

Removing Barriers to Justice

How a treaty on business and human rights could improve access to remedy for victims



Daniel Blackburn, International Centre for Trade Union Rights (ICTUR)

August 2017

Commissioned by:



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August 2017

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Stichting Onderzoek Multinationale Ondernemingen (SOMO)

Centre for Research on Multinational Corporations

Sarphatistraat 30, 1018 GL Amsterdam, The Netherlands

Tel: + 31 (20) 6391291, fax: + 31 (20) 6391321

info@somo.nl – www.somo.nl



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Foreword

Access to justice for victims of business-related human rights violations is a widespread and growing problem around the world. Complaints of human rights abuses committed by multinational businesses include land rights issues, forced labour, lack of protection for workers and local people from hazardous substances, as well as poor safety standards. These international businesses remain largely outside the formal regulatory system of human rights law and some are taking advantage of these loopholes.

At a time when there is increasing acknowledgement at the UN level that this problem needs to be addressed, SOMO initiated this report that was commissioned by a group of civil society organisations associated with the Treaty Alliance¹ and active in Europe. In this capacity we have been engaging in the sessions of the Intergovernmental Working Group on Transnational Corporations and other Business Enterprises,² as well as with European policy-makers and European Member State policy-makers on the need for an international binding instrument on business and human rights (referred to hereafter as 'Treaty'), as well as looking at what this Treaty might look like.

During this process, we often heard the argument that a Treaty would not address the fundamental problems that persist in the business and human rights sphere. We commissioned this report with the aim of developing a substantiated and well-documented approach to an often polarised debate between proponents and opponents of the Treaty. We started by asking a rather straightforward question: How can a UN Treaty on business and human rights improve access to remedy for victims of business-related human rights abuses?

We are grateful to Daniel Blackburn (Director of the International Centre for Trade Union Rights) for accepting this research assignment. The author selected five well-documented cases of litigation that played out partly in European courts. He used publicly available information to analyse – from a victim's point of view – the barriers they faced in accessing remedy for the abuses they have suffered. He went on to analyse the existing and potential policy approaches designed to address these barriers, thereby identifying elements that could be built upon by a Treaty. The cases and barriers described in this report are not new, and will probably resonate well with those familiar with access to justice issues in the business and human rights field. The goal of the current report is to link the ongoing barriers with potential elements of a Treaty.

The analysis concentrates on barriers to justice for victims of business-related human rights abuse; a more political economic analysis of the driving forces behind these abuses is largely outside the scope of this report. In its recommendations, the report focuses on Treaty elements that would improve access to remedy for victims. Beyond the recommendations of this report, the commis-

1 An alliance of committed networks and campaign groups around the world are joining to collectively help organise advocacy activities in support of developing a binding international instrument to address human rights abuses committed by transnational corporations and other business enterprises. See: <http://www.treatymovement.com/>

2 For a description of its mandate, see: <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>

sioning organisations envision – and indeed are already working on – developing additional elements that could enhance the Treaty’s regulatory effect. For example, CIDSE has just published a report that proposes model clauses for the Treaty to ensure the primacy of human rights in trade and investment policies.³ In addition, several organisations are supporting members of the Dismantle Corporate Power campaign, which is calling for the Treaty to address more elements in addition to improving access to remedy.⁴

The author of the report provides a number of straightforward recommendations about how the Treaty could add value so that it builds on and complements the UN Guiding Principles. As the initiator of the report, SOMO hopes these recommendations will contribute to the development of an effective and significant UN Treaty that will help to address the urgent concerns highlighted in this report.

Mariëtte van Huijstee
Senior Researcher
SOMO

3 Model clauses for a UN Treaty on transnational corporations, other businesses and human rights. Study commissioned by CIDSE to Prof. Dr. Markus Krajewski, University of Erlangen-Nürnberg. March 2017, at: <http://www.cidse.org/publications/business-and-human-rights/business-and-human-rights-frameworks/ensuring-the-primacy-of-human-rights-in-trade-and-investment-policies.html>

4 For the Treaty proposals of the Dismantle Corporate Power campaign presented in October 2016, visit: http://www.stopcorporateimpunity.org/wp-content/uploads/2016/10/SIX-points_ENG.pdf

Acronyms

ATCA	Alien Tort Claims Act
BITS	Bilateral investment treaty
CIDSE	Coopération Internationale pour le Développement et la Solidarité
CSR	Corporate social responsibility
EU	European Union
FNC	Forum Non Conveniens
FPIC	Free prior and informed consent
FRA	Agency for Fundamental Rights
FTLRP	Fast Track Land Reform Programme
ICTUR	International Centre for Trade Union Rights
IGWG	Inter-Governmental Working Group to develop an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights
ILO	International Labour Organization
ISDS	Investor-State Dispute Settlement
ITF	International Transport Workers' Federation
ITUC	International Trade Union Confederation
NAP	National Action Plan
NGO	Non-governmental organisation
OECD	Organisation for Economic Co-operation and Development
SOMO	Centre for Research on Multinational Corporations
TNC	Transnational corporation
UN	United Nations
UNGPs	United Nations Guiding Principles

Executive summary

Transnational businesses are extremely important actors on the global stage. Their operations can potentially create enormous benefits, but they can also cause lasting harm – both to people and the planet. There are now numerous cases involving transnational companies that have been implicated in creating, facilitating or tolerating situations leading to violations of human rights and environmental degradation. Complaints raised against major transnationals include cases of land acquisition that fail to respect the land rights of traditional and indigenous communities; the industrial use of powerful chemicals impacting on the environment; forced labour; the failure to protect workers and local communities from dangerous substances; dumping of waste; polluting of rivers; tolerance of poor safety standards and working conditions; and accounts of collaboration with State military and paramilitary groups against a backdrop of widespread violence against human rights defenders.

Given these severe international impacts, combined with the fact that dozens of companies and corporate groups are now bigger in economic terms than many individual countries, it is remarkable that they still remain largely outside of the formal regulatory system of international human rights law. The international human rights supervisory regimes are predicated on State-based systems. This raises a key question: how can businesses be regulated if they operate across national boundaries yet are only subject to the domestic supervisory frameworks of nation States?

A first step: the United Nations Guiding Principles

The adverse impacts of international businesses have long been acknowledged by the United Nations (UN). In 2005, a Special Representative for Business and Human Rights was appointed by the UN Secretary General. His mandate resulted in the 'Protect, Respect and Remedy Framework' that outlined the duties and responsibilities for states and businesses to address business-related human rights abuses. This was followed by the Guiding Principles on Business and Human Rights (UNGPs)⁵ in 2011. Both the Framework and the UNGPs were unanimously endorsed by the UN Human Rights Council.

The UNGPs have garnered international consensus and support because they include real and plausible strategies for reform. However, they lacked binding force, legal compulsion and the supervisory framework needed to implement real legal change. Unfortunately, the substantive legal reforms needed to remove barriers, and to improve access to remedies, have not been implemented. This means that corporate impunity continues to this day.

5 Guiding Principles on Business and Human Rights, HR/PUB/11/04, United Nations (2011), at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (hereafter UNGPs 1, UNGP 2, etc.)

About this report

In June 2014, a ground-breaking resolution was adopted by the Human Rights Council that established an Inter-Governmental Working Group to develop an 'international legally binding instrument on transnational corporations and other business enterprises with respect to human rights'.⁶ Such a 'binding instrument', or treaty, has the potential to take an important next step on the path towards remedy for victims of business-related human rights abuses.

Seeking to contribute to the mandate of the Inter-Governmental Working Group on business and human rights, this report provides more concrete evidence of continuing obstacles to access to remedy, reiterating the persisting remedy gap that a treaty might help to close. It also sets out arguments for practical reforms, arguing that the UN negotiations for a binding treaty offer a clear opportunity to improve access to remedy for victims.

The report focuses specific attention on policy and legal developments in the European Union (EU). It identifies whether and in what way a UN treaty on business and human rights could complement and improve policy development and action at the national level to address barriers to remedy, as well as setting the framework for harmonising key elements of law.

This report analyses five well-known cases of business-related human rights abuse, setting out the specific legal and practical problems that serve as barriers to justice in each of these cases. The cases profiled here are well-documented examples of some of the adverse impacts of business on human rights. For each example, the barriers that victims face in seeking remedy are examined. Recommendations are made for international legal reform that could potentially break down these barriers. Each analysis concludes with an overview of elements that should be included in a draft treaty to address these problems.

About the case studies

The case studies turn the spotlight on serious human rights impacts that are the result of transnational business ventures. They unpack the complexities of resulting litigation attempts around Europe, Asia, North America and Africa. They also include both criminal and civil law processes. And in one case they include an attempt by an affected community to gain a hearing before the tribunal process of the Investor-State Dispute Settlement (ISDS) mechanism⁷. All of these litigation processes demonstrate striking examples of the formal legal barriers, and practical challenges, that combine to deny many of the victims access to remedy. These cases reveal a clear need for effective action to enhance the protection for people, workers, farmers, communities and the environment from the harmful impacts of violations associated with transnational business operations.

6 Resolution adopted by the Human Rights Council 26/9. Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (2014) at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ResDecStat.aspx>

7 Fact Sheet: Investor-State Dispute Settlement (ISDS), Office of the United States Trade Representative, at: <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2015/march/investor-state-dispute-settlement-isds>

Analysis of the cases reveals:

- ▶ *Jurisdictional problems* specific to transnational litigation, including attempts to bounce cases from jurisdiction to jurisdiction, and the complexity of attempting to interpret and apply foreign law.
- ▶ Legal barriers – specifically the *corporate veil* – shielding the parent company from responsibility for the debts and liabilities of its subsidiaries.
- ▶ Similarly, *barriers to criminal liability* are shown to exist in many cases, with corporations either not indictable, or a lack of effective rules for determining intent.
- ▶ The need for ‘*due diligence*’ to be placed on a solid legal footing to ensure that human rights are appropriately integrated into corporate decision-making, and to establish a duty of care rather than reliance on voluntarism.
- ▶ *Risks for human rights defenders* – individuals and communities (or their representatives) who try to bring legal cases against multinational companies may face considerable challenges themselves as a result.
- ▶ A set of problems grouped here as ‘*access to courts*’ are a crucial factor: the unequal position of rural farmers and industrial workers against giant companies is exacerbated by rules on access to information, representation, the burden of proof and the complexity of transnational corporate structures and actions.
- ▶ Problems of *enforcement*: criminal law requiring adaptation and regulatory agencies and prosecutors requiring training and renewed mandates.

The cases include examples in which many thousands of victims have been left without a remedy, even after extensive, expensive and extraordinarily time-consuming transnational litigation processes. They include cases in which victims have been excluded from tribunal processes and denied the right to a hearing. They include cases that might be regarded as ‘successful’⁸ in which technical legal challenges led to such long delays that claimants died – by the thousand – waiting for a resolution. Another case shows how assertive reputational management action by one company led to libel proceedings against the plaintiff’s lawyers, and suppressed coverage by major media organisations. They also reveal that giant companies have been willing to try to derail plaintiffs on many technical and procedural aspects of their claims, including challenging the legal title of a rural farmer plaintiff.

While settlements were awarded in some cases, and criminal sanctions were imposed in another, there remains an overwhelming tendency for the corporate defendants to evade final court rulings and to settle both criminal and civil matters with cash payments but without admitting guilt. One unfortunate outcome of this is that the companies are subsequently able to – and do – claim

8 Ultimately the Lubbe case (citation below) was settled, resulting in compensation for plaintiffs

they did nothing wrong, thereby not contributing to the articulation of norms that condemn this conduct. Another concern is that, where fines have been imposed, these have been too small to impact upon the vast resources available to the companies concerned, thus having no or a very limited deterrent impact.

Why a Treaty is needed

Barriers to remedy exist in all jurisdictions; removing these barriers requires State action. States are cautious about taking unilateral action so there are strong reasons to propose a binding UN Treaty as a basis for prompting collective movement and convergence of standards. Action is needed now to address these problems and to bring about a new level of accountability so the victims of business-related human rights impacts can receive a hearing as well as remedy for the harms they suffer.

The UN Treaty has real potential to bring about change. It represents an opportunity to coordinate policies and legal developments at the domestic level. Europe can play a hugely influential role in this process. At first some governments feared that the Treaty and the UNGPs were in opposition. They were seen as competing strategies, rather than complementary approaches. An enthusiastic supporter of the UNGPs, the EU was among those arguing that the Treaty proposal risked derailing the implementation of the UNGPs. But this has not happened so far. Far from it, in fact there are signs that support for the UNGP process accelerated after the Treaty initiative got underway. This report argues that the UNGPs and the Treaty should now be regarded as complementary strategies for achieving the same goals.

Furthermore, the EU is now participating in the Treaty process, in spite of initial reluctance to do so.⁹ Beyond this, it has the potential to play a leadership role, and can provide templates in terms of jurisdiction and choice of law (i.e. that of the Brussels and Rome¹⁰ legal frameworks), which should guide and inform the Treaty development process.

Summary of recommendations for the elements of a Treaty

A future UN binding instrument on Business and Human Rights could help to break down barriers to remedy for victims of business-related human rights abuse by working together with existing normative frameworks. The report closes with an overview of elements that should be part of any such Treaty in order to effectively address current remedy gaps. It is recommended that the UN Treaty should introduce the following seven areas of reform, in order to address the problems identified in this report:

9 See Section 3 of this report.

10 Regulation (No. 1215/2012) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) and Regulation (No. 864/2007) on the law applicable to non-contractual obligations (Rome II), herein referred to simply as the 'Brussels' and 'Rome' Regulations.

1. Use the Treaty to make it easier to *overcome jurisdiction barriers*; by creating a framework for jurisdiction and choice of law by domestic courts for human rights violations by their companies overseas, the Treaty could decrease the likelihood of lengthy jurisdictional battles, ensuring that cases will proceed to trial of substantive matters more quickly.
2. Use the Treaty to *remove legal barriers to corporate liability* and to place upon corporations a *broad duty of care*; in almost all situations relevant to transnational human rights cases, parent companies do not, under present company law regimes, bear the liabilities of their subsidiaries. This constitutes a profound legal blockage causing denial of access to remedy in transnational human rights cases. The Treaty could create a mechanism for making a parent company liable for its subsidiary's conduct, enabling victims to pursue compensation from the parent if the local company was unable to meet its liabilities. A duty of care could be limited to the company's own subsidiaries or applied more generally throughout its supply chain.
3. Use the Treaty to *promote convergence of criminal law* around basic modern approaches to corporate liability; the criminal law in many countries is insufficiently structured to deal with corporations as offenders, but examples of modern approaches do exist. The Treaty could help move all legal systems towards a basic criminal law position for corporate offenders. Criminal conviction and sentencing of offenders can provide moral satisfaction for the victims of serious business related human rights abuses and also public recognition that a harm has been inflicted. Furthermore penalties, if set at an appropriate level, can serve as an effective deterrent.
4. Use the Treaty to *improve corporate responsibility* by giving binding legal force to the *due diligence* framework from the UNGPs; there are problems around corporate management and the integration of social and human rights objectives, varying in severity depending on countries' company law approaches. But there are signs of significant change as due diligence concepts become more entrenched. There is scope to support and progress these existing developments, and to build on them. Due diligence would appear to have the potential to radically improve corporate planning, to avoid problems, and to encourage transparency. Significantly, it would also, in principle, establish a broad direct parent company duty of care that would help to ensure a cause of action for private claims for redress by victims.
5. Use the Treaty to *affirm and extend protection for human rights defenders*; in 2017, the UN Working Group on Business and Human note that 'There are increasing records of killings, attacks, threats and harassment against human rights defenders who speak up against business-related human rights issues, including the particular challenges faced by women human rights defenders'.¹¹ The Treaty could help address this alarming trend by introducing libel law reform; introducing a model of judicial protection for whistle-blowers and human rights defenders; and by strengthening the commitment to consult with communities and recognise and to protect the rights and interests of indigenous peoples in relation to business projects.

11 UN Working Group on Business and Human Rights, Informal background note Human rights defenders and civic space – the business & human rights dimension, at: http://www.ohchr.org/Documents/Issues/Business/ForumSession6/UNWG_ProjectHRDsBackgroundNote12052017.pdf

6. Use the Treaty to *improve access to courts*; there are multiple problems for plaintiffs in accessing courts and receiving a hearing in cases against TNCs, including funding provision, locus standi (the right to appear before, or to make submissions to, the court), access to information, the disclosure of documents and the burden of proof. The strategies for reform that the Treaty could adopt include reversing the burden of proof, requiring disclosure of information by transnational businesses and making adequate provisions for plaintiffs and their representatives to secure a hearing and to finance their cases.
7. Use the Treaty to improve the effectiveness of *State enforcement*; at both the domestic and international levels, States face shortcomings and lack adequate processes to enforce human rights law against TNCs. Domestically these problems correspond to uncertainty over mandate, and adequate competence and resources. Internationally there is simply no current machinery dealing with corporate transnational human rights cases. The Treaty could address these shortcomings by creating international agreement on judicial cooperation and mutual recognition and enforcement of judicial decisions; affirming the role of domestic agencies in responding to transnational cases; establishing effective sanctions to be imposed by domestic administrative and criminal processes; and establishing a global oversight body on business and human rights.

There are fundamentally two levels at which the Treaty can deliver change. The first recognises that the majority of the barriers identified in this report exist at the national level, that is, within domestic law. Therefore change needs to happen at the level of domestic law reform in multiple countries if these barriers are to be effectively removed. The second approach calls for something more radical, by placing binding obligations on businesses, and backing that up with some form of monitoring, supervisory or judicial body at the global level. There are good arguments in favour of either approach. It is possible, and may be desirable, to pursue both strategies under the Treaty, calling upon States that ratify it to both amend their domestic law and to pave the way to an international supervisory regime.

Introduction

Business impacts on human rights

Transnational businesses are extremely important actors on the global stage. Their operations can potentially create enormous benefits, but they can also cause lasting harm – both to people and the planet. There are now numerous cases involving transnational companies that have been implicated in creating, facilitating or tolerating situations leading to violations of human rights and environmental degradation. Complaints raised against major transnationals include cases of land acquisition that fail to respect the land rights of traditional and indigenous communities; the industrial use of powerful chemicals impacting on the environment; the failure to protect workers and local communities from dangerous substances; dumping of waste; polluting of rivers; tolerance of poor safety standards and working conditions; and accounts of collaboration with State military and paramilitary groups against a backdrop of widespread forced labour and violence against human rights defenders.

How can businesses be regulated if they operate across national boundaries yet are only subject to the domestic supervisory frameworks of nation States?

The vast expansion of the role of private business in recent decades means that global businesses are now routinely involved in services that are vital to human rights, such as water, health, education, prison, policing and housing. Today's companies also have a great many different structures, making use of multiple layers of parent, holding and subsidiary companies within what can be very complex corporate groups. They also engage in business relationships with a much wider network of companies in their supply chains. The General Secretary of the International Trade Union Confederation (ITUC), Sharan Burrow, has observed that 'sixty per cent of global trade in the real economy is dependent on the supply chains of our major corporations, which uses a business model based on exploitation and abuse of human rights in supply chains'.¹²

Although dozens of companies and corporate groups are now bigger in economic terms than many countries, they still remain largely outside of the formal regulatory system of international human rights law. The international human rights supervisory regimes are predicated on State-based systems. This raises a key question: how can businesses be regulated if they operate across national boundaries yet are only subject to the domestic supervisory frameworks of nation States? Existing regulation is almost exclusively at the national level, and tends to be based around existing legal

12 'New ITUC report exposes hidden workforce of 116 million in global supply chains of fifty companies', ITUC, 18 January 2016, at: <https://www.ituc-csi.org/new-ituc-report-exposes-hidden>

mechanisms rather than specialised legislation.¹³ Human rights law is largely established by international instruments, but it is largely enforced on non-State actors through the ad hoc domestic legal processes, including civil and criminal law. These mechanisms are used to litigate human rights issues in respect of a variety of non-State actors,¹⁴ including businesses, but are very few were designed for the purpose either of holding transnational businesses to account or for providing a remedy to the victims of business-related abuses.

A first step: the United Nations Guiding Principles

The adverse impacts of international businesses have long been acknowledged by the United Nations (UN). In 2005, a Special Representative for Business and Human Rights was appointed by the UN Secretary General. His mandate resulted in the 'Protect, Respect and Remedy Framework' that outlined the duties and responsibilities for states and businesses to address business-related human rights abuses. This was followed by the Guiding Principles on Business and Human Rights (UNGPs)¹⁵ in 2011. Both the Framework and the UNGPs were unanimously endorsed by the UN Human Rights Council.

The UNGPs have garnered international consensus and support because they include real and plausible strategies for reform. However, they lacked the binding force, legal compulsion, and the supervisory framework needed to implement real legal change. Unfortunately, the substantive legal reforms needed to remove barriers, and to improve access to remedies, have not been implemented. This means that corporate impunity continues to this day.

The substantive legal reforms needed to remove barriers, and to improve access to remedies, have not been implemented. This means that corporate impunity continues to this day.

Coordinated and effective law reform is now needed to complement and drive forward work that is already taking place around policy development. Real action is urgently needed to address barriers to remedy. Victims of harm need access to courts and judicial processes, and effective remedies must be available that are appropriate and commensurate to the harm suffered. This is a principle of international human rights law¹⁶ and it is strongly emphasised by the UNGPs.¹⁷ More recently, the Committee on Economic, Social and Cultural Rights – tasked with monitoring the compliance

13 Craig Scott and Robert Wai, 'Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation', in C. Joerges, P. Sand and G. Teubner (Eds.), *Transnational Governance and Constitutionalism* (Oxford, Hart Publishing, 2004), 290.

14 Andrew Clapham, *Human Rights Obligations of Non-State Actors*, (Oxford University Press, 2006), 198

15 Guiding Principles on Business and Human Rights, HR/PUB/11/04, United Nations (2011), at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (hereafter UNGPs 1, UNGP 2, etc.)

