudefensie.nl/publicaties/bezwaren-uitspraken/judgment-courtcase-shell-in-jurisdiction-motion-oruma.

[882] Articles 27 through 30 of the "Brussels I" Regulation essentially require that the national courts of EU Member States abstain from hearing a case where the same case, or a related case, is already pending before another national court in an EU Member State in order to avoid positive conflicts of jurisdiction and the risk of contradictory judgments. Liesbeth Enneking, Foreign Direct Liability and Beyond: Exploring the Role of Tort Law in Promoting International Corporate Social Responsibility and Accountability 211 (2012). Though the rules of the "Brussels I" Regulation concerning "lis pendens" only apply where the same case is pending before a national court in another EU Member State, they are generally also applied to courts outside of the EU. National judicial authorities have broad discretion over whether or not to stay proceedings in such situations. For example, in the Netherlands, it has been noted that "if foreign victims of human rights violations have a reasonable interest in having their cases heard before the Dutch courts as well, for example because of unacceptable delays in the foreign proceedings, the Dutch court may decide to hear the case after all." *Id.* at 212. This "lis pendens" rule may be important in transnational litigation as legal systems in host States are often not able to adequately or efficiently deal with the complexities of such cases. Robert Grabosch, *Rechtsschutz vor deutschen Zivilgerichten gegen Beeinträchtigungen von Menschenrechten durch transnationale Unternehmen*, *in* Transnationale Unternehmen und Nichtregierungsorganisationen im Völkerrecht 69, 78 (Ralf Nikol et al. eds., 2013).

883 Vereniging Milieudefensie/Royal Dutch Shell plc, Rechtbank 's-Gravenhage [District Court of The Hague], 14 september 2011, docket no. 337050/HA ZA 09-1580 (Neth.), *available at* http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBSGR:2011:BU3529.

884 Milieudefensie, Factsheet: The Legal Case, Step by Step (n.d.), https://www.milieudefensie.nl/publicaties/factsheets/factsheet-court-case-step-by-step (last visited Nov. 14, 2013).

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887 Telephone Interview with Böhler Franken Koppe, *supra* note 868.

888 *Nigerians and Milieudefensie Appeal in Shell Case*, Milieudefensie (May 1, 2013), http://www.milieudefensie.nl/english/pressreleases/nigerians-and-milieudefensie-appeal-in-shell-case.

889 *Id.*

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

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

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