16 Universal Declaration of Human Rights, Article 8.

17 UNGP 25.

of States with their human rights obligations under the International Covenant on Economic, Social and Cultural Rights – affirmed the duty of home States of transnational corporations to control corporations across national borders, requiring effective access to justice for victims of business-related human rights abuses when more than one country is involved.¹⁸

But as the case studies in this report reveal, there are major regulatory gaps, and legally created barriers to remedy, that are entrenched in the legal systems, largely at domestic levels. The State's duty here is to ensure effective access to resolution mechanisms, including judicial mechanisms, and to identify and remove barriers to access to remedy.¹⁹ Despite the encouragement set out within the UNGPs in 2011, States have not yet engaged with this obligation. To date, just 14 countries have published the national action plans (NAPs) that were touted as a key measure to implement the UNGPs. Those NAPs that have been published are noticeably weak, particularly on access to remedy.

About this report

In June 2014, a ground-breaking resolution was adopted by the Human Rights Council that established an intergovernmental working group to develop an 'international legally binding instrument on transnational corporations and other business enterprises with respect to human rights'.²⁰ Such a binding treaty has the potential to take an important next step on the path towards the protection of victims of business-related human rights abuses.

Ahead of the third session of the Inter-Governmental Working Group on business and human rights in October 2017, this report provides more concrete evidence of continuing obstacles to access to remedy. It also sets out arguments for practical reforms, arguing that the UN negotiations for a binding treaty offer a clear opportunity to improve access to remedy for victims.

Throughout the analysis this report focuses specific attention on policy and legal developments in the European Union (EU). It identifies whether and in what way a UN Treaty on business and human rights could complement and improve existing avenues for remedy for victims of business-related human rights abuses in the EU.

18 General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolNo=E/C.12/GC/24&Lang=en

19 UNGPs 25 and 26.

20 Resolution adopted by the Human Rights Council. 26/9 Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights (2014) at: <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Pages/ResDecStat.aspx>

Outline of this report

Section 1 of this report analyses five well-known court cases, setting out with regard to each the specific legal and practical problems that serve as barriers to justice for the victims. The cases profiled here are well documented examples of some of the adverse impacts of business on human rights.

Section 2 analyses the identified barriers to justice thematically, exploring how each barrier is created, its implications for access to remedy, and the prospects for reform that are underway, with a particular focus on policy developments in European countries.

Section 3 describes the potential complementarity between a future UN Treaty and the existing international normative framework on Business and Human Rights that was created by the UNGPs in 2011. It also describes the EU's engagement with the UNGP and the Treaty to date.

Based on key problems identified in the case studies (Section 1), the legal analysis (Section 2) and the existing international normative framework (Section 3), Section 4 proposes to include seven areas of reform in the draft Treaty to address the barriers to access to remedy on the part of victims, as well as some of the structural causes of adverse business-related human rights impacts.

Section 1

Case studies

The five case studies profiled in this report have been chosen to help illustrate some of the legal and practical challenges that the UN Treaty will need to address. They cover serious human rights impacts arising from transnational business ventures. They unpack the complexities of resulting litigation attempts around Europe, Asia, North America and Africa. And they include both criminal and civil law processes, and in one case an attempt by an affected community to gain a hearing before the tribunal process of the Investor-State Dispute Settlement (ISDS) mechanism. All of litigation processes exhibit striking examples of the formal legal barriers, and practical challenges that combine to deny many of the victims access to remedy.

Most of the cases profiled relied on civil litigation to recover damages. The civil cases reveal considerable barriers to this kind of litigation that prevent access to effective remedies. This is most clearly illustrated in the cases where the 'corporate veil' absolves parent companies of responsibility for the harms caused or liabilities incurred by their subsidiaries. Two cases also examine the parent company duty of care, under which parent companies can sometimes be held directly accountable by those affected by the actions of their subsidiaries.

The cases also reveal problems faced by claimants such as rural farmers and industrial workers who begin from a position of considerable inequality in terms of their ability to pursue their case in comparison to hugely wealthy global corporations. The cases reveal how these factors are exacerbated by the interplay of access to information, the burden of proof and the complexity of transnational corporate structures and actions.

The cases also reveal problems specific to transnational litigation, including attempts to bounce cases from jurisdiction to jurisdiction, and the complexity of attempting to interpret and apply foreign law. It is also apparent that several domestic regulatory processes have proven ineffective against transnational corporate defendants.

It is helpful to look at bundles of litigation concerning grievances arising from the same or similar issues. This allows a clearer perspective, particularly since related or similar legal processes were taking place in more than one country, either following one another, or simultaneously, in several of the cases. The case studies also highlight relevant 'background' events, such as the defendant instructing defamation lawyers and successfully forcing plaintiffs' lawyers and major national broadcasters and newspapers to withdraw statements.

Cape

Case passport

Company: Cape plc (UK)

Claimants: Industrial workers and affected communities

Allegations: Negligence, failure to warn and prevent exposure to harm (asbestos)

Jurisdictions: South Africa, UK, USA

Barriers: Corporate veil, Parent duty of care, Jurisdiction, Forum Non Conveniens (FNC),²¹ Delay, Funding

Outcome: The first case profiled here was initially successful in the 'host state'²² – but the award could not be enforced against the UK parent company; the second case was settled after lengthy delay – during which many plaintiffs died; the third case profiled was successful – setting an influential precedent.

Cape plc is a major UK-based energy company with a global presence. Until the early 1980s a significant component of its business revolved around mining and manufacturing of asbestos products. Historically, Cape's group of companies mined asbestos in South Africa and fabricated the material at assembly and manufacturing sites in the UK. The company expanded into the US, where wholly-owned subsidiary companies processed asbestos fibre and fabricated asbestos-based products. Since at least the 1960s the dangers of working with asbestos were known within the industry.²³ However, victims allege that Cape failed to provide sufficient information or to protect either those working for, or those living nearby, its operations worldwide.²⁴

21 *Forum Non Conveniens* is a legal concept applied in the common law countries under which a court may decline jurisdiction if another 'forum' (that is, a court in another country) is more 'convenient'. In transnational business and human rights cases the concept has been used, usually by defendant corporations, to stop their home state courts accepting cases and to ensure that the cases are tried in host state courts, if at all. The doctrine of *Forum Necessitatis* ('forum of necessity') is a radically contrasting doctrine that is intended to prevent denial of access to justice. The doctrine has roots in the civil law countries but it has been applied quite diversely around the world. The doctrine requires a court to grant jurisdiction where no other court has jurisdiction or where there is no reasonable possibility for the plaintiff to bring a case in an alternative forum. Chilenye Nwapi suggests that the following jurisdictions exhibit versions of the doctrine, and observes that in several cases this has been codified in statute: Belgium, Mexico, the Netherlands, Uruguay, Argentina, Austria, Costa Rica, Estonia, Finland, Germany, Iceland, Japan, Lithuania, Luxembourg, Poland, Portugal, Romania, Russia, South Africa, Spain and Turkey, see Chilenye Nwapi, 'Jurisdiction by Necessity and the Regulation of the Transnational Corporate Actor' (2014) 30 (78) *Utrecht Journal of International and European Law* 24, at: <http://dx.doi.org/10.5334/ujiel.cb>

22 The 'host state' is the country in which the transnational business is invested, or from which it sources materials, manufactures goods, or in which it supplies services. It can be contrasted with the 'home state', the country in which the profit-making top-level corporation is headquartered, or has its main management operations, or its main stockmarket listing.

- ▶ The *Adams*²⁵ plaintiffs were the second of two litigant groups from Cape's wholly-owned US subsidiary to assert that their employer, NAAC, had been negligent in exposing its workers to asbestos, and in failing to bring the full extent of the dangers to workers' attention. Both groups of workers won their cases in the US, but before the *Adams* group received any compensation, NAAC was placed into liquidation. The workers attempted to follow the profits up the corporate group structure to the Cape parent company in London, arguing variously that the parent and subsidiary were a single entity, that the corporate veil should be pierced, or that the parent had submitted to the jurisdiction of the US court. Unfortunately, however, the English Court of Appeal was unwilling to overrule what it saw as clear company law barriers that protect parent companies from any form of vicarious or agency liability, and – rejecting veil piercing that would treat the parent and subsidiary as a single enterprise – noted that '... the right to use a corporate structure in this manner is inherent in our corporate law'.²⁶ This key case in English law confirmed that ancient company law principles²⁷ would be applied equally by the UK courts to cases involving harms suffered overseas by the subsidiaries of UK companies.

- ▶ In the *Lubbe* case²⁸ more than 3,000 victims, comprising former asbestos workers and members of the communities living around the asbestos mining and manufacturing areas in South Africa, suffered debilitating harm as the result of exposure to asbestos. The victims had worked for and lived around the mines and manufacturing sites operated by Cape plc's wholly-owned subsidiary Cape Asbestos South Africa (Pty.) Limited (CASAP), and its associated companies.²⁹ The exposure occurred over varying, but sometimes lengthy, periods of time. Many of the affected people died prior to the litigation, so several of the plaintiffs were suing as personal representatives of deceased persons, including one British citizen suing as representative of her deceased husband.³⁰ All the others were South African citizens resident in South Africa.

23 'History of Asbestos Health Effects', AsbestosNetwork.com, <http://www.asbestosnetwork.com/Asbestos-Use/History-Of-Asbestos-Health-Effects.shtml>, and *Chandler v Cape* [2012] EWCA (Civ) 525

24 Emily Dugan, 'Asbestos: A shameful legacy', *The Independent*, 22 November 2009, at: <http://www.independent.co.uk/news/uk/home-news/asbestos-a-shameful-legacy-1825554.html>, 'Historic judgment as asbestos victim wins damages from employer's parent company', Leigh, Day & Co., 25 April 2012, at: <https://www.leighday.co.uk/News/2012/April-2012/Historic-Judgment-as-Asbestos-Victim-Wins-Damages->, and 'Cape asbestos factory compensates worker for lung cancer', Field Fisher, at: <http://www.fieldfisher.com/personalinjury/case-studies/mesothelioma-claims/cape-asbestos-factory-compensates-worker-for-lung-cancer>. See also the concession in *Chandler*, at para 35, '[Cape] will admit that asbestos exposure in substantial concentration sufficient to create a risk of asbestosis was known to be foreseeably hazardous at the material time and that a person causing or permitting such exposure would be liable in respect to any relevant common law and statutory duties if the same were owed'.

25 *Adams v Cape Industries Plc* [1991] 1 All ER 929.

26 *Ibid.*

27 Introduced in the 18th century, and applied widely from the Companies Act 1844 and the Limited Liability Act 1855. See also *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, and see Corporate Liability section of this report.

28 Lubbe; For a compilation of sources that deal with this particular case, see the dedicated webpage of the Business and Human Rights Resource Centre: <https://business-humanrights.org/en/capegencor-lawsuits-re-so-africa-0>.

29 *Ibid* 3-6.

30 *Ibid* 2.

In the *Lubbe* litigation, several legal issues arose. The company resisted the jurisdiction of the UK courts on the basis of a *Forum Non Conveniens* argument. The company argued that South Africa was the more appropriate forum.³¹ In rejecting the *Forum* argument, the Court took into account the unavailability of legal aid in South Africa, the degree of legal specialisation available for business and human rights cases in Britain and South Africa, and the Right to a Fair Trial under Article 6 of the European Convention on Human Rights.³²

In the hearings, the UK courts indicated an openness to a line of argument drawing on direct claims based on the negligence of the parent company. However, this substantive legal issue was not finally resolved as the case was (in the words of the plaintiff's solicitor) 'bounced up and down the UK Court system by Cape plc, purely on the issue of where the case should be heard'.³³ The extensive litigation concerned primarily the procedural question of the *Forum Non Conveniens* argument, raised by the defendants. During this time, the plaintiffs' lawyers observed bitterly, 'approximately one thousand of the claimants died'.³⁴ The *Lubbe* case was eventually settled, and the surviving claimants did receive a remedy, while a trust was established in South Africa to meet future claims. However, many plaintiffs died before the settlement was concluded. The claim failed to establish either a legal precedent on direct parent company liability, or a clear finding by a court holding the company accountable.

- ▶ In the *Chandler* case³⁵, the victim was a former worker at one of Cape's wholly-owned, UK-based subsidiaries, Cape Building Products Limited (previously Uxbridge Flint Brick Company). He worked at the plant for a period of 18 months between 1959 and 1962. Decades later, in common with many others who had worked in the British plants, he developed asbestosis. The claimant faced two significant barriers: the subsidiary company that had employed him at the time no longer existed, and it had not had the necessary insurance. Chandler thus followed the strategy attempted in *Lubbe*, and proceeded directly against the parent company, Cape plc, arguing that it had owed him a direct 'duty of care'. In what was to become a key precedent that would later be cited in several transnational business and human rights cases, the Court of Appeal upheld a decision of the High Court finding that the parent company did owe a direct duty of care to an employee of its subsidiary. This duty did not exist automatically: the parent company had taken on an obligation towards the plaintiff by virtue of its greater specialist knowledge and expertise as against the direct employer.

The Court applied an established duty of care test (the *Caparo* test),³⁶ under which the existence of a duty is predicated upon: foreseeability; proximity; and whether it is fair, just and reasonable to impose a duty. Specifically, the Court looked at whether: the businesses of the parent and subsidiary are in a relevant respect the same; the parent has, or ought to have,

31 *Lubbe*, 8.

32 *Ibid*, 11-24, 12, 24 and 26, and 32.

33 Meeran, R. 'Legal accountability of multinationals: the current state of play in the UK', *International Union Rights*, 19.4 (2012), 18.

34 *Ibid*.

35 *Chandler v Cape* [2012] EWCA (Civ) 525. Chandler was a domestic case, but it set a precedent that has been cited in transnational cases and in courts outside the UK.

36 *Caparo v Dickman* [1990] 2 AC 605.

superior knowledge on some relevant aspect of health and safety in the particular industry; the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and the parent knew or ought to have foreseen that the subsidiary or its employees would rely on it using that superior knowledge for the employees' protection. These criteria appear to be merely indicative rather than exhaustive. However, several subsequent rulings (such as the *Thompson case*)³⁷ appear to have treated them as such, finding that situations that do not meet the criteria fail to establish a parent company duty of care.

Royal Dutch Shell³⁸

Case passport

Company: Royal Dutch Shell plc (UK)

Claimants: Rural fishermen and farmers

Allegations: Negligence, environmental damage and harm to livelihoods and health

Jurisdictions: The Netherlands, UK, Nigeria

Barriers: Corporate veil, Parent duty of care, Jurisdiction, FNC, Delay, Funding, Disputed land rights, Burden of proof, Disclosure, Complexity of applying foreign law

Outcome: The case in the Netherlands is on-going – but jurisdiction has been accepted; the first UK case ended with a large settlement; in the second UK case, the court declined jurisdiction. The parent company had 'restructured' since the events complained of in the first case, shedding its 'duty of care' for the actions of its subsidiary. The Dutch court has still to address this question in the on-going case.

The giant oil company Shell operated throughout the 20th century with joint British and Dutch stock market listings and with headquarters in both countries. In 2005 it underwent a restructuring to bring both sections within a global group identity. Shell began exploitation of Nigerian oil in 1958. Shell continues to be the single most dominant of the independent oil companies that have exploited the oil resources of Nigeria, much of it in the Niger delta area. There are thousands of kilometres of crude oil pipelines crossing the delta region, as well as numerous oil extraction areas and well heads.³⁹ Since the 1950s, there has been a large number of oil spills, a consequence of poor maintenance in some cases, and of third party sabotage and theft in others. A 2011 report from the United Nations Environmental Programme (UNEP) examining the situation in the Ogoniland delta region found that 'there are, in a significant number of locations, serious threats to human health from contaminated drinking water to concerns over the viability and productivity of ecosystems. In addition that pollution has perhaps gone further and penetrated deeper than many may have previously supposed', that 'most members of the current Ogoniland community have lived with chronic oil pollution throughout their lives', and that 'control and maintenance of oilfield

37 *Thompson v The Renwick Group plc* [2014] EWCA Civ 635.

38 For a compilation of sources that deal with this particular case, see the dedicated webpage of the Business and Human Rights Resource Centre: <https://business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria>

39 John Vidal, 'Shell verdict will determine whether other firms could be tried for oil spills', *The Guardian*, 29 January 2013, at: <https://www.theguardian.com/environment/blog/2013/jan/29/shell-oil-spills-niger-delta>

infrastructure in Ogoniland has been and remains inadequate: Shell Petroleum Development Company's own procedures have not been applied, creating public health and safety issues'.⁴⁰

The damages arising from the oil spills include environmental contamination of ground and water across traditional land, farms, agricultural areas and fishing grounds. Those living and working on the contaminated lands complain of sickness, eye problems, malaise and an impact on sanitation and hygiene due to water contamination. The traditional skills of fishing and gathering shellfish are under threat. The indigenous culture itself, which has a close connection to the land, is said to be directly harmed by the contamination. Those with commercial ties to agriculture and fishing have also suffered losses.⁴¹

There have been numerous court proceedings in local courts in relation to oil spills, many of them against Shell's subsidiary, Shell Petroleum Development Corporation (SPDC), which is incorporated in Nigeria. Some of these are continuing, but issues of delay, questions of the effectiveness of the forum,⁴² and concerns over the influence on local procedures of an industry that accounts for more than 90% of export earnings, mean that many have sought justice in Europe and in the US.⁴³ British lawyers Leigh, Day & Co. have argued that 'cases of this complexity in Nigeria can take decades', a degree of delay that the English Court of Appeal recently described as 'extraordinary', 'excessive', and 'inordinate'.⁴⁴

- ▶ Four farmers (Friday Alfrad Akpan, Chief Fidelis Ayoro Oguru, Alali Efanga and Eric Barizaa Dooh) from the rural Nigerian villages of Oruma, Goi and Ikot Ada Udo brought five separate cases (plaintiff Dooh filing two separate claims) in the Netherlands legal system. They argued that Shell Petroleum Development Company of Nigeria Ltd (SPDC) and its parent company Royal Dutch Shell (RDS) had failed in its duty to protect them from environmental harm arising from spills from pipelines and well heads, that they had suffered harm and loss as a result, and calling on the companies to provide compensation. The Akpan, Oguru, Efanga and Dooh cases were filed in the Netherlands against Royal Dutch Shell (RDS), under the Brussels jurisdiction regime. RDS's subsidiary Shell Petroleum Development Company of Nigeria Ltd (SPDC) was added as a co-defendant under Dutch procedural law.

40 'Environmental Assessment of Ogoniland', United Nations Environmental Programme, 2011 (UN), available at: http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf

41 *Ibid.*

42 'The communities say Nigerian courts are unfit to hear the case' in Karolin Schaps and Libby George 'Shell battles Nigerian communities in high-stakes London lawsuit' Reuters, 6 January 2017, at: <http://www.reuters.com/article/us-shell-nigeria-lawsuit-idUSKBN14Q1BR>, and 'High Court blocks Nigeria oil spill case against Shell', *Al-Jazeera* (26 January 2017), at: <http://www.aljazeera.com/news/2017/01/high-court-blocks-nigeria-oil-spill-case-shell-170126132912975.html>

43 Tens of thousands were represented in the *Bodo* and *Bebe* claims in the UK, while the families of Ogoniland activists killed by the Nigerian military sought justice in the US, based on claims of corporate complicity, see Chris Kahn, 'Shell settles human rights suit for \$15.5M', Associated Press, 8 June 2009, at: http://www.nbcnews.com/id/31175017/ns/business-world_business/, and *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

44 *IPCO (Nigeria) Limited v Nigerian National Petroleum Corporation* [2015] EWCA, para 22.

On 30 December 2009, the Court in The Hague dismissed Shell's attempts to contest jurisdiction. On 30 January 2013, the District Court held that all of the cases complained of were the result of third party sabotage, rather than of poor maintenance. Under Nigerian law, SPDC was liable for the latter, but not the former, and so four of the five cases were dismissed. In Mr. Akpan's case the finding was again of third party sabotage, but with the proviso that SPDC had also violated a duty of care under Nigerian law, and was thus liable under the tort of negligence: SPDC could and should have taken remedial action in 2006, but only did so in 2010, after the lawsuit had commenced. This failure to act constituted negligence and exacerbated the impact of the third party intervention. The Court ordered SPDC to pay damages to Mr. Akpan. The District Court dismissed all claims against the parent company RDS on grounds that Nigerian law – applicable under the Rome regime – lacked a tradition for imposing direct parent company duty of care.

Oguru, Efanga and Dooh appealed, asserting that a direct parent company duty should be applied, and placing additional demands on the parent company RDS for discovery of documents concerning maintenance, relevant internal reports and records of sabotage incidents. Shell vigorously opposed, even contesting the land and family succession rights of the rural farmer plaintiffs. On 18 December 2015, the Court of Appeal overturned the District Court's ruling, finding that the 'home state'⁴⁵ courts had jurisdiction against the parent company, based on standards EU jurisdictional rules found in the 'Brussels Regulation'.⁴⁶ Crucially, the Court also ruled that it was not necessary to first determine the substantive issues of whether RDS had in fact held a *Chandler* style direct parental duty of care.⁴⁷ The Court also ordered RDS to disclose relevant material. The case was then returned to the lower courts for full argument on both substantive issues and questions of Nigerian common law. At the time of writing, this process remains on-going.

- ▶ The *Bodo* claim,⁴⁸ litigated in the UK High Court, sought compensation for around 11,000 claimants following oil spills in 2008 in the Bodo region. The *Bodo* claim was brought in the British courts, also under the Brussels regulatory framework to establish jurisdiction over RDS. SPDC accepted the jurisdiction of the court alongside the parent company. The plaintiffs alleged that spills occurred due to age and poor maintenance and slow reactions by Shell. Shell argued that the cause of the oil spills was oil theft and sabotage. It also argued over the size and impact of the spills. On 20 June 2014, following a preliminary hearing, the Court ruled that Shell could be held responsible if it failed to take reasonable measures to protect the plaintiffs from either SPDC's failure or from third party intervention. In January 2015, six months before the full trial was due to be heard, Shell agreed a £55 million out of court settlement. The *Bodo* litigation thus saw home state jurisdiction established against the parent company,

45 The 'home state' is the country in which the profit-making top-level corporation of a transnational business or corporate group is headquartered, or has its main management operations, or its main stockmarket listing. It can be contrasted with the 'host state', in which the transnational business is invested, or from which it sources materials, manufactures goods, or in which it supplies services.

46 Regulation (No. 1215/2012) (Brussels Recast).

47 This contrasts with the opposite view taken by the UK court in the *Bebe* case (below).

48 *The Bodo Community and Others v Shell Petroleum Development Company of Nigeria Ltd* [2014] EWHC 1973 (TCC).

under Brussels, and the subsidiary joined to the case voluntarily (though the civil litigation rules would likely have required it to accept being joined to the action as a co-defendant, had it not volunteered, as in *Bebe* – below). *Bodo* is relevant to this report due to its stark contrast with the subsequent *Bebe* claim.

- ▶ The case of *Bebe Okpabi*,⁴⁹ also litigated in the UK High Court, consisted of two claims for compensation by around 42,500 affected people from the Ogale community and Bille Kingdom. The *Bebe* case also proceeded under the Brussels regulatory framework to assert jurisdiction over RDS. Elements of British domestic law⁵⁰ allowed the subsidiary, SPDC, to be added. In 2017, the UK court declined jurisdiction, basing its decision on a finding that RDS had not owed a *Chandler* duty of care to the communities and that it was an entirely separate entity from SPDC. The Court accepted that, following a corporate re-structuring, the parent company had henceforth lacked technical expertise and had exercised little or no supervision over its subsidiary. This distinguished the situation from the *Bodo* case, and led to a finding that – with no duty owing – RDS had no case to answer, and thus no jurisdiction could be founded. This line of formalistic reasoning indicates that a parent company can now divest itself of a duty of care for its subsidiaries, and throughout its supply chain, by simply failing to employ technical specialists and by paying no or minimal attention to what its subsidiaries are doing. If this analysis is correct then *Bebe* seems completely at odds with modern approaches to corporate social responsibility and due diligence.

Trafigura⁵¹

Case passport

Company: Trafigura Group Pte. Ltd. (Singapore)

Claimants: Urban poor

Allegations: Negligence, environmental and health impacts

Jurisdictions: The Netherlands, UK, Côte d'Ivoire

Barriers: Delay, Burden of proof, Regulatory agencies failing to act, libel claims and injunctions, Lack of determinative final judgments; Adequacy of compensation and deterrent

Outcome: The company paid out a number of settlements and fines, but there were no final court determinations against it in the major cases. Arrests were made in Côte d'Ivoire, but Trafigura's people were released following a settlement paid to the Ivorian government. Subsequently the Supreme Court held that the settlement blocked local legal actions. A criminal prosecution in the Netherlands was also settled. The company maintains that it 'did nothing wrong and its staff acted in an appropriate manner throughout'.⁵² Many victims have complained that they did not receive compensation.

49 *His Royal Highness Emere Godwin Bebe Okpabi and Others v Royal Dutch Shell PLC and Shell Petroleum Development* [2017] EWHC 89 (TCC).

50 Civil Procedure Rules, Practice Direction 6B.

51 For a compilation of sources that deal with this particular case, see the dedicated webpage of the Business and Human Rights Resource Centre: <https://business-humanrights.org/en/trafigura-lawsuits-re-c%C3%B4te-d%E2%80%99ivoire>

52 'Trafigura & the Probo Koala', Trafigura, at: <https://www.trafigura.com/images/probo-koala/trafigura-and-the-probo-koala.pdf>

Trafigura is a major oil and metals trader with a transnational character and a presence around the globe in the form of inter-linked companies, shipping and operations. Incorporated under the law of the Netherlands in 1993, Trafigura Beheer BV was the parent company and it has since transferred to Singapore. The company's main trading operations also moved from the UK to Switzerland. The company's website proudly claims to deliver petroleum products 'consistently, safely and responsibly'.⁵³ In 2006, Trafigura chartered the tanker Probo Koala to transport 84,989 metric tonnes of coker naphtha, a gasoline blendstock.⁵⁴ Trafigura carried out a 'caustic washing' procedure to refine the material.⁵⁵ The company then attempted to discharge 'slops' and waste material for treatment in Amsterdam. The contractor, Amsterdam Port Services, substantially increased its quote for dealing with the waste after running tests. Rejecting the higher quote for processing the waste, Trafigura had the waste pumped back onto the ship, and transported it to West Africa.⁵⁶

After calling at two ports en route, Trafigura called what it describes as 'an experienced port agent in Abidjan' and reached agreement with the local Compagnie Tommy, which Trafigura describe as 'a recently licensed local operator' for disposal of the waste.⁵⁷ On 19 August 2006, Tommy dumped 528 cubic metres⁵⁸ of 'slops' at 17 or 18 locations in Abidjan. Within 48 hours residents began to complain of a terrible smell.⁵⁹ More than 100,000 people sought medical treatment.⁶⁰ The Ivorian authorities also reported more than a dozen deaths.⁶¹ Trafigura has consistently denied that the waste could have caused anything other than mild health effects.⁶² The company also denies responsibility for allowing the waste to be dumped, and describes the dumping of waste by Compagnie Tommy as 'in flagrant breach' of both the operator's licence and Compagnie Tommy's contractual undertaking to Trafigura.⁶³

- ▶ Legal action commenced dramatically in Côte d'Ivoire when Trafigura executives were arrested while visiting the country one month after the waste had been dumped. On 18 September 2006, Trafigura Chairman Claude Dauphin and senior executive Jean-Pierre Valentini were

53 <https://www.trafigura.com/images/keyProcesses/keyProcess3/how-trafigura-delivers-oil-products-responsibly.pdf>, and *Trafigura Annual Report*, Trafigura, 2014, p65.

54 'Trafigura & the Probo Koala', p22 (FAQs).

55 'Trafigura & the Probo Koala', p6.

56 'Trafigura & the Probo Koala', p7, and see <http://www.bbc.co.uk/news/world-africa-10735255>

57 'The Probo Koala Case in 12 Questions', Trafigura, at: <https://www.trafigura.com/resource-centre/probo-koala/>, Section 1 'What happened?'

58 'The Probo Koala Case in 12 Questions'.

59 'Trafigura & the Probo Koala' p9.

60 Communiqué of 21 June 2007 issued by the Presidency of the Republic of Côte d'Ivoire and hosted at https://www.trafigura.com/media/3902/communiqué_rci_21_06_2007_en.pdf (accessed 29 June 2017), also statement by 6 UN Special Rapporteurs, 'Ten years on, the survivors of illegal toxic waste dumping in Côte d'Ivoire remain in the dark', UNOHCHR, 19 August 2016, available at www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20384&LangID=E#sthash.2CXoFgwz.dpuf

61 Communiqué of 21 June 2007 (citation above), also 'Ten years on, the survivors of illegal toxic waste dumping in Côte d'Ivoire remain in the dark'.

62 'Trafigura & the Probo Koala', p19-20.

63 'Trafigura & the Probo Koala', p4.

arrested, along with N’zi Kablan, an executive of locally registered company Puma Energy.⁶⁴ The three were detained until 13 February 2007, when all three were released immediately following the negotiation of a settlement deal between Trafigura and the State, under the terms of which Trafigura agreed to pay US\$198 million in compensation as well as paying for clean-up and recovery.⁶⁵ Trafigura described the settlement with the government as serving to ‘complete remediation and compensate the Ivorian government and any victim’.⁶⁶ The terms of the deal purported to absolve Trafigura from liability for criminal or civil cases arising from the matter. The settlement did not, however, protect the local companies involved: in October 2008, the director of the local company Compagnie Tommy was convicted (on charges of manslaughter) and sentenced to a term of 20 years imprisonment for his part in the affair.⁶⁷ A local shipping agent was also convicted and sentenced to five years imprisonment.⁶⁸ However, on 23 July 2014 the Côte d’Ivoire Supreme Court blocked a local legal action against Trafigura, confirming that the settlement paid to the State effectively shielded the company from claims under the Ivorian legal system.⁶⁹

- ▶ In late 2006, the British-based law firm Leigh Day and Co., acting on behalf of around 30,000 victims of the dumped waste, brought a civil damages suit in the British High Court, seeking more than £100 million. Following a long and acrimonious battle, during which Leigh, Day & Co. sought (and received) a legal order banning Trafigura from contacting claimants, and Trafigura lodged a libel action against Leigh, Day & Co., an out-of-court settlement was reached, securing a total payment of around £30 million.⁷⁰
- ▶ On 6 December 2006, a local government inquiry in Amsterdam found that public officials had been negligent in allowing the waste to be loaded back onto the ship.⁷¹ In 2008 a criminal

64 ‘Trafigura & the Probo Koala’, p9.

65 ‘Trafigura & the Probo Koala’, p13.

66 The Probo Koala Case in 12 Questions, Section 1 ‘What happened?’.

67 Trafigura say: ‘Salomon Ugborugbo, the owner of Compagnie Tommy, was indeed convicted of manslaughter in connection with the Probo Koala incident. However, Trafigura does not know the basis upon which the court reached its decision. The company was not a party to the case and therefore had no access to the evidence. Trafigura maintains that there is no basis to support any allegation that the slops could have caused anything other than short term low-level flu-like symptoms and anxiety, and this is supported by the work of the 20 independent experts who submitted evidence to the English group action case’, at: ‘Trafigura & the Probo Koala’, p30.

68 ‘The Probo Koala Case in 12 Questions’, Section 5 ‘Who is liable for this incident?’

69 *Yameogo Hado & others v Trafigura*, 23 July 2014, at: https://www.trafigura.com/media/3909/cour_supreme_rci_yameogo_hado_and_others_23_07_2014_fr.pdf

70 Agreed Final Joint Statement, at: https://www.trafigura.com/media/3950/trafigura_and_leigh_day_co_agreed_final_joint_statement.pdf, and ‘Ivory Coast’, at: <https://www.leighday.co.uk/International-and-group-claims/Ivory-Coast>. This settlement was then paid into an Ivorian bank account as a precursor to local distribution, from where it was fraudulently seized by a third party, who secured the backing of the Ivorian Supreme Court. Some of the funds were subsequently recovered, resulting in payments to 23,000 claimants. Some of the 6,000 who did not receive payments sued Leigh, Day & Co. in the British High Court and won, with a ruling that the law firm had breached both its contract and a duty of care to the claimants, by failing to protect the settlement against third party fraud. See: Sylvie Aya Agouman and Leigh Day (a firm), [2016] EWHC 1324 (QB), and https://www.trafigura.com/media/3926/judgment_agouman_v_leigh_day_16_06_2016.pdf

71 Hulshof Commission, Municipality of Amsterdam.

prosecution was opened against the captain of the Probo Koala, a Trafigura manager, and the company's Chairman Claude Dauphin.⁷² The court dismissed the case against Trafigura's Chairman, a decision that was challenged by Greenpeace Netherlands. On 16 September 2009, they filed a legal action⁷³ calling for review of the decision not to prosecute Trafigura's Netherlands registered entity (Trafigura Beheer BV), the company's Chairman, and Trafigura's Netherlands-based subsidiary Puma Energy International BV.⁷⁴ On 6 July 2010, the Dutch Supreme Court ruled that the Court of Appeal should review again whether the Trafigura Chairman could be prosecuted.⁷⁵ On 23 July 2010, the Court ruled that Trafigura would be fined €1 million for breaching rules on the transport of hazardous waste, contrary to the European Waste Shipment Regulation (259/93/EC), the EU Port Reception Facilities Directive (2000/59/EC) and the MARPOL Convention (73/78) of 1983.⁷⁶

On 16 November 2012, a settlement was reached, with the company agreeing to pay the existing €1 million fine, plus a further €367,000.⁷⁷ Following the fine and settlement agreement, the criminal prosecution of the manager was withdrawn.⁷⁸ As the outstanding cases were all then settled, Trafigura's Chairman was not prosecuted. Trafigura says the fine and settlements 'dealt with a technical breach of the provisions for exporting from the European Union – not with the events in the Ivory Coast'.⁷⁹ The official Statement from the Dutch Public Prosecutor's Office of 16 November 2012 says: 'Trafigura was sentenced by the Amsterdam Court of Appeal to a fine of €1 million for the illegal export of waste to Ivory Coast in the middle of 2006 and for concealing the hazardous nature of those materials'.⁸⁰

- In September 2009, Trafigura took extraordinary legal steps to prevent the leaking of the contents of an early draft of a report that it had commissioned, the so-called 'Minton report'.⁸¹ This report made findings concerning the nature of the waste that Trafigura found unpalatable, and the company took drastic action to prevent the information surfacing. On 11 September 2009, the company obtained a rare form of injunction, dubbed a 'super-injunction', banning

72 'Trafigura & the Probo Koala', p15.

73 Under Article 12 of the Dutch criminal code.

74 'Complaint concerning failure to prosecute for an offence', Greenpeace, 2009, at: <http://www.greenpeace.org/international/Global/international/planet-2/binaries/2009/10/trafigura-complaint-toxic.pdf>

75 'Trafigura & the Probo Koala', p21.

76 'The Probo Koala Case in 12 Questions', and 'The Toxic Truth', Greenpeace/Amnesty International (Netherlands, 2012), at: <http://www.greenpeace.org/international/Global/international/publications/toxics/ProboKoala/The-Toxic-Truth.pdf>, p155-156, Judgment of 23 July, LJN: BN 2149, Amsterdam Court, 13/846003-06 (promise), at: https://www.trafigura.com/media/3928/judgment_of_23_july_2010_english_rb_amsterdam_ecli_nl_rbams_2010_bn2149.pdf

77 'Trafigura's punishment final, top executive settles', Press Release, 16 November 2012, Openbaar Ministerie, at: http://www.trafigura.com/media/3916/dutch_authorities_statement_english.pdf

78 *Ibid.*

79 The Probo Koala Case in 12 Questions.

80 'Trafigura's punishment final' (press release, 16 November 2012).

81 Draft report of 14 September 2006, by John Minton of Minton, Trehane and Davies Ltd., at: https://www.trafigura.com/media/3914/draft_minton_report_14_september_2006.pdf

The Guardian from reporting the contents of the report.⁸² Breach of the injunction would potentially amount to contempt of court, an offence punishable by imprisonment or seizure of assets.⁸³ The order was 'anonymised' so that Trafigura's name did not appear in court listings and was extended not only to *The Guardian*, but also to 'Persons Unknown', and contained an extraordinary clause blocking any mention of the existence of the injunction itself.⁸⁴

Trafigura's lawyers also contacted a number of other media agencies, including the Norwegian State broadcaster NRK, warning of legal action if they published the contents of that report.⁸⁵ Also in 2009, the BBC faced a libel case over its story 'Dirty Tricks and Toxic Waste in the Ivory Coast'. The BBC reached agreement to settle the libel case, paid £25,000 in damages and Trafigura's legal costs. It also broadcast an apology, in which it withdrew the allegation that deaths, miscarriages or serious or long-term injuries were caused by the waste. The BBC also issued its own statement, adding that 'the BBC has played a leading role in bringing to the public's attention the actions of Trafigura in the illegal dumping of 500 tonnes of hazardous waste', which it said 'caused a public health emergency with tens of thousands of people seeking treatment'.⁸⁶

- ▶ British regulatory agencies were unwilling or unable to call Trafigura to account, with both the Prosecution Service and the Environment Agency failing to do so when requested by Amnesty International. The Environment Agency did acknowledge, however, that the facts as alleged by Amnesty would potentially, in its view, amount to an offence.⁸⁷ However, it made no investigation and reached no findings on the matter, maintaining a lack of resources and expertise, and only agreeing to look at the file when Amnesty threatened to file a judicial review case.⁸⁸ In March 2015, a group of six UN Special Rapporteurs reported this failure in the following terms: 'the United Kingdom refused to launch a criminal investigation into whether Trafigura's London-based subsidiary had conspired in the UK to dump the waste in Abidjan'.⁸⁹

82 Annotated copy of the super injunction against *The Guardian*, hosted at: <http://image.guardian.co.uk/sys-files/Guardian/documents/2009/10/20/SUPER-INJUNCTION.pdf>, and see Alan Rusbridger, 'Trafigura: anatomy of a super injunction', *The Guardian* (20 October 2009), at: <https://www.theguardian.com/media/2009/oct/20/trafigura-anatomy-super-injunction>, and 'Eight key facts about the draft Minton report', Trafigura (16 October 2009), at: https://www.trafigura.com/images/probo-koala/Trafigura_Statement_on_Draft_Minton_Report_16_October_2009.pdf

83 Annotated copy of the super injunction against *The Guardian*, para. 18.

84 *Ibid.*

85 The NRK distinguished itself by not only ignoring the injunction, but reporting it publicly, in English as well as Norwegian, Synnøve Bakke and Kjersti Knudssøn, 'Trafigura and the Minton Report', NRK (14 October 2009), at: <https://www.nrk.no/dokumentar/trafigura-and-the-minton-report-1.6816347>

86 Michael Holden, 'Trafigura, BBC settle Ivory Coast waste libel case', Reuters (17 December 2009), at <http://uk.reuters.com/article/britain-trafigura-idUKLDE5BG25C20091217> and David Leigh, 'BBC settles Trafigura libel case', *The Guardian* (17 December 2009), at: <https://www.theguardian.com/media/2009/dec/17/bbc-trafigura>

87 Too Toxic to Touch?: The UK's response to Amnesty International's call for a criminal investigation into Trafigura Ltd', Amnesty International (2015), at: <https://www.amnesty.org/en/documents/eur45/2101/2015/en/>, p5

88 *Ibid.*, p2.

89 'Ten years on, the survivors of illegal toxic waste dumping in Côte d'Ivoire remain in the dark', statement by 6 UN Special Rapporteurs (19 August 2016), UNHCHR, at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=20384&LangID=E>

- ▶ In 2015 and then in 2016 two Ivorian associations brought claims in the Dutch court, each claiming to represent more than 100,000 individuals. Both established Dutch organisations to progress their claims, the Stichting Union des Victimes des Déchets Toxiques d'Abidjan et Banlieues (UVDTAB) and the Stichting Victimes des Déchets Toxiques Côte d'Ivoire (VDTCl).⁹⁰ UVDTAB made a claim on 16 February 2015. On 10 May 2016, Trafigura counter-filed a criminal complaint against UVDTAB, alleging forgery and fraud. On 30 November 2016, UVDTAB's claim was dismissed by the Dutch court, which made adverse findings with regard to the propriety, effective administration and conduct of the organisation concerned, and regarding its capacity to represent and safeguard the interests of those it claimed to represent.⁹¹ The second of these associations, VDTCl, served its summons on 11 January 2016.⁹² That case has not yet been heard.

The company did not escape entirely from this sprawling series of legal actions: indeed, Trafigura was forced to pay several fines, to pay a settlement with the Ivorian government and to meet the settlement terms (and subsequently, also a proportion of the substantial legal costs) of the Leigh Day compensation claim. However, what is notable is that the company so effectively managed to free itself from criminal actions and to avoid final determinations of liability in civil actions by agreeing to pay financial settlements. Given the company's vast resources it cannot be assumed that these have a sufficiently robust deterrent effect. Further, as the settlements headed off several judicial rulings there are no final determinative court rulings⁹³ on whether or not the company acted improperly. Indeed Trafigura maintains that it 'did nothing wrong and its staff acted in an appropriate manner throughout'.⁹⁴

In 2016, a group of UN Special Rapporteurs reported that 'many victims also report that they have still not received compensation. It is estimated that only 63% of registered victims received compensation under a February 2007 settlement agreement between Trafigura and the Ivorian Government. Victims' associations appear not to have been consulted before the agreement was signed'.⁹⁵ One promising sign came when those responsible for misappropriation of the Leigh, Day & Co. settlement⁹⁶ were sentenced to 20 years of imprisonment on 13 January 2015, confirmed by the Court of Appeal in Abidjan on 27 July 2016. However, a final flourish of impunity means that none of them was arrested and no warrant was issued for them.⁹⁷

90 'The Probo Koala Case in 12 Questions', Section 9 'Who are the Associations and "Stichtings" (Claim Vehicles) Suing Trafigura in Amsterdam?'

91 *Stichting Union des Victimes de Déchets Toxiques d'Abidjan et Banlieues v Trafigura Beheer B.V.*, Case No.: C/13/581973 / HA ZA 15-195, 30 November 2016, available at: https://www.trafigura.com/media/4087/20161130_judgment_stichting_uvdtab_v_trafigura_ii_english.pdf

92 The Probo Koala Case in 12 Questions, Section 9.

93 The Dutch court did impose sentences, but these were appealed, and the proceedings were ultimately settled without final determination.

94 'Trafigura & the Probo Koala'.

95 'Ten years on' (UN Special Rapporteurs).

96 Third party fraud in Côte d'Ivoire (footnote 56).

97 'Ten years on' (UN Special Rapporteurs).

Borders Timbers

Case passport

Company: Border Timbers Ltd. (Zimbabwe)

Claimants: Indigenous communities

Allegations: Expulsion from traditional land

Jurisdictions: Germany, Switzerland, Zimbabwe, USA

Barriers: *Locus standi*;⁹⁸ Disputed land rights; Tribunal choosing not to apply human rights instruments⁹⁹

Outcome: The investors received an order for their land to be restored, with compensation of US\$196 million payable by the State in the alternative. An application for *amicus100* intervention by the indigenous communities was rejected by the tribunal, which noted that they could be removed from the land by force.

Border Timbers is a subsidiary of the Rift Valley Corporation, an agro industrial corporation in Zimbabwe, Mozambique and Tanzania, with its head office in Harare. Border Timbers has timber plantations in Zimbabwe, including in the south-eastern region of Chimanimani; these were established during the period of British colonial rule and in Rhodesia after the 'Unilateral Declaration of Independence' in 1965. In 2005, Border Timbers' plantation in Chimanimani was 'gazetted' for expropriation by the Zimbabwean government, following the 'fast-track land reform programme'. The Border Timbers plantations in the region are located on the ancestral territories of four indigenous communities, whose interests in the land were informal and traditional, yet are of a form that is explicitly recognised under international human rights law¹⁰¹ and which should be protected. The possibility of disturbance or conflict in the process of removing the communities, as well as the constructions and crops planted by them, was recognised by the ICSID panel as a likely outcome of the restoration of Border Timbers' land claim. However, the communities' informal land claims and traditional rights were regarded as 'fragile at best',¹⁰² despite the fact that the

98 *Locus standi* is the 'standing' that a party has in respect of a given court in a given legal matter, that is the right of a party to join or initiate a legal action.

99 For an insightful commentary on the non-admission of ECCHR and Indigenous Communities as *Amici Curiae* before the ICSID tribunal, see 'Human Rights inapplicable in International Investment Arbitration?' European Center for Constitutional and Human Rights (July 2012), at: https://www.ecchr.eu/en/our_work/business-and-human-rights/worldbank.html?file=tl_files/Dokumente/Wirtschaft%20und%20Menschenrechte/ICSID%20tribunal%20-%20Human%20Rights%20Inapplicable_A%20Commentary.pdf

100 *Amicus Curiae* ('friend of the court') is a concept under which someone who is not a party to a legal action can join the action as a third party in order to offer evidence or assert arguments in order to assist the court in reaching its decision.

101 Including the Indigenous and Tribal Peoples Convention, 1989 (No. 169), ILO (though it has not been ratified by any of the States concerned in this dispute), but also the United Nations Declaration on the Rights of Indigenous Peoples, 2007 (A/RES/61/295), and the African Charter on Human and Peoples' Rights ('Banjul Charter'), 27 June 1981, both of which are applicable. Indigenous peoples' civil, political and social, economic and cultural rights are further supported under the two UN Covenants of 1966, both of which Zimbabwe has ratified.

102 ICSID Case No. ARB/10/15 *Border Timbers Limited, Border Timbers International (Private) Limited, and Hanganí Development Co. (Private) Limited v. Republic of Zimbabwe*, ICSID Case No. ARB/10/25, and *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, para. 730, at: https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf

communities were long known to the company, that has historically granted them access to parts of the Border Estate.

Redistribution of land in Zimbabwe has been a focus of domestic politics since the country's independence in 1980. Colonial rule dispossessed the indigenous population of almost all their territory; by the end of Ian Smith's white supremacist regime in 1979, the vast majority of arable land was owned by a minority white population. The controversial and chaotic Fast Track Land Reform Programme (FTLRP) gained pace in the early 2000s, when the Zimbabwean government controversially enacted laws and constitutional amendments to the effect that no compensation would be made payable for land expropriated under the FTLRP. This legal position was eventually incorporated into the Constitution adopted in 2013, which directed non-indigenous owners of land expropriated under the FTLRP to seek compensation from the former colonial power – the UK. However, investors whose properties are protected under bilateral investment treaties (BITs) are expressly eligible for compensation under the 2013 Constitution.

- ▶ Two claims against the Republic of Zimbabwe were initiated in 2010 at the International Centre for the Settlement of Investment Disputes (ICSID), an institution of the World Bank Group. The claims (*Bernhard von Pezold and others; Border Timbers Ltd. and others*)¹⁰³ were submitted for arbitration under the dispute settlement provisions of two bilateral investment treaties (Germany-Zimbabwe BIT and Switzerland-Zimbabwe BIT). Apart from one German national, the claimants had dual Swiss and German citizenship. The companies concerned are registered in Zimbabwe, but the Swiss investors claimed effective control of them. The ICSID tribunal was essentially charged with addressing the state's failure to pay compensation for the properties expropriated in 2005, and for its treatment of the investors. The investors' primary request in their claim was for the tribunal to order full unencumbered legal title and exclusive control over the properties to be restored to them. The cases were filed by the investors against the State who were seeking an order instructing the State to return the land or pay compensation. The parties to these cases were the investors and the State of Zimbabwe.
- ▶ In 2012 the chiefs of four indigenous communities from Chimanimani petitioned the ICSID tribunal with support from a German NGO (the European Centre for Constitutional and Human Rights, ECCHR) for permission to participate as *amicus curiae* in the proceedings. The petitioners argued that the Border Timbers plantations in Chimanimani are located on the ancestral territories of these indigenous communities; as such any outcome of the tribunal that determined legal rights to these properties would necessarily impact on the rights of these indigenous peoples to their ancestral lands, contrary to international law.¹⁰⁴

The tribunal rejected the communities' petition to participate as *amicus curiae*.¹⁰⁵ The tribunal conceded that its determinations in the proceedings might impact on the interests of the indigenous communities, but it felt it was unable to reconcile these interests, which it found were in conflict with the Claimants' right to full, unencumbered legal title and exclusive

103 *Ibid.*

104 *Ibid.*, para. 21.

105 *Ibid.*, paras. 57–63.

control.¹⁰⁶ The tribunal considered the act of returning the land to the investors merely in terms of formal legal title,¹⁰⁷ and regarded the possibility of disturbance or conflict in the process of removing the communities as well as the constructions and crops planted by them to be ‘a matter for the police and the local authorities’. The tribunal described the communities’ rights as ‘fragile at best’,¹⁰⁸ and determined that the communities could be removed with ‘reasonable and proportionate force’.¹⁰⁹ The tribunal rendered its final award in 2015, awarding full restoration of the investors’ properties. If the restoration failed, the State was instructed to pay the investors compensation amounting to US \$196 million.¹¹⁰

Total¹¹¹

Case passport

Company: Total S.A. (France)

Claimants: Rural Myanmar peasants (subsequently refugees)

Allegations: Forced labour and human rights violations

Jurisdictions: Belgium, France, Myanmar

Barriers: *Locus standi* (right of party to bring legal action), adequacy of criminal law to prosecute human rights violations

Outcome: The Belgian case failed due to the non-Belgian national status of the claimants, as Belgian citizenship was a requirement of the statute relied on. The French case settled for a sum worth at least €5 million. However, no final court determination was made against the company, and it has consistently maintained that the allegations were without substance and that the arguments were flawed both in fact or law.¹¹²

Founded in 1924, Total is one of France’s largest companies. It was reported to have some 900 subsidiaries around the world, but is in the process of consolidating its structures into a more unified global whole. In the 1990s, prior to the democratic reforms in Myanmar, Total was the largest stakeholder in a major pipeline project in that country. At the time, Myanmar was facing international criticism for state-sponsored forced labour,¹¹³ among other widespread human rights violations.

106 *Ibid*, para. 51.

107 *Ibid*, para 731.

108 *Ibid*, para. 730.

109 *Ibid*, para. 587.

110 Jacob Greenberg, ‘ICSID tribunal orders Zimbabwe to return expropriated farms’, *Investment Treaty News* (16 May 2016), at: <https://www.iisd.org/itn/2016/05/16/icsid-tribunal-orders-zimbabwe-to-return-expropriated-farms-bernhard-von-pezold-and-others-v-zimbabwe-icsid-case-no-arb-10-15-jacob-greenberg/>

111 For a compilation of sources that deal with the Belgian case, see the dedicated webpage of the Business and Human Rights Resource Centre: <https://business-humanrights.org/en/total-lawsuit-in-belgium-re-myanmar>

112 Ludovic Hennebel, ‘L’affaire Total-Unocal en Birmanie jugée en Europe et aux Etats-Unis’, CRIDHO Working Paper 2006/09, at: <http://cridho.uclouvain.be/documents/Working.Papers/CRIDHO.WP.2006.09.pdf>

113 Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), Geneva, 2 July 1998.

- ▶ In April 2002, four Myanmar refugees filed a lawsuit against TotalFinaElf (now Total), Thierry Desmarest (Chairman of Total) and Hervé Madeo (the former Director of Total's Myanmar operations) in a Belgian criminal court.¹¹⁴ The four refugees – one of the plaintiffs had formal refugee status in Belgium, which became a materially important point of argument in the case – accused Total of having provided moral, logistical and financial support to the military junta during the 1990s, during which time rural farmers and peasants were subjected to mobilisation by the military for the purposes of forced labour, taking place in and around investment infrastructure.¹¹⁵ They alleged further that the rural poor had been subjected to a regime of deportations, murder, arbitrary executions and torture. The Belgian case was opened as a criminal case using the '*parte civile*' procedure and relying on the 1993 Belgian law of *compétence universelle* ('universal jurisdiction'), alleging complicity in crimes against humanity, amounting to violations of international law. This law provided a jurisdictional basis for Belgian courts to hear cases for the most serious international crimes, even if they were committed outside Belgium. Belgium revised the law in 2003 to insist upon a closer connection with Belgium, restricting access for foreign nationals.¹¹⁶ This jurisdictional amendment came to be defining.

The subsequent legal dispute saw Belgium's superior courts take diverging views on the question of whether the *parte civile* plaintiffs had standing to bring their complaint, in the light of the restrictive clause introduced in 2003. In April 2005, the Court of Arbitration ruled that blocking access to the legal procedure for refugees amounted to unconstitutional discrimination.¹¹⁷ The Court of Appeal dismissed the proceedings just two months later.¹¹⁸ In June 2006, the Constitutional Court struck down the provision of the universal jurisdiction law preventing non-citizens from accessing the law,¹¹⁹ but in March 2007, the Court of Appeal dismissed the case.¹²⁰ In October 2007, prosecutors opened a new investigation founded on the June 2006 ruling, but in March 2008 prosecutors dropped the matter and announced that the case was closed, confirmed by the Court of Appeal.¹²¹

- ▶ In August 2002 a further complaint was filed against Total, this time in a French court, by eight Myanmar nationals who, citing essentially the same factual background as was complained of in the Belgian case, accused Total of being complicit in forced labour violations. The plaintiffs claimed that during the 1990s they had been forced by the army to work in support of the

114 Eric Toussaint, Damien Millet, Renaud Vivien, 'Crimes en Birmanie: TOTAL 1 – Justice 0', CADTM, 24 April 2007, at: <http://www.cadtm.org/Crimes-en-Birmanie-TOTAL-1-Justice> and 'Affaire Total – Compétence universelle Belgique', AFPCU, at: (30 January 2016), at: <https://competence-universelle.org/tag/cour-de-cassation-belgique/>

115 Toussaint, Millet, Vivien, 'Crimes en Birmanie'.

116 Arrêt n° 104/2006 du 21 juin 2006, at: <http://www.const-court.be/public/f/2006/2006-104f.pdf> and see 'Crimes en Birmanie'

117 Arrêt n° 68/2005 du 13 avril 2005 (accessible via search at: <http://www.const-court.be>) and see 'Trial Watch: Thierry Desmarest' (webpage), Trial International (29 April 2016), at: <https://trialinternational.org/latest-post/thierry-desmarest/>

118 Arrêt n° P.04.0482.F at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20050629-11 and see Penelope Simons, 'The governance gap: domestic laws and other governance mechanisms' in *The Governance Gap: Extractive Industries, Human Rights and the Home State Advantage*, Penelope Simons, Audrey Macklin (Routledge, 2014), p209

119 Arrêt n° 104/2006, at: <http://www.const-court.be/public/f/2006/2006-104f.pdf>

120 Arrêt n° P.07.0031.F at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20070328-10

121 Arrêt n° P.08.0547.F at: http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20081029-4

Yadana gas pipeline. The French lawsuit was conceptualised as the domestic criminal offence of *séquestration illégale* ('unlawful confinement').¹²² The case managed to overcome initial hurdles, with a first instance court dismissing Total's argument that there was no case to answer.¹²³

On 29 November 2005, Total and the NGO Sherpa (representing the eight Myanmar nationals) reached a settlement, under the terms of which Total created a €5.2 million solidarity fund to compensate the eight plaintiffs and all other persons able to demonstrate that they had suffered a similar experience in the area near the pipeline construction corridor.¹²⁴ The company maintained throughout, and continues to say, that the allegations were without substance and that the arguments were flawed both in fact or law.¹²⁵ On 10 March 2006, in the light of the settlement, Nanterre's Tribunal de Grande Instance dismissed the case, noting a lack of evidence, and observing that forced labour was not recognised as a criminal offence under French law, but also remarking that there was notable consistency among the testimony of the witnesses who had appeared before the inquiry.¹²⁶

Conclusions

The cases profiled here are not exclusively a list of failures. Nor are they a list of successes. They include serious, and indeed severe, human rights violations, in which plaintiffs, variously, claim: that their land and livelihoods have been damaged; that their rights have been disrespected; that they have been forced into servitude; that they have suffered serious health problems. In one case the plaintiffs' solicitors reported that up to 1,000 people died during the lengthy legal procedures. Although the barriers to justice were great, it was still possible, in some cases, for a number of victims to secure acceptable compensation payments. However, rather dispiritingly, *Chandler* is the only case profiled in which compensation was imposed after a final court determination. While that case is now a cornerstone of transnational human rights litigation, it was not actually a transnational case. Furthermore, it only involved a single claimant...

The cases include examples in which many thousands of victims have been left without a remedy, even after extensive, expensive and extraordinarily time consuming, transnational litigation processes. They include cases in which victims have been excluded from tribunal processes and

122 July 2005 Report (by NGO coalition), 'Total pollutes democracy – Stop TOTALitarianism in Burma', at: <https://www.fidh.org/IMG/pdf/mm04062005a.pdf>

123 'Totalitarian Oil', Burma Campaign (July 2005), at: http://burmacampaign.org.uk/images/uploads/total_report.pdf

124 'Myanmar: Total and the Sherpa Association reach agreement for the creation of a solidarity Fund for humanitarian actions', Total (press release, 29 November 2005), archived at: https://web.archive.org/web/20080402074707/http://www.total.com/en/press/press_releases/pr_2005/051129_myanmar_agreement_sherpa_8205.htm

125 *Ibid*, and NGO statement 'Info Birmanie, la Ligue des droits de l'Homme et la FIDH dénoncent l'accord intervenu entre Total et Sherpa' (webpage), at: <https://business-humanrights.org/sites/default/files/reports-and-materials/LDH-FIDH-communique-Total-accord-30-nov-2005.pdf>

126 'Trial Watch: Hervé Madeo', Trial International (30 April 2016), at: <https://trialinternational.org/fr/latest-post/herve-madeo/>

denied a right to a hearing. They include 'successful'¹²⁷ cases in which technical legal challenges led to such lengthy delays that claimants died – by the thousand – waiting for a resolution. Another case shows how assertive reputational management action by the company saw a company bring libel proceedings against the plaintiff's lawyers, and force major media organisations to reign in their coverage. They also reveal that gigantic companies have been willing to try to derail plaintiffs on many technical and procedural aspects of their claims, including challenging the legal title of a rural farmer plaintiff.

The cases include examples in which many thousands of victims have been left without a remedy, even after extensive, expensive and extraordinarily time consuming, transnational litigation processes.

The corporate veil is a recurring problem, openly blocking litigation in several of the cases profiled it represents a major barrier to litigation, denying access to remedy even following a successful host state court victory in the *Adams* case, the principles of which resurfaced throughout the litigation against Cape and Shell. Even where a radical strategy successfully established the direct parent company's duty of care, the courts have been reluctant to apply a liberal understanding of this duty. In the *Bebe* case, the limitations of this approach were starkly laid out: the less care and attention a company pays to the activities of its subsidiaries, and the less capacity it maintains to supervise them, the less likely a duty of care would arise.

Criminal law is addressed directly as the main theme in only one profile, the *Total* case, where the prosecutions were in civil law countries. It also emerges in the background of the *Trafigura* case, but in neither case did a company executive serve a court-imposed sentence. A fine was issued by the Dutch courts, but the series of criminal actions were ultimately settled. Criminal law is rarely pursued in the common law countries in transnational corporate human rights cases, and no common law criminal cases are profiled here. Amnesty International recently commented that criminal law is a significantly under-used tool for seeking justice in the context of transnational human rights violations by businesses.¹²⁸

Where criminal sanctions have been initiated or envisaged, these too seem to have been largely ineffective against parent companies or their executives. However, the cases also show that the executives of local companies have not always been so lucky, with a sentence of 20 years handed down to a local executive in one case, though the sentence was not served.

127 The *Lubbe* case referred to here ultimately resulted in a settlement payment to plaintiffs.

128 See Amnesty International's statement 'in the last 15 years no country has put a company on trial after an NGO brought evidence of human rights related crimes abroad', in 'Corporate Crime: New principles will help governments and law enforcement tackle corporate abuse', Amnesty International (6 October 2016), at: <https://www.amnesty.org/en/latest/news/2016/10/corporate-crime-new-principles-will-help-governments-and-law-enforcement-tackle-corporate-abuse/>

The need to access technical information about the corporate form and the relationship between the parent company and its subsidiaries, and concerning technical and procedural aspects of corporate group management is a recurring problem. The common law has formal disclosure procedures, which the civil law countries tend to lack.¹²⁹ However, somewhat ironically the cases cited here show the Dutch court ordering disclosure while in the *Bebe* case the British court dismissed the case prior to full disclosure taking place.

Above all they show the extraordinary lack of final court rulings due to the tendency for companies to settle claims if they fear losing. Of course, settlements can result in effective remedies for the victims, and may even be preferable if they speed up the resolution process. But we have seen in several of the cases profiled that the companies insist that they have settled for practical reasons and insist – sometimes even after extensive law suits by thousands of claimants, supported by an army of NGOs, lawyers and campaigners – that they have done ‘nothing wrong’.

129 Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, Andie Lambe, ‘The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business’, ICAR, CORE, ECCJ (December 2013), p62.

Section 2

Analysis of barriers to justice

The barriers identified in the first section of this report are analysed here thematically, exploring how each barrier is created, its implications for access to remedy, and the prospects for reform that are underway in particular countries, or more generally. As described in the conclusions to the first section, the significant barriers that exist in criminal law are also profiled in this section. The section groups together various legal barriers, and practical concerns and problems, as well as introducing the general legal landscape that underpins these areas. This section draws concrete conclusions establishing the main barriers and starts identifying possible strategies in law and policy that could affect significant improvements.

Concerning *jurisdiction*, this section looks at how courts ordinarily recognise jurisdiction over companies, outlining what rules govern forum selection, and what legal framework – home or host state law – will be applied by the forum court. It considers how parent and subsidiaries may be joined as defendants to actions, and looks at the prospects for enforcing the provisions of home state law against parent companies in a context where host state law is more regularly used and concerns have been raised around the use of extraterritorial jurisdiction.

Turning to *corporate liability*, the traditional legal concepts of separate legal personality and limited liability are set out, with consideration of their ancient roots and the extent to which they are deeply embedded in legal systems around the world. The concept of a direct parent company duty of care is also discussed, along with modern ‘due diligence’ approaches that are expanding the duty of care, with likely eventual consequences for private tort litigation.

The problems with the *criminal law* are discussed. In some legal systems, corporations either cannot be indicted for any offences, or only for a small number of specified offences. There are also further problems in many jurisdictions with the concept of corporate *mens rea*,¹³⁰ which is necessary to prosecute criminal offences.

A focus on *regulation of business conduct and due diligence* outlines corporate social responsibility and respect for human rights, as this contrasts with or supports directors’ decision-making obligations. The increasing interest in legally supported due diligence processes is discussed as a likely basis for further work to improve human rights compliance.

130 The ‘mental element’ of a crime – usually some form of intent, recklessness or negligence – which must be proven for so-called ‘intentional’ crimes, that require some form of awareness (not necessarily ‘intent’ in the ordinary meaning of the word, but encompassing also risk-taking, recklessness, negligence or some similar mental state). Intentional crimes can be contrasted with ‘strict liability’ offences, for which no *mens rea* is required.

This section also introduces the *risks for human rights defenders* that include physical threats, legal risks (such as those from libel actions), and fear that challenging powerful business interests may invite local retaliation.

An analysis is also set out around barriers that arise in terms of *access to courts*. These include the profound practical barrier of funding for cases, the technical challenges posed by burden of proof and disclosure issues, and legal procedural issues such as the standing that individuals and groups have to bring cases, together with the problem of delay.

This section ends with an overview of some of the challenges for *enforcement*, by state agencies and by prosecutors, and at the international, as well as national levels, confronting corporate defendants in transnational cases.

Jurisdiction

The first stage of bringing a transnational case is founding jurisdiction. A case might be brought in either the courts of the home state of the parent company, or in the plaintiff's home state, or in the place where the harm occurred. If there is a legal basis for a claim to be brought in more than one country, the plaintiff has a choice of where to begin the action. However, in some circumstances a court may decline jurisdiction, such as when applying the legal doctrine of *Forum Non Conveniens*. Under this doctrine, courts in the common law countries can decline jurisdiction if they are persuaded that a more appropriate forum ought to hear the case. This doctrine was argued in the *Lubbe* case (see case study). The decision concerning which country's courts (which 'forum') hears a case has many implications, including issues of transparency, accessibility, legal costs, the value of compensation that may be awarded and the capacity of the court to enforce its findings against a defendant.

In Europe, the *Forum Non Conveniens* doctrine has been almost totally replaced now by an EU Regulation, known as the 'Brussels' Regulation,¹³¹ bringing the common law jurisdictions into line with the civil law countries in their approach to jurisdictional questions. Essentially Brussels establishes a right to found the case in the domicile of the defendant (the home state), although with some flexibility, including an option to found jurisdiction where the harm occurred (host state) in tort cases¹³². One recent case has, however, seen the UK courts reject jurisdiction under Brussels, despite the fact that the defendant (Shell) is a major UK-domiciled corporation, on grounds that no substantive case against the defendant had been made out.¹³³ The court insisted it was not applying the *Forum Non Conveniens* rule, but it still examined typical *Forum Non Conveniens* questions, such as availability of funding, before making its ruling. This approach – of examining a

131 Regulation (No. 1215/2012) (Brussels Recast). The *Forum Non Conveniens* rules persist in rare circumstances in the UK but the case of *Owusu v Jackson* (case C-281/02) [2005] QB 801 confirmed that, where Brussels applies, the UK courts are bound to follow that approach. However, the doctrine is still applicable by a significant number of common law countries outside Europe.

132 Tort actions are described further below.

133 *Bebe*.

substantive issue before accepting jurisdiction – is the opposite approach taken by the Dutch court in a case based on similar facts and the same EU law.¹³⁴

Host state courts are more accessible to victims, and some research indicates that victims prefer for cases to be filed locally.

To better understand the contests that are fought over jurisdiction it is useful to compare the benefits and problems associated with litigating in 'home' and 'host' state forums. Host state courts are more accessible to victims, and some research indicates that victims prefer for cases to be filed locally – with the crucial caveat that they *only* prefer to use the host state forum if the process is known to be fair and effective.¹³⁵ It will generally be cheaper to litigate cases in host state courts, certainly if host state legal representation is used. But host state lawyers may lack the expertise that a few highly specialised firms have acquired in some of the home state jurisdictions. While it may be cheaper to litigate in the host state, there may be a less well-established tradition of pro bono work, and there may tend to be fewer possibilities to secure case funding or legal aid. In addition, law firms in host states may be less well prepared than large firms in the industrialised world to take on work on a contingency (i.e. – no win/no fee) basis. These factors were raised variously in *Lubbe*, *Trafigura* and *Shell*. Complaints are also often raised about the slow pace of host state legal proceedings (see the *Lubbe* and *Shell* case profiles). The potential for the influence of corporate power over state regulatory bodies, prosecution services and police, investigative agencies and judicial processes has also been raised as a legitimate fear in host states.¹³⁶ King Emere Godwin Bebe Okpabi, plaintiff in the case representing the Ogale Community, expressed the opinion that 'Shell is Nigeria and Nigeria is Shell ... You can never, never defeat Shell in a Nigerian court. The truth is that the Nigerian legal system is corrupt'.¹³⁷ On a similar theme – the influence of corporate power – it was unclear, for example, which legal principle the courts of Côte d'Ivoire drew upon to conclude that a settlement agreement paid from *Trafigura* to the authorities was sufficient to oust the rights of victims privately to seek redress in local courts. There was also a lack of clarity as to the legal basis on which criminal processes were halted and executives released immediately following the payments.

134 Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3588 (*Oguru-Efanga/Shell*); ECLI:NL:GHDHA:2015:3586 (*Dooh/Shell*); ECLI:NL:GHDHA:2015:3587 (*Shell/Akpan*)

135 This is the tentative conclusion drawn from discussions with a small sample of victims and lawyers by Professor Gwynne Skinner, see 'Beyond Kiobel: Providing Access to Judicial Remedies for Violations of International Human Rights Norms by Transnational Business in a New (Post-Kiobel) World', Gwynne L. Skinner, *Columbia Human Rights Law Review* (46.1, 2014), at: <http://hrilr.law.columbia.edu/wp-content/uploads/sites/10/2016/03/46.1.3.pdf>, p171-173.

136 'Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse', Oxford Pro Bono Publico (3 November 2008), at: <http://www2.law.ox.ac.uk/opbp/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf>, p3, and 'Beyond Kiobel', p169.

137 'High Court blocks Nigeria oil spill case against Shell', *Al-Jazeera* (26 January 2017), at: <http://www.aljazeera.com/news/2017/01/high-court-blocks-nigeria-oil-spill-case-shell-170126132912975.html>

Where court systems are functioning effectively, host state litigation can be a relatively straightforward solution if proceedings are lodged against the local subsidiary company that has caused the harmful event. There is a risk, however, of 'corporate veil' problems. Even if litigation against the local subsidiary is successful (as in *Adams*), it will be impossible to enforce the judgments against the parent company due to the 'corporate veil' barriers of separate legal personality and limited liability that blocked the *Adams* case. As was the case in the *Adams* and *Chandler* cases, local subsidiaries may be wound-up, or may be found to have insufficient funds, or lack insurance. But attempting to exert host state jurisdiction over parent companies domiciled outside the host state can be just as problematic. Even where host state courts are able to exert jurisdiction against parent companies – or when parent companies submit to the jurisdiction of the host state court voluntarily – the courts may find difficulties with enforcement. This has happened in several notorious cases where US-based transnationals succeeded in persuading US courts to refuse to implement the rulings of Ecuadorian and Nicaraguan courts.¹³⁸

Even where host state courts are able to exert jurisdiction against parent companies the courts may find difficulties with enforcement.

The use of the home state forum is a more attractive option for many as an opportunity to litigate against the profit-making centre of the corporate group in its home jurisdiction – avoiding the 'corporate veil' barriers that exist between the corporation and its subsidiaries. As discussed above, the domicile of the defendant is generally an available jurisdiction, and this is the basic model of the Brussels regulation. So far as jurisdiction over subsidiary companies is concerned, this remains primarily determined by the domestic law of the forum, so in some jurisdictions there will be a right to join the subsidiary to an action against the parent (known as the 'anchor defendant'). Both the British and Dutch legal systems permitted this in the *Shell* cases, though in other jurisdictions this may not be possible. It can further be observed that litigation in overseas courts can be a very remote process, highly distanced from victim participation, and that – like host state processes – home state litigation can also be frustratingly slow (see again the *Lubbe* case). But if it is successful, home state litigation can have significant rewards, in terms of compensation levels (if home state law is used – on which point, see below),¹³⁹ and also in terms of the capacity of the forum to enforce its decision against the home state domiciled parent company.

138 See *Mejia v. Dole Food Company*, Case No. BC340049; *Tellez v. Dole Food Company*, Case No. BC312852; *Rojas Laguna v. Dole Food Company*, Case No. BC233497; *Chevron Corp. v. Donziger* Case No. 14-826. The US courts had no power to overturn the decisions of the Latin American courts but they refused to implement them. Given that the US courts made findings of corruption and lack of due process, these cases are problematic examples, but the point in principle deserves attention.

139 Meeran, R. 'Legal accountability of multinationals: the current state of play in the UK', *International Union Rights*, 19.4 (2012), 18.

Whichever forum is used, parties may well also contest the applicable legal framework, and this argument may be the subject of further litigation and delay. The most common approach is the default position under the EU's Rome Regulation,¹⁴⁰ which is to apply host state law to the substantive points at issue. There is some flexibility; Rome offers the victim a choice of law in environmental cases, but generally host state law will be applied. However, there are very real problems, including the need to call expert evidence to determine local law, which can be a cumbersome approach, and which may still require judges to apply laws that they are not familiar with. This arrangement was the cause of at least a certain amount of confusion and controversy in both the most recent British and Dutch cases against Shell. In the Dutch case, a particularly vexing legal question arose: Nigerian law shares significant history and character with English common law, and may at some point develop along the lines of the *Chandler* case, but it has not yet done so. Should a Dutch Court apply the law 'as it is' in Nigeria, or follow the English precedent? Expert evidence submitted in the *Bebe* case (this was before the UK courts but involved essentially the same question) indicated that a Nigerian court may follow the *Chandler* precedent if this were brought before it.¹⁴¹ But the Dutch court has been wary: 'it is not for the Dutch court to start a completely new development in Nigerian law'.¹⁴² This problematic and sensitive conceptual point was only covered in passing. The court did not take a decision on the issue.

Whichever forum is used, parties may well also contest the applicable legal framework, and this argument may be the subject of further litigation and delay.

The Rome framework allows exceptions to the choice of law approach. Foremost among these are environmental cases, where victims may choose whether home or host state law should be applied. This exception allows home states to hold their companies to higher standards in support of the general principle of raising environmental protection globally. But home state law might be preferable in other situations. Choice of law thus has implications for the ability of the industrialised nations to use the law effectively to ensure that companies domiciled in their territory respect standards, and to apply a deterrent effect. A related factor is that home state law also substantially impacts upon compensation levels, which tend to be much higher than compensation levels under host state legal schemes. This in turn impacts significantly upon the fee levels that are recoverable and that are thus payable to lawyers. Of further importance under the Rome regime is the system of over-riding mandatory provisions,¹⁴³ which ensure that some elements of home state laws can

140 Regulation (No. 864/2007) (Rome II).

141 *Bebe*, para 58.

142 Remarks of the Dutch Court of Appeal, translated by Prof. Cees van Dam in the note 'Preliminary judgments Dutch Court of Appeal in the Shell Nigeria case', available at: <http://www.ceesvandam.info/default.asp?fileid=643>, with the following citations given: Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3588 (Oguru-Efanga/Shell), par. 2.2. Similar considerations can be found in Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3586 (Dooh/Shell), par. 3.2, and Court of Appeal The Hague 17 December 2015, ECLI:NL:GHDHA:2015:3587 (Shell/Akpan), par. 2.2.

143 Regulation (No. 864/2007) (Rome II) Article 16.

be applied to the case, even while host state law might be applied to the main points in issue. This clause is potentially highly significant for proposals to implement binding home state due diligence, while respecting host state law.

The direct application of home state law to host state events can be highly controversial. This form of extraterritoriality is asserted, from time to time, notably in the context of an individual's home state courts exercising criminal jurisdiction with respect to crimes committed abroad. It is less clear whether such an approach is viable with respect to parent corporations and their subsidiaries. Olivier De Schutter has written favourably with respect to certain aspects of extraterritoriality, but has expressed caution about attempts to assert extraterritorial jurisdiction over corporations based on the nationality of their shareholders observing that 'whether such exercise of extraterritorial jurisdiction would [...] be diplomatically acceptable, however, is doubtful, as it would be interpreted as questioning the sovereign right of host states to regulate investment under their (territorial) jurisdiction'.¹⁴⁴ He noted that a 'more modest approach may therefore be preferable', under which States impose on their home domiciled companies an obligation to comply with human rights wherever they operate, and that 'the impacts on situations located outside the national territory are merely indirect, insofar as such impacts would result from the parent company being imposed an obligation to control its subsidiaries, or to monitor the supply chain'.¹⁴⁵ Jennifer Zerk found that 'only very rarely, it seems, do states assert direct extraterritorial jurisdiction over foreign subsidiaries of parent companies domiciled in their territory on the basis of the nationality principle. This appears largely to be confined to US export control laws – and it is almost always controversial'.¹⁴⁶

Further concerns around extraterritorial jurisdiction in general were also expressed by Zerk, who noted that 'direct extraterritorial jurisdiction is often controversial. This is because of the political and legal importance of territorial sovereignty: the idea that each state should be able to regulate activities within its own territory in accordance with its own policies and priorities',¹⁴⁷ and that 'direct extraterritorial jurisdiction by states in relation to private foreign actors and activities has been opposed by other states in some areas on the grounds that it constitutes an interference in their own domestic affairs, including their ability to implement their own policy choices. It has also been opposed by companies (and their home states in some instances) for the extra risk, uncertainty and expense that it may create for commercial actors'.¹⁴⁸ Zerk refers to 'the taking of civil jurisdiction over a local parent company in relation to harm suffered in another state', as being 'often referred to as "extraterritorial jurisdiction"'. However, she asserts that 'while the litigation may have extraterritorial implications, no assertion of extraterritorial jurisdiction is made if the litigation relates solely to the role of the parent company (e.g. its acts and omissions) within the territory of the regulating state'.¹⁴⁹ For these reasons Zerk emphasises the importance of a

144 De Schutter, 'Towards a New Treaty on Business and Human Rights', *Business and Human Rights Journal* 1 (2016), at: https://law.yale.edu/system/files/bhrj-treaty_on_business_and_human_rights-2015.pdf, p47.

145 De Schutter, 'Towards a New Treaty', p47.

146 Jennifer Zerk, 'Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas', CSRI Working Paper No. 59 (Harvard University, 2010), p23.

147 Zerk, 'Extraterritorial jurisdiction' p10.

148 Zerk, 'Extraterritorial jurisdiction' p10.

149 Zerk, 'Extraterritorial jurisdiction' p14.

distinction between direct extraterritorial jurisdiction' and 'domestic measures with extraterritorial implications'.¹⁵⁰

In an exceptional series of cases, various forms of universal jurisdiction have been trialled, with claims that have been predicated on international law, although jurisdiction in such cases has been conferred under enabling statutes in domestic law, notably the so-called Alien Tort Claims Act (ATCA)¹⁵¹ in the US, and by criminal law in Belgium and Spain, for example. Criminal prosecutions under so-called universal jurisdiction laws have seen prosecutions brought, for example, against the oil company Total and Total executives, in Belgium, on the basis of fundamental international human rights law. Both the Spanish and Belgian 'universal jurisdiction' regimes for the most serious international crimes were controversial, and both were amended to insist upon a connection with the prosecuting State. There were echoes of this retreat in the infamous *Kiobel* judgment, which has limited the opportunities for ATCA litigation in the US by foreign plaintiffs for harm suffered overseas, often by corporate defendants.¹⁵² Thus, the idea that universal jurisdiction might allow domestic courts to prosecute citizens or corporations of any country for harms occurring anywhere seems to be on the decline.

In an exceptional series of cases, various forms of universal jurisdiction have been trialled, with claims that have been predicated on international law.

The more typical model is one under which host state litigation is possible, but may be thwarted (or rejected by plaintiffs) due to practical barriers (cost, delay, funding, effectiveness, capacity to enforce judgments, etc). Home state litigation is also now widely supported in principle, but in some cases still depends on overcoming *Forum Non Conveniens* barriers. After the *Bebe* case, this may now depend on proving, as a preliminary step, that the substantive case against the defendant has been made out. In either host or home state forums, host state law ordinarily applies, unless an exemption applies, such as in environmental cases heard under the Rome Regulation. It is possible, however, for the approach Zerk calls 'domestic measures with extraterritorial implications', to function under this framework. Due diligence requirements set by the home state could potentially take binding effect against a parent company as 'over-riding mandatory provisions' under an international legal framework based on Article 16 of the Rome Regulation. This could allow certain provisions of home state law to be applied by the home state court, even when the principle law applied to the events complained of is host state law.

150 Zerk, 'Extraterritorial jurisdiction' p5, 9, 10, 14 and 15.

151 Code of Laws of the United States of America, s. 28, para. 1350.

152 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), and analysis: '...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', Skinner, McCorquodale, De Schutter, Lambe, 'The Third Pillar', p14.

Corporate liability

Most of the cases profiled here are based upon forms of tort as a cause of action.¹⁵³ Tort laws are typical domestic legal mechanisms, used for centuries in the litigation of disputes. They essentially provide for forms of redress for parties suffering injury or loss as a result of a wrongful act or omission by another. A typical tort action can be based on harm suffered as a result of negligence. The types of remedy that can be provided depend on the rules of the legal system, but the most typical form of remedy is financial compensation, though it may be possible in some cases to obtain an injunction (a court order) to prevent harm from occurring. In the *Adams, Lubbe* and *Shell* cases, the 'corporate veil' rules protected the parent companies from liability for harms caused by their subsidiaries. An alternative litigation model arguing that a direct duty of care was owed by the parent company was used in the *Lubbe, Chandler* and *Shell* cases. The direct parent duty approach has potential, but is under-developed, and it has been interpreted restrictively in some cases (see *Bebe*). The barrier between the parent company that ultimately profits from transnational business activities and liability for harm involving its subsidiaries thus remains.

Corporate structures are now employed by companies involved in hazardous processes specifically to take advantage of this legal barrier.

The concepts of separate corporate entity and limited liability date from the era of European colonial expansion, and were first applied to the British and Dutch East India Companies. They were rolled out to corporations generally from the 19th century, and have become deeply entrenched in legal systems around the world. Also known as the 'corporate veil' they serve to isolate a company's owners from any legal responsibility to meet that company's debts. Under this framework, shareholders are considered legally separate from the company, and they bear no form of agency or vicarious liability for the harm their company may have caused.¹⁵⁴ Corporate structures are now employed by companies involved in hazardous processes specifically to take advantage of this legal barrier. In the *Adams* case, victims won a lawsuit against their employer, brought in a local court, only to see the company evaporate as it was wound-up, leaving them without any prospect of a local remedy, despite the court ruling in their favour. Even in this context, Cape successfully relied on limited liability to shield itself from responsibility for the judgment awarded against its former subsidiary. Separate legal personality and limited liability are near ubiquitous¹⁵⁵ and can be

153 The basis is actually a breach of statutory duty in some of the cases, but this can be regarded as largely equivalent to a negligence tort for present purposes.

154 Ben Pettet, *Limited Liability: a Principle for the 21st Century?*, 48 *Current Legal Problems*, 142-143 and 154.

155 Phillip I. Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality*, (Oxford University Press, Oxford, 1993), 59.

found in civil law jurisdictions such as France, Belgium and the Netherlands,¹⁵⁶ and in Germany,¹⁵⁷ just as in the common law countries (in Europe these are Cyprus, Ireland, Malta, and the UK).

Most jurisdictions permit some form of exception to the general rule – France and Belgium recognise variously concepts of ‘fraud’ and ‘abuse’ of the corporate structure.¹⁵⁸ However, the authors of *The Third Pillar* report noted that ‘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’.¹⁵⁹ The authors of that report also observed that a French environmental case had held a parent company liable ‘in the *ERIKA* case [...] French judges justified the liability of the parent company partly on its voluntary practice of vetting oil tankers contracted by its subsidiaries’.¹⁶⁰ However, the basis for finding liability there seems closer to the direct duty of care of the *Chandler* case than to piercing the veil.

The ‘piercing’ or ‘lifting the veil’ legal metaphor permits the court to unravel corporate structures in order to view the reality of the relationship between different entities in the corporate group.

In some situations, courts will look past formal legal structures: the ‘piercing’ or ‘lifting the veil’ legal metaphor permits the court to unravel corporate structures in order to view the reality of the relationship between different entities in the corporate group.¹⁶¹ This can allow the court to set aside the separate legal entity and limited liability barriers and hold parent companies and shareholders responsible for the liabilities of the subsidiary. Similar approaches include the imposition of ‘enterprise’ liability, which treats the parent and subsidiary as a single unit. But in Europe and around the world legal protection of the ‘corporate veil’ has long been the dominant approach.¹⁶² Veil piercing is not applied in human rights cases and it did not occur in any of the cases featured in this report. It is usually applied in commercial cases and corporate fraud. The cases in which the German courts have applied veil piercing have been described as ‘exceptional cases of obvious and intentional misbehaviour of the shareholders to the detriment of the company or its creditors’.¹⁶³ In *The Third Pillar*, the authors observed that ‘under most legal systems, it is possible to lift the “corporate veil” only in exceptional circumstances’.¹⁶⁴

156 Siel Demeyere, ‘Liability of a Mother Company for Its Subsidiary in French, Belgian, and English Law’, *European Review of Private Law* 3-2015, at: http://www.iuscommune.eu/html/prize/pdf/2015_Demeyere.pdf, p391.

157 ‘Germany’ (submission to the SRSG’s Corporate Law Project), Clifford Chance LLP (2010), at: <https://business-human-rights.org/sites/default/files/media/documents/ruggie/corp-law-germany-clifford-chance-for-ruggie-sep-2010.pdf>

158 S. Demeyere, ‘Liability of a Mother Company’, p392.

159 Skinner, McCorquodale, De Schutter, Lambe, ‘The Third Pillar’, p81.

160 Skinner, McCorquodale, De Schutter, Lambe, ‘The Third Pillar’, p81.

161 S. Ottolenghi, ‘From Peeping Behind the Corporate Veil to Ignoring it Completely’, *The Modern Law Review*, 53 (3) (1990), 339.

162 Blumberg, *The Multinational Challenge to Corporation Law*, 59.

163 Germany, Clifford Chance LLP.

164 Skinner, McCorquodale, De Schutter, Lambe, ‘The Third Pillar’, p21.

The hard legal barrier created by the principles of separate legal personality and limited liability are a serious problem for victims seeking redress against corporate actors. Where cases proceed against local subsidiaries in host state courts there can be a real risk that a subsidiary will turn out to have insufficient funds to meet its obligations, or that it will be uninsured, or that it will simply be wound-up and evaporate. This is unfortunate, because this kind of local host state litigation is likely to be the simplest, cheapest and quickest approach, and at least some research indicates that victims may prefer it.¹⁶⁵ There is also some irony to the insistence on legal separation in parent liability cases, as it contrasts strikingly with the image that corporations seek to portray in their publicity material, of seamless, fully integrated, global operations. Shell, for example, currently describes itself as ‘an integrated energy company’,¹⁶⁶ not ‘1367 completely separate companies’. Several lines of argument along these lines, however, were rejected by the Court in *Bebe*:

‘Adopting Group policies does not, in my judgment, affect or dilute the concept of separate legal personality of the different companies within the Group. Compliance with Group policies, which is what the RDS Corporate Social Responsibility Committee oversees, or observance of those Group policies, does not either. To suggest that it does is simply to resurrect, in a different guise, the “single economic unit” argument which was disapproved in Adams v Cape Industries plc.’¹⁶⁷

This centuries’ old pillar of company law is unlikely to be repealed as it has significant implications for commercial law and for inter-business dealings. However, there are two principal routes around the corporate veil problem that could be taken up to improve the situation for the victims of business’ harmful impacts on human rights. The first of these is that some form of statutory exception to the general rules could be established, so that by whatever route (agency, vicarious liability, the ‘enterprise principle’, or simple shareholder liability, also known as ‘piercing the corporate veil’) it would become possible for liability for harm to follow profits up the corporate chain. The alternative model developed in *Chandler* – of direct parent company liability – could be given greater potential by state action to expand the concept of the parent company duty of care, establishing that a duty should ordinarily apply, and then either rolling that out to a parent company’s subsidiaries, or expanding it throughout a corporate supply chain.

Criminal liability

An alternative to seeking financial compensation through civil litigation is to seek punishment of the offender under the criminal law. A criminal conviction and sentencing can provide moral satisfaction and also public recognition that a harm has been inflicted, contrary to law. Both criminal and civil law suits are understood as forms of ‘remedy’ for victims.¹⁶⁸ In some countries, these legal regimes are rather separate (such as the UK), while in others claims for compensation might be attached to criminal prosecutions (as in France, see Total).

165 Skinner, ‘Beyond Kiobel’ (discussed at footnote 117).

166 ‘Shell: What we do’ (webpage), Shell, <http://www.shell.co.uk/about-us/what-we-do.html>

167 *Bebe*, 102.

168 Including under the UNGPs, see Commentary to UNGP 25, ‘Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions’.

Transnational companies, however, are rarely effectively prosecuted under the criminal law in respect of transnational human rights violations. Pointing to France, Germany, the US and the UK as among the countries requiring reform, Amnesty International last year insisted that governments 'must take immediate steps to start holding companies criminally accountable for serious human rights abuses, including those committed overseas'.¹⁶⁹ Amnesty added 'in the last 15 years no country has put a company on trial after an NGO brought evidence of human rights related crimes abroad'.¹⁷⁰ While the capacity and mandate of prosecutors is likely a factor underlying this staggering claim, there are also hard legal problems worthy of attention. These include: can legal persons (i.e. – companies) be indicted, how does the law ascribe intention to corporations, is the criminal law a good 'fit' for human rights cases, and can prosecutions be effective in terms of the penalties that can be issued?

Amnesty International last year insisted that governments 'must take immediate steps to start holding companies criminally accountable for serious human rights abuses, including those committed overseas.'

Where the prosecution of a corporate defendant is contemplated, a prior factor to be overcome is whether 'legal persons' or just 'natural persons' can be prosecuted. The UK and the Netherlands have the oldest traditions of specific corporate criminal liability offences.¹⁷¹ They also have well established possibilities for corporations to be indicted under the general criminal law. In 1976, Section 51 of the Dutch Criminal Code established that both individuals and legal entities could commit any criminal offence. In the UK, prosecution of corporations under the general criminal law was theoretically possible even hundreds of years ago, but the conceptual barrier of *mens rea* (discussed below) prevented most prosecutions. In a 2014 report, Dr. Jennifer Zerk categorised Australia, Canada, the USA, South Africa and Norway as jurisdictions alongside the UK and the Netherlands as recognising corporate criminal responsibility as a general concept.¹⁷²

In jurisdictions where corporations cannot be prosecuted under the general criminal law, in some cases specific corporate crime offences have been introduced – Poland and Portugal are examples of countries in which corporations are only indictable for such offences.¹⁷³ Zerk lists Argentina, Indonesia and Japan as examples where corporate criminal liability exists, but only in relation to specific offences. Quite often, where corporations are indictable under specific statutes rather than the general criminal law, the range of crimes tends towards regulation of 'white collar' crimes, such

169 Amnesty, 'Corporate Crime'.

170 *Ibid.*

171 'Corporate Liability in Europe', (Clifford Chance, 2012), at: https://www.cliffordchance.com/content/dam/cliffordchance/PDFs/Corporate_Liability_in_Europe.pdf

172 Jennifer Zerk, 'Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies' (UNHCHR 2014), available at: <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>

173 'Corporate criminal liability: a review of law and practice across the globe', Linklaters, at: https://www.allens.com.au/pubs/pdf/ibo/CorporateCriminalLiabilityPublication_2016.pdf

as fraud. Zerk goes on to describe Germany, Italy and Ukraine as jurisdictions that do not recognise the possibility of corporate criminal responsibility, but where 'instead, corporate wrongdoing is dealt with through a system of administrative offences and penalties'.¹⁷⁴ There are also varying possibilities in these different systems to prosecute corporate executives – either alongside the company or alone where corporate criminal prosecutions are not possible.

Where companies – or their officers – can be prosecuted under the general criminal law, then for most serious crimes this normally consists of a two-stage process: establishing that the criminal act in question was committed; and that the party responsible had the requisite criminal *mens rea*. This mental state may be clear criminal intention or a form of negligence or 'recklessness', depending on criteria established by the legal system concerned. In several legal systems, this concept of intent was historically an absolute barrier to the prosecution of corporations, even where legal persons were indictable in principle, as in the UK. Hundreds of years ago, English jurists observed that companies had no 'minds' and no 'souls', and could not, therefore, form criminal intent, and thus could not commit intentional crimes.¹⁷⁵ These notions spread throughout the common law world. But the civil law countries also struggled with conceptualising the corporate mental state.

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One approach that overcame the problem was the concept of identification, under which the mental state of a company executive or employee is said to constitute the *mens rea* of the company in respect of the wrongful act that it has carried out.¹⁷⁶ Courts may thus find that a corporation has fulfilled the mental aspect of a criminal offence.¹⁷⁷ A problem for this approach is that the courts in several countries require that the person possessed of the *mens rea* for the offence must also be a 'controlling mind' within the company.¹⁷⁸ The leading English case of *Tesco v Nattras* illustrates how liability is thus unlikely to be established where the acts in question were performed without the specific approval of a high-level executive.¹⁷⁹ Zerk observes that the United Kingdom, Canada, Japan, France, India and South Africa operate versions of the 'identification' approach, but adds that the US and Netherlands allow aggregation of the role played by several individuals to constitute the necessary intent/negligence.¹⁸⁰

174 Zerk, 'Corporate liability', 32.

175 Intentional crimes tend to be the more serious crimes, and in many legal systems require proof of a culpable mind ('intent').

176 Guy Stessens, 'Corporate Criminal Liability: A Comparative Perspective', *International and Comparative Law Quarterly*, 43 (1994), 496.

177 Stessens, 'Corporate Criminal Liability', 496.

178 Celia Wells, Paper prepared for OECD Anti-Corruption Unit. Working Group on Bribery in International Business Transactions, Paris (October 2000), 5.

179 *Tesco v. Nattrass* [1971] 2 All E.R. 127.

180 Zerk, 'Corporate liability', 34.

Australia operates the most modern system, which makes a significant break with the anthropomorphic difficulties of the past, by applying a 'corporate culture' approach, also known as a 'management systems' approach to corporate *mens rea*.¹⁸¹ This has been recognised as a more 'holistic' approach, recognising the non-human nature of corporations as complex entities managed by systems.¹⁸² It takes due account of the corporation as a system, and emphasises the extent to which the culture within a corporation tends to support risk awareness and compliance.¹⁸³ Essentially the Act ascertains liability based on whether or not a company has effective systems in place to anticipate and to effectively manage risk. Zerk identifies France and Belgium as jurisdictions that also apply variants of the management systems approach.¹⁸⁴ It shares much in common with the due diligence approach more often discussed in relation to civil liability, corporate social responsibility compliance and company management.

Vicarious liability should be mentioned as an alternative vehicle under which a company can be held responsible for the acts of its agents, such as an employee. However, the concept is subject to various limitations, such as a requirement that the employee was engaged on the employer's business at the time of the offence. Zerk points to Japan, South Africa and the US as examples of countries applying these approaches.¹⁸⁵

A further problem to be considered is whether domestic criminal law is a good 'fit' for holding companies accountable for the kinds of situation complained of in 'human rights' situations: when the Total case was litigated it was reported that forced labour as such was not a crime in France,¹⁸⁶ although the facts complained of were prosecuted under somewhat analogous provisions of domestic law. On the whole, there is generally overlap at least around fundamental issues of causing death or serious harm, but there may be times – when more complex human rights provisions are in play – that domestic criminal law may fail to provide a sufficiently close analogous provision.

The sums payable under most systems of fines will likely remain so small as to be irrelevant to major transnational corporations unless they are attached to a calculation based on the relative wealth of the corporation.

Finally, while there is definitely a trend towards recognising some forms of corporate crime, there remain problems with the imposition of penalties on corporate actors. Most commonly the type of penalty imposed – if any – is a fine. France, for example, has a schedule for transposing

181 Australian Criminal Code Act, 1995, Section 12.

182 Celia Wells and Juanita Elias, 'Corporate Complicity in Rights Violations' in Philip Alston (ed) *Non-State Actors and Human Rights* (Oxford, 2005, Oxford University Press), 161 (on criminal law), 157.

183 Wells, *Paper prepared for OECD Anti-Corruption Unit*, 4.

184 Zerk, 'Corporate liability', 34.

185 Zerk, 'Corporate liability', 35-6.

186 France's failure to implement a modern domestic law against forced labour has also been the subject of a complaint to the European Court of Human Rights in the (unrelated) case of *Siliadin v. France*, Application no. 73316/0, [2006] 43 EHRR 16.

sentences to fines when the guilty party is a corporation.¹⁸⁷ The UK's Bribery Act is an example of a recently drafted corporate crime statute that provides potentially substantial penalties for both the corporate entity and for individual executives: unlimited fines for the corporate entity and prison terms of up to ten years. The sums payable under most systems of fines, however, will likely remain so small as to be irrelevant to major transnational corporations (TNCs) unless they are attached to a calculation based on the relative wealth of the corporation. Questions must also be asked about the deterrent effect of criminal punishments where TNCs seem to be in a position to choose to pay a fine or agree financial settlement terms to allow their executives to be released from detention or to avoid possible prison terms (see the *Trafigura* case study).

Due diligence: regulation of business conduct

Shortcomings in the regulation of business conduct mean that there is as yet insufficient regard at boardroom level for human rights and environmental concerns when it comes to high-level corporate planning. This lack of regulation means that too many poor decisions are made, which lead to more adverse human rights impacts occurring. This is a key point raised under the UNGPs, which placed its major emphasis on calling for expanded corporate 'due diligence'. Furthermore, the lack of a legally binding basis for due diligence in many countries gives support to the problematic outcome of the *Bebe* case.¹⁸⁸

Corporate decision-making processes are crucial for managing the impacts of corporate activities on human rights and the environment. Until recently, in much of the common law world, directors' duties required that directors work towards the benefit of the company. Writing on the popular conception of this model, Andrew Keay has said that its proponents believe that 'the objective of the company [...] is to maximise the market value of the company [...] The principle is generally regarded as applying in relation to companies located in Anglo-Saxon jurisdictions, such as the United Kingdom ('UK'), Australia, the United States, Canada and New Zealand'.¹⁸⁹ This view was, and remains, widely held, although the idea that this is a clear legal requirement has been hotly disputed, and has even been described as a 'legal myth'.¹⁹⁰ Nevertheless, the view was widely held, and under it directors may believe they are unable to pursue social goals if these ambitions clash with the interests of the company. Unless these interests were otherwise defined in statute law or in the company's articles, they tended to be understood in primarily financial terms.

187 Criminal Code, Articles 131-37 to 131-49.

188 That the parent company RDS had no duty of care towards its subsidiary.

189 Andrew Keay, 'Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's "Enlightened Shareholder Value Approach"', (29 *Sydney Law Review* 2007), at: https://sydney.edu.au/law/slr/slr29_4/Keay.pdf, 578.

190 Sjøfjell, Beate and Anker-Sørensen, Linn, 'The Duties of the Board and Corporate Social Responsibility (CSR)', in Birkmose, Mette Neville & Karsten Engsig Sørensen (eds.), *Boards of directors in European companies – reshaping and harmonising their organisation and duties* (Kluwer Law International, 2013), also published as University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2013-26 and as Nordic & European Company Law Working Paper No. 10-40, at: <https://ssrn.com/abstract=2322680>, p24 (footnote 73).

More common in Europe is the 'stakeholder' company management model, which, to a greater or lesser extent, has encouraged directors to take into account a wider range of interests in their planning. The stakeholder theory essentially holds that the objective of the company is to work towards the interests of shareholders and other stakeholders. This model is said to be 'embraced in many continental European jurisdictions, and most notably in Germany'.¹⁹¹ Beate Sjøfjell reports that variations on the stakeholder approach exist in Norway,¹⁹² Denmark¹⁹³ and the Netherlands.¹⁹⁴ In the mid-2000s, the UK revised its company law, but rejected calls to fully embrace the 'stakeholder' model of Europe, and adopted instead what was termed the 'enlightened shareholder' model. Under this, a director was permitted to 'have regard' to certain stakeholder issues. Keay described the new UK model as 'little different from the shareholder value approach'.¹⁹⁵

A problem, for the pioneers of voluntary corporate social responsibility (CSR) is that voluntary CSR obligations lacked a formal basis that required compliance. This was simple where social considerations did not conflict with the interests of the company – either mechanism then permitted progressive directors to take these into account. However, where social interests clashed with the interests of the company, it was at times unclear whether directors were able, or required, to promote these objectives, and even in some stakeholder models the extent to which non-binding social obligations could outweigh a simple economic imperative was unclear. Sjøfjell has argued that 'CSR as voluntary, as a case of "don't regulate us and we can talk about how we behave" does not suffice. This tends to lead to delimitation against legal obligations and an unwarranted Corporate Governance/CSR dichotomy'.¹⁹⁶ Sjøfjell has written that 'despite a paradigm shift in the definition of CSR, little is done to integrate CSR concerns into the duties of the board',¹⁹⁷ adding that, 'to ensure true compliance, a proper due diligence in social and environmental matters is required so as to integrate these issues into the core risk management of the company'.¹⁹⁸

To ensure true compliance, a proper due diligence in social and environmental matters is required so as to integrate these issues into the core risk management of the company.

Recently, there has been a just such a move towards a progressive concept of corporate planning that has sought to encourage – or require – companies to exercise 'due diligence' in managing their subsidiaries and supply chains:

191 Keay, 'Tackling the Issue of the Corporate Objective', 578.

192 Sjøfjell, Anker-Sørensen, 'The Duties of the Board', p24.

193 Sjøfjell, Anker-Sørensen, 'The Duties of the Board', p27.

194 Sjøfjell, Anker-Sørensen, 'The Duties of the Board', p25.

195 Keay, 'Tackling the Issue of the Corporate Objective', p579.

196 Sjøfjell, Anker-Sørensen, 'The Duties of the Board', p5.

197 Sjøfjell, Anker-Sørensen, 'The Duties of the Board', p6.

198 Sjøfjell, Anker-Sørensen, 'The Duties of the Board', p12.

- ▶ The UK Bribery Act, which was passed in 2010, surpassed the limited measures of the 2006 Companies Act with a much more forceful obligation, and introduced real penalties for non-compliance. The Act introduced an offence of corporate failure to prevent bribery. The defence for a company against this liability is to prove that it had 'adequate procedures' in place to prevent bribery.¹⁹⁹ Albeit limited to the issue of bribery, this law introduced what was effectively a binding due diligence model, backed up by significant legal consequences for non-compliance.
- ▶ In France, a new corporate social responsibility law has introduced a reporting and risk management regime that requires very large companies to plan for, anticipate, and make efforts to avoid harmful impacts arising in their supply chains.²⁰⁰ The law obliges that plans should be drawn up to manage these risks and that plans should be developed and steps taken to avoid the risks that arise. Crucially, the French law allows for complaints to be raised by victims.²⁰¹
- ▶ And in the Netherlands, the child labour due diligence Bill will require companies to develop and apply strategies in their supply chains. Non-compliance will leave companies at risk of a fine.²⁰²
- ▶ At the EU level, the Non-Financial Reporting Directive 2014/95 establishes a basis for due diligence to be required in respect of human rights and corruption.²⁰³

The UNGP model of due diligence could be the template for a rounded and effective binding legal obligation.

The due diligence approach was promoted under the UNGPs, and it has also been developing within Europe, and in EU law, as indicated above, though its reach is as yet limited, in terms of the countries, companies and substantive requirements covered. As many of these new approaches are legally binding duties, however, compliance is mandatory. These due diligence models superficially resemble CSR, but there are two key outcomes that arise from their having a proper legal underpinning. Firstly, directors are clearly legally obliged to give them proper consideration when taking fundamental business decisions, which factor has a greater potential to improve corporate decision-making. Secondly, the imposition of a binding due diligence requirement strongly implies that the company responsible for implementing it has a duty of care throughout the corporate group and the supply chain. Binding due diligence thus also supports models of direct parent

199 Bribery Act 2010, s.7(2).

200 LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.

201 LOI n° 2017-399 du 27 mars 2017, Article 1.

202 Though the fine is set at €4,100, which is not obviously a significant deterrent to major companies, see 'Dutch and French Legislatures Introduce New Human Rights Due Diligence Reporting Requirements' (Little Mendelson PC, 13 March 2017), at: <http://www.lexology.com/library/detail.aspx?g=153b6746-8734-43b0-8462-4bfd9dc25f5a>

203 Directive 2014/95/EU, Article 1.

company liability, as discussed under corporate liability (above). The UNGPs set out an extensive framework for due diligence, including requirements both for stakeholder consultation and for stakeholder feedback on whether due diligence is working.²⁰⁴ The UNGP model of due diligence could therefore be the template for a rounded and effective binding legal obligation. The only significant change required would be the legally binding nature of the rules.

Risks for human rights defenders

The support of campaigning lawyers' groups, NGOs and unions is often of key importance to victims, and any UN treaty needs to take account of the important supporting role played by these institutions. It is important to be aware of the broader context in which legal cases are brought. Globally there have been more than 400 documented cases of attacks against human rights defenders working on corporate accountability – most commonly taking the form of criminalisation, killings, threats and other violence.²⁰⁵ In 2017, the UN Working Group on Business and Human Rights launched a workstream on this issue, noting that 'There are increasing records of killings, attacks, threats and harassment against human rights defenders who speak up against business-related human rights issues, including the particular challenges faced by women human rights defenders'.²⁰⁶

Issues of corporate capture may mean that access to justice is thwarted if victims and their local representatives face intimidation, lack of cooperation from local agencies, and even violence, when they raise complaints locally.²⁰⁷ These concerns can sometimes, in part, be addressed when victims work through associations or in partnership with civil society groups or trade unions. However, a comprehensive set of pro-active reforms are needed to reduce the risks to communities and those who represent them in cases against multinational corporations.

This report has already noted examples of libel actions brought by companies and challenges to claimants' land rights. As well as hindering existing cases, awareness of the repercussions of bringing a court case for victims and their families may mean that many legal actions are never pursued at all.

204 UNGPs 18 and 20.

205 Business and Human Rights Resource Centre, Business and Human Rights Defenders: Key database findings, February 2017

206 UN Working Group on Business and Human Rights, Informal background note Human rights defenders and civic space – the business & human rights dimension, at: http://www.ohchr.org/Documents/Issues/Business/ForumSession6/UNWG_ProjectHRDsBackgroundNote12052017.pdf

207 Robert Verkaik, 'Farmers "terrified out of their homes" to sue BP for £15m', *The Independent*, 17 June 2005, at: <http://www.independent.co.uk/news/world/americas/farmers-terrified-out-of-their-homes-to-sue-bp-for-15m-8692045.html>

Access to courts

There is a serious problem of inequality that victims face compared to corporate bodies. While TNCs have vast financial resources, establishments in several countries, and may have deep links into and influence over the State, victims are often poor, marginalised and under-resourced. For example, in the case studies highlighted above: the citizens bringing the cases against Cape were industrial workers; in the case of Trafigura it was the urban poor; rural fishermen, farmers and communities brought the cases against Shell; and indigenous communities attempted to gain a right to a hearing as a third party intervener in the Border Timbers case. In several of the cases profiled in this report, victims were unable to access courts, or encountered significant barriers. For this report, these cases have been loosely grouped together under the heading 'Access to courts', but they include funding provision, *locus standi* (the right to appear before, or to make submissions to, the court), access to information, the disclosure of documents and the burden of proof.

Access to operational and technical data is also required in order to substantiate claims concerning, for example, environmental impacts, or the manner in which systems have been operated over time, even years. This is data that is obviously unlikely to be available to plaintiffs, but ought to be on record in the files of major TNCs.

Among these barriers, in the civil law countries in particular, the burden of proof and access to information are particularly problematic. It is not that the civil law burden is particularly unusual: in Dutch law, the burden falls on the party that wishes to rely on the fact or law asserted.²⁰⁸ In France, 'the claimant always has the burden of proof'.²⁰⁹ These notions are essentially the same as that which prevails in English law.²¹⁰ The problem is that many of the civil law countries lack a formal right of pre-trial disclosure of documents. This factor, combined with the principle that the plaintiff must prove sometimes quite technical aspects of the case, interact to create a situation in which plaintiffs are at a disadvantage. Given the technicality of transnational human rights cases against corporations, this disadvantage is exacerbated in these cases. The problem was identified in *The Third Pillar* report, where it was noted that 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'.²¹¹

The burden of proof and access to evidence was crucial in the Shell and *Lubbe* cases, with information about corporate structures and decision-making being of vital importance in all cases

208 'Evidence in Dutch law' (AMS Advocaten), at: <https://www.amsadvocaten.com/litigation/rules-of-evidence-in-dutch-law-on-civil-proceedings/>

209 Elizabeth Oger-Gross, Anastasia Pitchouguina, Elodie Valette and Anaïs Harlé, 'Litigation and enforcement in France: overview' (White & Case LLP), at: [https://uk.practicallaw.thomsonreuters.com/9-502-0121?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhcp=1](https://uk.practicallaw.thomsonreuters.com/9-502-0121?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1)

210 Gary Slapper and David Kelly, *The English Legal System*, (Routledge Cavendish, 2009), p7.

211 Skinner, McCorquodale, De Schutter, Lambe, 'The Third Pillar', p9.

to establish facts about the degree of parental control. Access to operational and technical data is also required in order to substantiate claims concerning, for example, environmental impacts, or the manner in which systems have been operated over time, even years. This is data that is obviously unlikely to be available to plaintiffs, but ought to be on record in the files of major TNCs. In the Dutch case against Shell, however, the court initially rejected the claimant's request for discovery for this information.²¹² Although a higher court subsequently accepted the plaintiff's calls for access to the relevant documentation, this was a significant development possible only after appeal, rather than as a preliminary process. The UK's *Civil Procedure Rules* oblige a party to disclose:

- '(a) the documents on which he relies; and
- (b) the documents which –
 - (i) adversely affect his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case; and
- (c) the documents which he is required to disclose by a relevant practice direction.²¹³

While this model is good in principle, and offers a useful template to those calling for a disclosure regime in the civil law countries, it is not a panacea in practice. In transnational business cases, the documentation required will often be vast and technical. Teams of lawyers with specialist assistance are required to make sense of such material. Furthermore, the *Bebe* case saw plaintiffs arguing in the UK that they expected to be able to build a stronger case following further discovery of documents. The judge referred to plaintiff's lawyers building their case around 'anticipation of what disclosure will reveal',²¹⁴ but then dismissed their case.

Access to courts for victims is hampered by financial pressures and the lack of highly specialised lawyers willing to invest substantial effort over time.

Access to courts for victims is hampered by financial pressures and the lack of highly specialised lawyers willing to invest substantial effort over time and to work on these cases on a conditional fee basis (victims often lack the funds to pay legal teams). The cases tend to be long and complex, and require significant investment in securing access to technical information concerning the operations of massive networks of corporate entities, and the interactions between them. Plaintiff lawyers have been critical of the funding implications of the Rome Regulation, which establishes that compensation should be based on host state levels of compensation. This sits uncomfortably

212 Reported in 'The Third Pillar', see also: 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>

213 Civil Procedure Rules, Part 31.6.

214 *Bebe*, para 91.

with the fact that plaintiff lawyers are often in the home state, and their fees are thus typically high by comparison to host state compensation.

Another important factor in terms of access is the problem of delay; the time taken for transnational business and human rights cases to proceed can be truly shocking (see *Lubbe* – numerous plaintiffs died while the case was litigated). Delay is cited as a problematic factor in both home and host state proceedings (see discussions in case studies on *Lubbe* (Cape), and also on Shell and *Trafigura*). There are key factors affecting delay in transnational cases, such as disputes over jurisdiction, forum and choice of law, which could be minimised, thus reducing the problems around delay, if clear international rules were established around those factors.

One problematic area so far as access to courts is concerned is the growth of a global network of investment protection treaties aimed at promoting investment between the signatory states. Human rights issues have emerged repeatedly, yet few investment treaties contain substantial human rights commitments, and some tribunals have outright refused to consider human rights arguments or to admit third party participation by affected groups. Since the dispute settlement processes are conceived as between investors and the State, there is no clear way for others who may be affected by the outcome of the process to have a voice in the proceedings. Thus, the concerns of affected workers, rural farmers, indigenous communities (as in the *Border Timbers* case), or other groups are excluded from consideration in the tribunal processes. Many of these treaties are negotiated in closed or partially closed environments and with relatively little public consultation or debate. The hearings also seem uninterested in the subtleties of human rights protection that arise (in the *Border Timbers* case an attempt to intervene by indigenous people was dismissed as was the attempt to have international human rights standards considered by the tribunal).

The time taken for transnational business and human rights cases to proceed can be truly shocking.

As happened in the *Border Timbers* ISDS case, indigenous peoples often find that their interests fall at the crux of a number of legal and procedural problems, which include the recognition, protection and effective enforcement of informal and traditional land claims.²¹⁵ Some of these also affect wider constituencies of the rural poor, informal miners and peasant farmers. Even where local law does recognise these informal claims the process by which they are registered and enforced can be unreliable. In the *Dooh* case, an example can be seen of the company contesting the land rights and rights of legal succession of a rural farmer plaintiff, while the problems of the indigenous, their interests in land and their rights of representation and rights to a hearing are central to the

215 'Indigenous Peoples' (webpage), Amnesty International, at: <https://www.amnesty.org/en/what-we-do/indigenous-peoples/>, and David Berry, 'Losing their Land, Indigenous Peoples Turn to the Courts', Open Society Foundations, 19 May 2017, at: <https://www.opensocietyfoundations.org/voices/losing-their-land-indigenous-peoples-turn-courts>, and generally see: Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, 2002).

Border Timbers case. For the proper protection of indigenous peoples, rights frameworks focussed around the protection of their specific and collective interests is required, such as that found in ILO Convention 169.

The issues grouped together here as ‘access to courts’ comprise a range of problems, most of which can afflict domestic legal actions, but which are exacerbated in transnational cases involving large businesses. The strategies for reform include reversing the burden of proof, requiring disclosure of information by transnational businesses and making adequate provisions for plaintiffs and their representatives to secure a hearing and to finance their cases. Making adequate provision for plaintiffs to secure a hearing ought to include provisions that ensure that varied representation models are recognised and permitted, and that formal rules of standing may need to be relaxed to accommodate the situation of disenfranchised third parties, such as occurred in the *Border Timbers* case.

Enforcement

At the domestic level, questions around the capacity of the State to enforce the law turn around the willingness and capacity of agencies to respond, the capacity of corporate defendants to influence prosecution decisions and the effectiveness of criminal law sanctions. At the international level, there are few mechanisms that address the human rights responsibilities of businesses, though those which do exist are instructive, comprising primarily the Organisation for Economic Co-operation and Development (OECD) Guidelines, although these are not legally enforceable obligations.

Transnational businesses are believed to exert influence over the judicial systems in some countries.

Where state enforcement processes are concerned, it is not always clear that home state agencies will respond effectively (see the *Trafigura* case study for examples of British and Dutch NGOs resorting to legal action to call on regulatory agencies to respond). In the *Trafigura* cases, questions arose around the State’s enforcement mechanisms, including both prosecutorial services and environmental and regulatory agencies. Several times, state agencies failed to pursue potential routes to prosecute violations, and were in some cases persuaded to reconsider by the intervention of NGOs. In several cases prosecutions were halted and/or persons were released from detention following the payment of ‘settlements’. These agencies complained of uncertainty around their mandates, and lack of experience and skills. Netherlands Greenpeace pressured Dutch prosecutors and agencies (with some success), and the UK-based Amnesty International tried to push British prosecutors and agencies (with no success).

Transnational businesses are also believed to exert influence over the judicial systems in some countries, and to hold influence with prosecutors and other investigative agencies.²¹⁶ For example, where government agencies or regulatory bodies have personal and professional relationships with individuals working for or with the corporation, or where there are enormous financial interests at stake between the company and the State, there are concerns that individuals and prosecutors may 'turn a blind eye'. The flip side of this coin is that, where these individuals do decide to act, they may face political pressures, personal risks, or other forms of disadvantage. It is not necessary for investigatory agencies to be corrupt or under any unlawful pressure in order for the influence or even the potential influence of that company's resources to contribute to a more favourable outcome. While there may be questions as to why a compensation settlement from Trafigura to the Côte d'Ivoire government coincided with the release from prison of two of their top executives, it is also the case that in the Netherlands the payment of the maximum fine was regarded as sufficient to settle a case that had previously issued criminal sentences.

At the international level, systems to monitor, investigate and report upon human rights issues with regard to States exists in many forms. However, at present, no such body exists with a mandate specific to business. In fact, all of the human rights supervisory machinery – even within the tripartite International Labour Organization (ILO) – is directed towards States. Examples of machinery that does exist with a supervisory role vis-à-vis corporate actors include the OECD Guidelines procedures, under which a series of National Contact Points provide complaint and dispute settlement mechanisms. The Guidelines are non-binding for TNCs, but the States that adhere to them make a binding commitment to implement them. This commitment entails the setting up of National Contact Points which provide for a formalised process to receive, examine and mediate complaints against corporate actors.

While very little international machinery exists at the present time, mention could also be made of an early 19th century international legal structure. Four international 'anti-slavery' courts were established under a network of bi-treaties between Britain, Spain, France, Holland and Portugal.²¹⁷ These courts exercised direct international jurisdiction over private citizens of the State parties that continued to ply the slave trade after its legal abolition.²¹⁸ When the US joined the treaty network in 1862 the transatlantic slave trade was effectively abolished, in practice as well as in law.²¹⁹

Efforts to improve enforcement, then, would seem to require a threefold strategy. Firstly, to provide support, training and revised mandates to domestic agencies, including prosecutors but also environmental and other agencies. Secondly, reforms to criminal and administrative sanctions to ensure that these are in some sense proportional to the vast resources transnational businesses often possess. And thirdly, the establishment of some form of international level body that could provide a level of oversight on the activities of transnational businesses.

216 (Footnote 29).

217 Howard Hazen Wilson, 'Some Principal Aspects of British Efforts to Crush the African Slave Trade, 1807-1929', *The American Journal of International Law*, 44 (3) 1950, 514, 516-519.

218 Jenny S. Martinez, 'Antislavery Courts and the Dawn of International Human Rights Law', *Yale Law Journal*, 117 (2008), 578.

219 *Ibid*, 628-629.

Conclusion

There are problems arising from a lack of basic agreed principles about the proper forum for hearing such cases. When corporations are involved in transnational cases this frequently leads to questions around what court will hear them; and under what law they will be judged. While this remains unclear, it will be a focus for litigation and thus delay, uncertainty and increased costs for both parties. The use of home state courts and law is often perceived as likely to be more effective, and the capacity of the courts greater to enforce a judgment against a parent company, which is less likely to disappear or prove unable to pay. Also sums awarded in damages and as costs for legal fees may be higher. However, there are good reasons to prefer host state litigation if it is effective, including proximity, cost and, potentially, speed, though in practice many of these barriers are unpredictable. Delay can affect either forum. Clarifying the rules may reduce forum and choice of law disputes, which ought to improve matters.

In almost all situations relevant to transnational human rights cases, parent companies do not, under present company law regimes, bear the liabilities of their subsidiaries. The basic rules on separate corporate personality and limited liability are still reckoned to serve useful commercial law purposes, but in the modern era these commercial rules have inappropriate impacts in the human rights sphere. They constitute a profound legal blockage causing denial of access to remedy in transnational human rights cases. Radical strategies to establish direct parent liability to victims have made a promising start in UK litigation, with parallels in other cases, but these are as yet being interpreted narrowly. Accountability for parent companies for harms caused by their subsidiaries remains largely blocked.

Internationally there is simply no current machinery dealing with corporate transnational human rights cases.

The criminal law in many countries is insufficiently structured to deal with corporations as offenders. In some countries, corporations can only be prosecuted for a few financial wrongs and cannot be prosecuted for human rights impacts. In other countries, profound difficulties remain in attributing to corporate actors the mental state to fulfil the intentional component of serious offences. But examples of modern approaches do exist and seem to address these barriers adequately, providing useful templates for reform.

There are problems around corporate management and the integration of social and human rights objectives, which have traditionally been marginalised under Anglo-American company law approaches. While European models have been more progressive, problems remain of a 'dichotomy' between human rights and social responsibility and the hard practice of corporate management. But there are signs of significant change as due diligence concepts become more entrenched. These place much clearer legal responsibilities on the company. As a result, directors may be more certain of their need to plan for and avoid negative impacts on human rights and the environment. There is scope to support and progress these existing developments, and to build on

them. Due diligence would appear to have the potential to radically improve corporate planning, to avoid problems, and to encourage transparency. Significantly, it would also, in principle, establish a broad direct parent company duty of care that would help to ensure a cause of action for private claims for redress by victims.

There are problems for plaintiffs in accessing courts and receiving a hearing, in some cases due to financial problems, while in other situations *locus standi* is a factor. In the *Border Timbers* case, indigenous communities were excluded from a right to a hearing during the legal process between the land's formal owners and the State. In some countries procedural rules around disclosure and proof, combined with inequality of arms (between giant corporations and rural farmers from Nigeria, for example), have created real problems for victims seeking to prove their case.

At both the domestic and international levels, States face shortcomings and lack adequate processes to enforce human rights law against TNCs. Domestically these problems correspond to uncertainty over mandate, and adequate competence and resources. Internationally there is simply no current machinery dealing with corporate transnational human rights cases. However, possible templates can be identified: in the state supervisory systems; in the National Contact Point system linked to the OECD Guidelines; in specific areas of international law; and in legal history.

Section 3

Complementarity of the UN Treaty

The United Nations Guiding Principles on Business and Human Rights

The UN's Guiding Principles on Business and Human Rights (UNGPs), published in 2011, are the elaboration of a framework developed by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. In 2011, the UNGPs were endorsed by the UN Human Rights Council, and have since received a wide level of international consensus and support. The UNGPs apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

The underlying framework is based on what has been called 'three pillars'. These comprise:

- ▶ *the State duty to protect* against human rights abuses by third parties, including business enterprises;
- ▶ *the corporate responsibility to respect* human rights, based on due diligence as a tool to avoid adverse impacts;
- ▶ *the need to improve access by victims to effective remedies.*

Each pillar is described as an 'essential component in an inter-related and dynamic system of preventative and remedial measures: the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business in relation to human rights; and access to remedy because even the most concerted efforts cannot prevent all abuse'.²²⁰ The main contribution of the UNGPs is said to be 'in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved'.²²¹ Hence, the UNGPs map problems and propose areas for action.

To this end, the UNGPs contained within them real and plausible strategies for overcoming some of the most important legal barriers. However, the lack of binding legal force, and the reliance by governments on voluntary action as the preferred implementation methods for the UNGPs led some critics, particularly among the community of human rights organisations to warn that voluntarism

220 'Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie', (Human Rights Council, 21 March 2011), UN Doc A/HRC/17/31, at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/121/90/PDF/G1112190.pdf?OpenElement>, para 6.

221 *Ibid*, para 14.

alone would not be effective (Human Rights Watch called the UNGPs 'woefully inadequate').²²² These warnings proved prophetic. The kinds of legal reform needed to facilitate a reduction in the barriers that the UNGPs identified simply did not take place. Victims remained unable to gain hearings before courts. Remedies remained out of reach. Unreformed corporate structures and old legal principles blocked litigation.²²³ Impunity for corporate harm continued.

This is not to say that the UNGPs were unsuccessful. Indeed, the UNGPs have achieved notable and far-reaching successes. These include very significant impacts in terms of awareness raising and in mainstreaming the ideas of corporate due diligence with regard to human rights impacts, ideas about planning for, avoiding, and taking steps to minimise harm, and the notion of full supply chain responsibility. These concepts emerged from the UNGPs and are now firmly established in the mainstream of discussion about corporate responsibility and business human rights impacts. This approach was also integrated into the revision of the OECD Guidelines on Multinational Enterprises, which was also bolstered by a new chapter specifying human rights obligations. The update was influenced by the process under which the UNGPs were elaborated.²²⁴ However, the major legal barriers to access to remedy, which required State legislative action to change, have changed very little.

The major legal barriers to access to remedy, which required State legislative action to change, have changed very little since the endorsement of the UNGPs in 2011.

The form and direction of the UNGPs to some extent explains the kinds of impact they have had, and the impacts they have not had. The UNGPs are expressed as a mixture of best practice examples, broad policy objectives and human rights requirements. A number of the UNGPs outline policy approaches for government and voluntary strategies for business. Some UNGPs are dealt with very effectively as recommendations and as policy guidance – they do not require enabling law for their effective implementation. For the purposes of this report, most attention is therefore given to those UNGPs that engage more directly with specific legal factors, such as the need for corporate law reform and with corporate governance issues, such as due diligence (which is a recurring theme in the UNGPs).

One point made clearly in the Final Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises is instructive:

222 'Without Rules: a Failed Approach to Corporate Accountability' (Human Rights Watch 2015), at: <http://corporatejustice.org/statement-2015-csr-forum.pdf>, p2.

223 The lack of legal reform to date on key areas, such as the corporate veil, is a main theme throughout this report.

224 John Ruggie, 'Progress in Corporate Accountability', IHRB, 4 February 2013, at: <https://www.ihrb.org/other/remedy/commentary-progress-corporate-accountability>

*'What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.'*²²⁵

So, the UNGPs, then, were never intended as a final stage in the process. They played a starting role, and have usefully defined some important terms of reference. Indeed, many of those advocating for a binding Treaty view the content (if not the voluntary form) of the UNGPs favourably. The key point of divergence is around binding legal status, as opposed to voluntarism. In fact, a Treaty could prompt precisely the kind of coordinated approach to law reform by States that is needed to address the UNGPs and to implement them effectively. The UN Treaty can therefore reinforce and affirm the UNGPs.

One fear expressed in the initial stages was that the Treaty negotiation process may slow down or displace work to implement the UNGPs. This does not seem to have happened, and it has been suggested that progress towards the production of National Action Plans, which arose from the UNGPs, but had been patchy, has accelerated as the Treaty process has been underway.²²⁶ To date, though, even following this acceleration of the process, just 14 countries have published the national action plans that were touted as a key measure to implement the principles.

At the Fourth Session of the UN Working Group in 2015, the view was widely endorsed that the Guiding Principles and the treaty process should be 'complementary' and that the treaty process should be 'built upon, the implementation of the Guiding Principles and the United Nations Protect, Respect and Remedy framework'.²²⁷ Participants also noted that the treaty process 'offered an opportunity to clarify issues, such as the principle of parent company liability, mandatory human rights due diligence requirements' and the issue of regulating extraterritorial activities of business.²²⁸

The Treaty development process can complement and further prompt work that is already taking place at the national level to address barriers to remedy.

Attempts to articulate the relationship between the UNGPs and the need for a new UN Treaty have tended to focus heavily on the so-called 'third pillar', which requires that victims must have access to effective remedies. Given the very significant barriers – identified in this report – which remain

225 Report of the Special Representative (21 March 2011), para 13.

226 Both the US and Germany announced they had begun work on their respective Plans following the initial Treaty vote, see: Phil Bloomer, 'Unity in Diversity: the advocates for the Guiding Principles and binding treaty can be complementary', Business and Human Rights Resource Centre, at: <https://business-humanrights.org/en/unity-in-diversity-the-advocates-for-the-guiding-principles-and-binding-treaty-can-be-complementary>

227 Fourth session of the Forum on Business and Human Rights: summary of discussions, UN Doc: A/HRC/FBHR/2015/2

228 *Ibid.*

standing between victims and access to remedy, action to provide access to remedy is critical if the problems identified by the UNGPs are to be effectively addressed. The Treaty development process can complement and further prompt work that is already taking place around policy development and action at the national level to address barriers to remedy, as well as setting the framework under which harmonisation of key elements of law can be addressed.

This paper has identified seven specific areas in which reforms are needed, for which specific recommendations are proposed in Section 4, to be put forward for consideration as elements for inclusion in a future UN Treaty. These areas of concern are listed below, together with brief details of the most relevant UNGPs that address them:

1. The question of *jurisdiction and choice of law*. These issues were addressed in UNGPs 1, 3 and 25 and 26. UNGP 26 says 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’. The commentary refers to the specific situation ‘where claimants face a denial of justice in a host State and cannot access home State courts regardless of the merits of the claim’.
2. The need for *criminal law* to be effective where business impacts on human rights, for its sanctions to be effective and as an important means to achieve access to remedy. The role for criminal law as an appropriate mechanism that should be effective was addressed in UNGPs 2, 7, 25 and 26. UNGP 7 calls for states to take appropriate steps, indicating that this may require ‘civil, administrative or criminal liability for enterprises domiciled or operating in their territory and/or jurisdiction that commit or contribute to gross human rights abuses’. The commentary to UNGP 25 further clarifies that access to remedy covers criminal prosecution of offenders: ‘Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines)’.
3. The barriers that exist mostly in company and tort law that create barriers for *corporate liability* for human rights harms. This area is the subject of only two UNGPs directly, UNGPs 3 and 26, but they contain clear statements indicating that state action is required in this area: UNGP 26 calls for states to ‘reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy’, the commentary noting bluntly that ‘the way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws facilitates the avoidance of appropriate accountability’.
4. The imperative of establishing *binding due diligence*, which concept is central to the UNGPs, and the corporate obligation to respect human rights, which concepts are expressed in UNGPs 3, 4, 5, 6, 11, 12, 13, and which is expanded on at some length through UNGPs 15-21. UNGP 17 states that ‘in order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence’.

5. The precarious situation of *human rights defenders*²²⁹ and the need for their protection from harm obstruction, and a need for *consultation with affected stakeholders*.²³⁰ This is addressed in UNGPs 18, 21, 23 and 26. The commentary to UNGP 18 says that businesses ‘should seek to understand the concerns of potentially affected stakeholders by consulting them directly in a manner that takes into account language and other potential barriers to effective engagement’, while UNGP 26 urges that ‘States should also ensure [...] that the legitimate and peaceful activities of human rights defenders are not obstructed’.
6. Reforms to a number of issues loosely grouped in this report as *access to courts*, which were identified as a key area in UNGPs 3, 21, 25 and 26. The commentary to UNGP 26 notes that ‘practical and procedural barriers to accessing judicial remedy can arise where, for example:
 - ▷ The costs of bringing claims go beyond being an appropriate deterrent to unmeritorious cases and/or cannot be reduced to reasonable levels through Government support, “market-based” mechanisms (such as litigation insurance and legal fee structures), or other means;
 - ▷ Claimants experience difficulty in securing legal representation, due to a lack of resources or of other incentives for lawyers to advise claimants in this area;
 - ▷ There are inadequate options for aggregating claims or enabling representative proceedings (such as class actions and other collective action procedures), and this prevents effective remedy for individual claimants.’
7. Improvements to the existing procedures for *enforcement*, including a need for effective punishment and redress. This is covered in UNGPs 1, 25 and 26. The commentary to UNGP 26 notes that ‘State prosecutors lack adequate resources, expertise and support to meet the State’s own obligations to investigate individual and business involvement in human rights-related crimes’.

Shifting policies in the EU

The European Union (EU) took an active part in helping to develop the UN Framework and Guiding Principles on business and human rights. In doing so, the EU was responding to growing pressure from the European Parliament and from European civil society organisations. The EU adopted its own CSR programme, and the concept of business and human rights was carried into the EU’s external policy as a formal component of the EU Strategic Framework on Human Rights and Democracy. Following its strong support for the UNGPs, the EU was sceptical of the calls for a UN Treaty, which emerged shortly after their adoption. The EU argued that more work was needed for implementation and diffusion of the UNGPs.²³¹ More recently, however, that position has begun to shift.

229 See also the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (A/RES/53/144).

230 Giving particular effect to the concept of Full Informed and Prior Consent (FIPC) and in respect of indigenous communities also ILO Convention 169.

231 EU submission to Inter-Governmental Working Group (IGWG) on business and human rights, 2015, at: www.ohchr.org/Documents/HRBodies/HRCouncil/.../Session1/EuropeanUnion.doc

In view of the developing situation, on 20 June 2016, the Council of the EU adopted conclusions noting that ‘access to effective remedies for victims of business-related human rights abuses is of crucial importance’ and that ‘further progress on this third pillar of the Guiding Principles is necessary’. The Council called on the Commission ‘to address remedies in the forthcoming EU Action Plan on Responsible Business Conduct, including at EU legislative level as appropriate, and to consider providing guidance to Member States in this regard’.²³² The Council requested an Opinion from the Agency for Fundamental Rights (FRA) into avenues to lower barriers for access to remedy at the EU level.

The Council of the EU adopted conclusions noting that ‘access to effective remedies for victims of business-related human rights abuses is of crucial importance.’

In its Opinion, the FRA delivered a report that had much in common with both the original issues raised by the UNGPs and the areas flagged by this report which the present author argues are requiring further attention. Among its observations, the FRA noted:

- ▶ ‘Having a *uniform system of remedies* for business-related human rights abuse, or at least clarity and transparency on which procedures and mechanisms are in place in each of the EU Member States, would be important to ensure effective access to justice’.²³³
- ▶ ‘The same logic as for environmental damage under Rome II could be applied to business related human rights abuse’, and notes that ‘a *parallel approach to human rights could be considered*’.²³⁴
- ▶ That the ‘*corporate veil may be lifted* (allowing the parent company to be held liable for the acts of the subsidiary) and due diligence obligations of the parent company (to control acts of the subsidiary), coherence criteria could be agreed at an EU level’ and that ‘a uniform system does make sense’.²³⁵
- ▶ The goal of ‘*ensuring effective remedies through criminal justice*’,²³⁶ while it is further stated that ‘criminal law and criminal justice are indispensable means of human rights protection against severe human rights violations’.²³⁷

232 Council Conclusions on Business and Human Rights Foreign Affairs Council, 20 June 2016, accessible via: http://www.consilium.europa.eu/press-releases-pdf/2016/6/47244642903_en.pdf

233 ‘Improving access to remedy in the area of business and human rights at the EU level’, Opinion of the European Union Agency for Fundamental Rights, 1/2017 [B&HR], p32.

234 FRA Opinion 1/2017 [B&HR], p33.

235 FRA Opinion 1/2017 [B&HR], p32.

236 FRA Opinion 1/2017 [B&HR], p3.

237 FRA Opinion 1/2017 [B&HR], p40.

- ▶ ‘The EU could incentivise Member States to impose *due diligence* obligations, including for parent companies linked to human rights performance in subsidiaries or supply chains’.²³⁸
- ▶ That *representative standing* is important and similar in its advantages to collective redress.²³⁹
- ▶ That it was appropriate to shift the *burden of proof*.²⁴⁰
- ▶ That States should ‘ensure that, when *damage levels* in ‘host’ countries are too low, an EU-wide level of damage, high enough to deter business from further abuse, could be applied’.²⁴¹
- ▶ That *disclosure* is a powerful tool in that it can ensure equality of arms between the relatively powerless claimant and large business’,²⁴² and it argues that a ‘general duty across the EU would enhance victims’ possibilities to effective remedy’.²⁴³
- ▶ That *funding mechanisms* could be established to support victims.²⁴⁴
- ▶ That it would be helpful to establish *rules for representative action and collective redress*.²⁴⁵

The FRA listed 21 opinions in all, but its chief recommendations for reform are grouped together into six thematic areas. Encouragingly, these show considerable overlap with the core issues addressed by the UNGPs and with those legal principles identified as persisting barriers to remedy in this report. FRA’s core recommendations included:

- ▶ ‘lowering barriers to make judicial *remedies more accessible*’,
- ▶ ‘enhancing the *effectiveness of judicial remedies*’,
- ▶ ‘ensuring effective remedies through *criminal justice*’,
- ▶ promoting ‘*transparency and data collection*’,
- ▶ and promoting the concept of *due diligence* as a vehicle for preventing harm and improving accountability.²⁴⁶

At the second session of the Intergovernmental Working Group (IGWG) on Transnational Corporations and other Business Enterprises in October 2016, the EU remained a cautious participant but significantly acknowledged that ‘the Program of Work provides the reassurance that this process does not undermine the much needed continued implementation of the UN Guiding Principles’.²⁴⁷ One of the specific concerns expressed by the EU was the footnote in the adopted text supporting the proposed UN Treaty, which indicated that it might address only transnational corporations

238 FRA Opinion 1/2017 [B&HR], p17.

239 FRA Opinion 1/2017 [B&HR], p37.

240 FRA Opinion 1/2017 [B&HR], p7.

241 FRA Opinion 1/2017 [B&HR], p10.

242 FRA Opinion 1/2017 [B&HR], p38.

243 FRA Opinion 1/2017 [B&HR], p39.

244 FRA Opinion 1/2017 [B&HR], p39.

245 FRA Opinion 1/2017 [B&HR], p6-7.

246 FRA Opinion 1/2017 [B&HR], p5.

247 EU submission to IGWG (2015).

and not enterprises operating at the domestic level.²⁴⁸ Intensive discussions in the lead-up to the second IGWG secured broad agreement that many of those present were open to the view that the UN Treaty should address all businesses and not transnational companies exclusively. The EU declared that it was 'pleased' with the broadening of debate in the Programme of Work, and indicated that it was satisfied that this desire to see the UN Treaty have broad applicability was now 'the view of many' within the IGWG.²⁴⁹ This was a critical step forward for the EU's participation in the Treaty process.

The European Parliament itself produced an emphatic statement on 'corporate liability for serious human rights abuses in third countries', which led to a Resolution, adopted by the European Parliament on 25 October 2016, which 'calls on the Commission and Member States to guarantee policy coherence on business and human rights at all levels: within different EU institutions, between the institutions, and between the EU and its Member States, and in particular in relation to the Union's trade policy'.²⁵⁰ Significantly, the Resolution 'warmly welcomes the work initiated in preparation for a binding UN Treaty on Business and Human Rights; regrets any obstructive behaviour in relation to this process, and calls on the EU and Member States to constructively engage in these negotiations'.²⁵¹

In demonstrating these examples of legal approaches there is an opportunity for the EU to play an important, influential and active role in the planning and elaboration for a UN Treaty.

In 2017, the Directorate-General (DG) for External Policies of the EU, Implementation of the UN Guiding Principles on Business and Human Rights, reported that the initial division between supporters of the UN Treaty process and those wishing to remain focused only on the UNGPs is 'becoming smaller'. With the passage of time, the DG reported 'those polarised positions seem to soften, with more voices arguing that there is no inherent competition between the two processes, and that instead they would strongly benefit one another'.²⁵²

If the EU does become more fully and substantially involved in the treaty process, it is clear that the European experience can be informative, and may serve as a template for some of the critical elements that the UN Treaty may need to address. There are several key ideas that are currently

248 Jens Martens and Karolin Seitz, 'The Struggle for a UN Treaty Towards global regulation on human rights and business' (Rosa Luxemburg Stiftung, 2016), p25.

249 EU submission to IGWG (2015).

250 European Parliament resolution of 25 October 2016 on corporate liability for serious human rights abuses in third countries, at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0405+0+DOC+XML+V0//EN>

251 *Ibid.*

252 'Implementation of the UN Guiding Principles on Business and Human Rights', Policy Department, Directorate-General for External Policies (European Union, February 2017), at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU\(2017\)578031_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/578031/EXPO_STU(2017)578031_EN.pdf)

in the ascendancy in Europe that might inform the UN Treaty, particularly the Brussels and Rome regimes for the determination of jurisdictional questions of forum and choice of law. These examples will be invaluable as guidance to any attempt to create an international jurisdictional framework, particularly with regard to key features of the European regime, such as the right of victims to choose home state law in environmental cases²⁵³ and the potential for the application of over-riding mandatory provisions of home state law by the home state forum even when applying host state law.²⁵⁴

The experience of working with a growing number of functioning models for legally binding due diligence models that are now operating within a number of EU states, and through the EU's own non-Financial Reporting Directive, will also be very informative for those looking to incorporate due diligence models into the UN Treaty. In demonstrating these examples of legal approaches there is an opportunity for the EU to play an important, influential and active role in the planning and elaboration for a UN Treaty.

The EU can also benefit from the process. While the EU and its Member States do indeed have several progressive elements of law that could be templates for elements of a future UN Treaty, the general approach and the machinery that exists in the EU remains for the most part rather uncoordinated. There is a significant lack of specialised or purposely designed legal machinery, and cases tend to rely on an ad hoc co-opting of legal rules that were principally developed to address domestic tort and crime. The EU states could benefit from modernisation and harmonisation of these standards, as many other jurisdictions could. Even where the EU can provide a template for others to learn from, there are still challenges, notably the entirely contrasting approaches to jurisdiction under the Brussels Regulation taken by the Dutch and British courts in the 2017 Shell cases (see case profiles).

253 Regulation (No. 864/2007) (Rome II), Article 7.

254 Regulation (No. 864/2007) (Rome II), Article 16.

Section 4

Recommendations for the future Treaty

The case studies of litigation processes in Section 1 have illustrated the multiple challenges that victims of serious human rights impacts arising from transnational business ventures continue to experience when trying to access justice and remedy in varying jurisdictions across home and host states. Section 2 analysed these barriers thematically, resulting in a grouping of barriers in the seven areas: 1. Jurisdiction; 2. Corporate liability; 3. Criminal law; 4. Regulation of business conduct; 5. Risks for human rights defenders; 6. Access to courts; 7. Enforcement. By analysing existing approaches in each of these areas, this section already started identifying potential strategies for reform that could break down these barriers. Section 3 went on to analyse how the existing normative framework created by the UNGPs addresses these barriers, and concluded that a UN Treaty could complement and strengthen these efforts. In this final section, all these ingredients are combined to recommend seven areas of reform that should be addressed by the Treaty from an access to remedy perspective.

Unless otherwise stated, it is proposed that all of the following are to be achieved by domestic law reform on the part of ratifying States, or by the direct application of the provisions of the Treaty. The ratification of a Treaty creates binding legal obligations for the State.²⁵⁵ Treaties generally lack specificity in the proposals they lay down, setting broad principles but leaving significant leeway regarding the mode of application and implementation down to ratifying States. This recognises the different legal systems and cultures and permits States to adopt modes of implementation that fit their system and meet their requirements. Whatever mode of implementation is adopted, however, the State must fulfil the minimum requirements established by the Treaty. Treaties may establish various modes for monitoring or reporting compliance, such as the establishment of an oversight mechanisms or treaty body.

Whatever mode of implementation is adopted, the State must fulfil the minimum requirements established by the Treaty.

Whether the obligations imposed on the State translate directly into the domestic legal system as actionable legal rights depends on various factors, including whether the State has a monist or dualist legal system, and whether the Treaty is 'self-executing', which broadly equates to whether the Treaty terms are sufficiently clear and precise as to have what would, under EU law, be known

²⁵⁵ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html>, Article 26.

as 'direct effect'. These concepts are typical matters for all international treaties and as such are not discussed in detail within this report. It is worth noting the implications in outline, however. Under monist legal systems, the provisions of sufficiently clear self-executing treaties normally create immediately binding legal obligations that are enforceable within the domestic legal order and which can be relied on in judicial proceedings. Under dualist legal systems, such as the UK, ratification normally has a lesser effect within the domestic legal order, usually requiring the enactment of implementing legislation or relevant policy reform, before creating actionable rights or obligations between parties.

It is suggested that most of the reforms proposed here should be drafted in broad terms, leaving the exact modes of implementation to be determined by the ratifying States. Each of the recommended treaty elements would therefore create binding legal obligations for the State, internationally, but would require domestic legal reform by the ratifying State in order to implement the particular element and thus to create justiciable legal obligations between parties, and that – given the broad terms in which it is suggested that the elements should be drafted – this would apply in either monist or dualist systems. This need not mean that treaty elements should be reduced to vague general objectives. The outcomes required by each element can be quite specific: requiring that an exception should be introduced to the corporate veil, for example, is quite a specific objective. But the mode of implementation even for such a specific requirement can be left for ratifying States to determine.

Recommendation 1

Use the Treaty to make it easier to overcome jurisdiction barriers

► **Create a framework for jurisdiction and choice of law**

Establish a basic consensus, supported by domestic law, for home state courts to ordinarily recognise jurisdiction over companies domiciled in those states when cases are filed against them for human rights violations occurring overseas. A presumption for choice of law must also be established (on which, see overriding mandatory provision, below). For the purposes of this framework, 'domiciled' should have a wide interpretation that would apply to, at least, countries in which companies have (or perhaps even 'recently had') their main corporate governance office, their registered office, or their main stock market listing/s.

► **Joinder of host state subsidiaries**

Rules should be developed to allow local subsidiaries to be joined as co-defendants to claims against parents, which may provide for the more speedy and effective determination of claims, and avoid conflicting judgments if claims against parent and subsidiary are litigated in separate courts. The Brussels/Rome regime does not grant this right, but does not prevent it, and a number of European domestic legal systems already permit such joinder in the interests of justice.

► **Overriding mandatory provisions**

A critical factor for any choice of law regime that ends up applying host state law is to emphasise the possibility for a scheme of overriding mandatory provisions, which is envisaged in the Rome Regulation²⁵⁶ as a vehicle under which certain aspects of home state law can be applied to defendants on trial in their home forum, despite the fact that the case is to be judged according to host state law. Such an exception would allow the home state to apply, for example, the requirements of a home state due diligence law, thus holding the company accountable to home state standards of planning and accountability, while still basing its assessment of the legality of conduct in the host state against host state law.

► **Abolish Forum Non Conveniens rule**

The *Forum Non Conveniens* rule would conflict with the principle jurisdictional rule proposed here, which would establish grounds for home state jurisdiction. The rule should therefore be abolished or dis-applied in transnational human rights cases involving corporate actors. The reforms proposed above, together with the abolition of *Forum Non Conveniens*, could decrease the likelihood of lengthy jurisdictional battles, ensuring that cases will proceed to trial of substantive matters more quickly.

Recommendation 2

Use the Treaty to remove legal barriers to corporate liability and to place upon corporations a broad duty of care

► **Corporate entity/limited liability exception**

Statutory reforms could permit courts to apply an exception to the traditional legal concepts of separate legal personality and limited liability. This would be a mechanism for making the parent liable for the subsidiary's conduct and to require a parent to pay a subsidiary's debts to human rights victims in the event that the subsidiary defaulted or was unable to pay. Such a reform would require courts to apply 'agency', 'enterprise', 'shareholder' or 'vicarious' models of liability as a presumption in human rights cases and to ignore the traditional statutory barriers to these liability models. This could encourage local (host state) litigation against local (i.e. – subsidiary) companies, even where there were fears that the subsidiary might be wound-up, or lacked the assets or insurance necessary to meet a successful claim. Victims successful in host state litigation would be able to pursue compensation from the parent if the local company was unable to meet its liabilities.

► **Parent company duty of care**

A duty of care introduced by statute could require a parent company to be responsible for the conduct and impacts of its subsidiaries. This could cover just those subsidiaries it 'controls', or supervises closely (a relatively weak '*Chandler*' style duty of care), or the duty could be extended to all of its subsidiaries (avoiding the situation in *Bebe*, where Shell divested itself of responsibility following a corporate restructuring). As this would be a statutory model the duty

256 Regulation (No. 864/2007) (Rome II), Article 16.

could be limited to the company's own subsidiaries or applied throughout its supply chain more generally. Violations of this duty of care could be the basis for private, victim-led legal actions, such as negligence suits. This has a significant overlap with 'due diligence' (discussed below).

Recommendation 3

Use the Treaty to promote convergence of criminal law around basic modern approaches to corporate liability

▶ **Make corporations generally indictable for crimes**

All legal systems should move towards a basic criminal law position for corporate offenders under which they may be prosecuted for crimes generally, though specific corporate crime offences could be retained alongside this model.

▶ **Introduce corporate culture model**

All legal systems should move towards a basic criminal law position for corporate offenders based on the corporate culture model for the assessment of the *mens rea* (intent or recklessness/negligence) of corporate offenders.

▶ **Introduce appropriate sanctions**

See recommendations on enforcement (below).

Recommendation 4

Use the Treaty to improve corporate responsibility by giving binding legal force to the due diligence framework from the UNGPs

▶ **Binding due diligence**

A legally binding requirement should be introduced requiring companies to prepare detailed reports on all aspects of their predicted (forward looking), and actual, human rights impact throughout their supply chain. The approach to due diligence could be based on the approaches outlined in the UNGPs, with the crucial additional requirements: stakeholder verification and binding legal force. There is a need for stakeholder input and verification of reports. Local and global unions (perhaps meeting certain membership or representative criteria) and ILO or UN accredited human rights NGOs should have a right to contribute to or comment on the annual report. This could include a right to trigger administrative, investigation and sanction processes that would, where appropriate, support enforcement actions by regulatory bodies and prosecution services. It is critical that due diligence be binding, not voluntary, if it is to be effective, and that sanctions and liabilities constitute a meaningful deterrent, relative to the turnover of the company.

Recommendation 5

Use the Treaty to affirm and extend protection for human rights defenders

▶ **Libel law reform**

Introduce protection for human rights activists, journalists and NGOs from libel law in the context of sincere human rights advocacy.

▶ **Protection for whistle-blowers/human rights defenders**

Introduce a model of judicial protection for whistle-blowers and human rights defenders, possibly based on the *medidas cautelares* ('precautionary measures') regime, used in the inter-Americas human rights system.²⁵⁷

▶ **Consultation with communities and the unique situation of indigenous peoples**

The Treaty should proclaim a commitment to protection of the situation of indigenous peoples, in particular acknowledging the importance of the recognition of, and legal protection of, traditional land rights, and requiring courts and tribunals to recognise and to protect the rights and interests of indigenous peoples. The Treaty should require business projects in all cases to meet the standards of Free Prior and Informed Consent (FPIC).²⁵⁸

Recommendation 6

Use the Treaty to improve access to courts

▶ **Burden of proof reversed**

There are two specific aspects where the defendant corporation should be required to provide the evidence, which it will normally have far greater capacity to address than would victims. The issues are: i) the parent – subsidiary relationship (such as the extent to which the parent has control or responsibility over the subsidiary); and ii) other technical matters specific to the case (such as the nature of materials used in industrial processes). Plaintiffs would be required to raise basic evidence setting out a claim to meet a low standard of proof (termed a *prima facie* case). It would be for the defendant corporation to rebut this case.

▶ **New rules on disclosure**

Require transnational corporations to cooperate with pre-trial disclosure rules in all transnational human rights cases. The rules could be based on common law approaches, such as

257 About precautionary measures (web page), Inter-Americas Commission on Human Rights, at: <http://www.oas.org/en/iachr/decisions/about-precautionary.asp>

258 As advanced under the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples, 2007 (A/RES/61/295).

those set out under Part 31 of the UK's Civil Procedure Rules,²⁵⁹ or developed specifically for the context of these cases. Establishing a basis for disclosure as a routine procedure would again reduce the need for delays and legal battles.

▶ **Funding**

Improving access to funding is a difficult request. While rural Nigerian farmers clearly need funding assistance to bring a transnational legal case against the Shell corporate group in Europe, the demand must be squared with domestic provision, where demands on resources mean that in many countries access to legal financial assistance is quite restricted. A possible solution is for the Treaty to require that signatory States or transnational corporations contribute to an insurance scheme that would assist plaintiffs.

▶ **Locus standi**

Require greater flexibility on access to the court for groups, representatives, and third parties, notably in the case of indigenous peoples, to address – at a minimum – the complete exclusion experienced by the Chimanimani at the *Border Timbers* ISDS hearing.

Recommendation 7

Use the Treaty to improve effectiveness of State enforcement

▶ **Agreement for recognition and enforcement of judgments**

There is a need for international agreement on judicial cooperation and mutual recognition and enforcement of judicial decisions.

▶ **Improve training, resources and mandates for domestic regulatory agencies**

The UN Treaty should affirm the role of domestic agencies in responding to transnational cases, giving agencies the confidence to take up these cases, and provide appropriate training and resources.

▶ **Increase sanctions available to domestic regulatory agencies**

Sanctions imposed by administrative and criminal processes, including fines for breach of environmental regulations, for example, but also the criminal law, must be set at a level that acts as an effective deterrent, judged against the turnover of the parent company.

▶ **Establish a global oversight body on business and human rights**

A body could be established based on the UN supervisory bodies that oversee the compliance of States with international human rights obligations. This body could receive reports from businesses, from communities, NGOs and other stakeholders, and produce authoritative statements concerning the compliance of business groups with their obligations under international human rights law, and the extent to which they meet – or fail to meet – their duty as

²⁵⁹ Note, however, that these rules alone were insufficient to support the plaintiffs in the *Bebe* case.

expressed under the UNGPs to 'respect' human rights. If a more ambitious 'world business and human rights court' were to be established the procedure would be relatively straightforward for ratifying States to grant this body judicial power to exercise jurisdiction over companies based in their territory. See also proposals for a World Court.²⁶⁰ Any attempt to exercise judicial authority over companies based in non-ratifying States, however, may raise concerns about state sovereignty.

260 Luis Gallegos and Daniel Uribe, 'The Next Step against Corporate Impunity: A World Court on Business and Human Rights?', *Harvard International Law Journal* (Vol. 57 Online Symposium), at: <http://www.harvardilj.org/2016/07/the-next-step-against-corporate-impunity-a-world-court-on-business-and-human-rights/>; <http://www.foei.org/news/rights-people-rules-business>

Conclusion

The Treaty elements recommended by this report map out possible ways for achieving real legal change, based primarily on a model of cascading implementation of Treaty elements by ratifying States. It is critical, however, to recognise that while access to remedy is compounded by the interplay of various factors the Treaty cannot achieve its aims merely by improving the procedural elements identified in this report. It must incorporate at least one model of substantive reform for placing effective legal accountability on corporations. Among those the model of binding supply chain due diligence is clearly shown by this report to be both highly complementary to the model established by the UNGPs and also to be at the forefront of current European legislative models for improving corporate accountability.

The legal barriers identified in this report are on the whole old and greatly overdue for reform. There is currently a tremendous appetite for proper accountability of transnational businesses for their adverse human rights impacts, and nowhere was this more visible than in the process leading up to the adoption of the UNGPs. Indeed, this report argues that the UNGPs and the Treaty should now be regarded as complementary strategies for achieving the same goals.

Removing Barriers to Justice

How a treaty on business and human rights could improve access to remedy for victims

In June 2014, a ground-breaking resolution was adopted by the Human Rights Council that established an Inter-Governmental Working Group to develop an 'international legally binding instrument on transnational corporations and other business enterprises with respect to human rights'. Such a 'binding instrument', or treaty, has the potential to take an important next step on the path towards remedy for victims of business-related human rights abuses.

Seeking to contribute to the mandate of the Inter-Governmental Working Group on business and human rights, this report provides more concrete evidence of continuing obstacles to access to remedy, reiterating the persisting remedy gap that a treaty might help to close. It also sets out arguments for practical reforms, arguing that the UN negotiations for a binding treaty offer a clear opportunity to improve access to remedy for victims.

The report focuses specific attention on policy and legal developments in the European Union (EU). It identifies whether and in what way a UN treaty on business and human rights could complement and improve policy development and action at the national level to address barriers to remedy, as well as setting the framework for harmonising key elements of law.