



The EU's Business:

Recommended actions
for the EU and its Member States
to ensure access to judicial remedy
for business-related human rights
impacts

 **Access to Justice**

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Frank Bold is a public interest law firm that seeks to solve social and environmental problems by combining the power of business with non-profit approaches. With offices in the Czech Republic, Poland, and Brussels, Frank Bold engages with a range of issues at European and national levels, including corporate governance and access to justice for victims of business-related abuses.

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The **European Coalition for Corporate Justice** (ECCJ) promotes corporate accountability by bringing together national platforms of civil society organizations, including non-governmental organisations, trade unions, consumer advocacy groups and academic institutions across Europe. ECCJ represents more than 250 civil society organisations from 15 European countries, including FIDH and national chapters of Oxfam, Greenpeace, Amnesty International and Friends of the Earth.

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The **European Center for Constitutional and Human Rights**, which is based in Germany, is an independent, not-for-profit legal and educational organization dedicated to protecting civil and human rights throughout Europe. It was founded in 2007 by a group of renowned human rights lawyers to protect and enforce by juridical means the rights proclaimed in the Universal Declaration of Human Rights, other human rights instruments and national constitutions.

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The **Corporate Responsibility Coalition** (CORE) is the leading UK civil society network on corporate accountability. CORE brings together extensive experience and expertise in the areas of international development, the environment and human rights from NGOs, academics, trade unions and legal experts. CORE's aim is to reduce business-related human rights and environmental abuses by ensuring companies can be held to account for their impacts both at home and abroad, and to guarantee access to justice for people adversely affected by corporate activity.

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Sherpa is a French not-for-profit organization whose aim is to defend the rights of people affected by business-related crimes. The work of Sherpa is organised around advocacy and strategic litigation. Sherpa gathers legal experts and lawyers from diverse backgrounds and works closely with many civil society organizations around the world.

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Executive summary

The European Union (EU) and its Member States pledged their full support to the UN Guiding Principles on Business and Human Rights (UN Guiding Principles),¹ which articulate the State duty to ensure effective remedy for victims of human rights violations, including through judicial mechanisms.

During 2013 and 2014, a dialogue took place amongst legal experts in Europe on how to tackle barriers to accessing justice by victims of business-related human rights abuses, with a particular focus on civil justice. This paper summarizes the outcomes of that dialogue. The dialogue was organised by Association Sherpa, CORE, the European Center for Constitutional and Human Rights, ECCJ, ICAR and Frank Bold, with the kind support of the Law Society in London, La Maison du Barreau in Paris and Humboldt Universität in Berlin. The implications of this dialogue for EU policy-making were discussed at a conference held at the European Parliament on 11 November 2014.

Legal experts, both practitioners and academics, identified multiple obstacles to accessing judicial remedy. These obstacles, when combined, make it exceptionally difficult – and frequently impossible – for victims to access justice. Many of these obstacles arise in respect of both transnational and domestic cases that involve human rights violations, as well as in different contexts, such as cases that address consumer, environmental or labour issues. The research also revealed examples of good practice that may alleviate obstacles to accessing justice. There are three major categories of existing barriers to justice. First, there are commonly significant financial and procedural burdens associated with pursuing remedies through the courts. Second, the implications of the “corporate veil”, combined with the absence of effective evidential disclosure requirements, may prevent the attribution of liability to individual companies within a multinational enterprise.

Third, lack of clarity regarding the application of EU rules on private international law may contribute to legal uncertainty for victims, even though these rules in themselves do not present major obstacles to transnational litigation.

Participants generally agreed that policy action in four areas is required to overcome these challenges:

1. Tackle financial and procedural burdens: In particular, both the EU and its Member States should introduce effective collective redress mechanisms based on the reference to “fundamental rights” set out in the Charter of Fundamental Rights of the EU.

¹ See Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 (25 June 2012). As of 19 December 2014, the UK, the Netherlands, Denmark, and Finland have published National Action Plans to implement UN Guiding Principles. Spain has produced a draft National Action Plan. Italy, France, Germany, Greece Ireland, Latvia, Lithuania, and Slovenia have committed to developing a National Action Plan or were in the process of doing so. The Business and Human Rights Resource Centre provides comprehensive information on the National Action Plans: <<http://business-humanrights.org/en/un-guiding-principles/implementation-tools-examples/implementation-by-governments/by-type-of-initiative/national-action-plans>>. This link as well as all other links in this report were accessed on 19 December 2014.

2. Put in practice and clarify standards of human rights due diligence in civil justice systems across the EU: The introduction of an EU directive and/or Member States' laws providing for the reversal of the burden of proof, or establishing common standards for the disclosure of evidence, would provide a very significant advance. The EU should also explore the potential utility of the concept of mandatory human rights due diligence.

3. Clarify EU rules regarding private international law. The European Commission should explore amendments that would better ensure the protection of human rights in its forthcoming review of the Rome II Regulation.

4. The EU should exercise its convening powers to support the implementation by EU Member States of the third pillar of the UN Guiding Principles, which addresses access to remedy.

The Annexure to this paper provides short summaries of the current situation in France, Germany and the United Kingdom (UK). A set of specific recommendations is provided for each of these States. These summaries are based on the outcomes of four conferences held during 2014 in Paris, London, Berlin, and Brussels.

The EU's Business:

Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights impacts

INTRODUCTION

A quarter of the 100 largest listed companies in the world are headquartered in EU Member States.² The EU estimates that 42,000 EU companies are considered to be “large”. These companies have many non-EU subsidiaries and business partners. European citizens expect European companies to operate to high standards and to ensure that they are not implicated in human rights violations.³ However, European companies’ involvement in human rights and environmental harms is not marginal. Between 2005 and 2013, more than half of the companies listed on the British, French and German stock exchanges were identified in concerns or allegations regarding adverse human rights risks and impacts.⁴ Recent high-profile incidents involving European companies include: the collapse of the Rana Plaza garment factory in 2013, which resulted in a death toll of 1,129; the toxic waste dump in 2006 in Côte d’Ivoire, which according to the United Nations (UN) and the government of Côte d’Ivoire led to the deaths of 17 and injury of more than 30,000 Ivoirians; the recurring oil spills in the Niger Delta that each year affect tens of thousands of farmers and fishermen and, *de facto*, amount to ecocide;⁵ and the development of surveillance systems by European companies for use by oppressive regimes around the world.⁶

In Europe, large scale pollution in the vicinity of heavy industry sites causes the most significant impacts. For example, a community of more than 6,000 people in Ostrava, Czech Republic, is exposed to air

² See IPIS, ‘The Adverse Human Rights Risks and Impacts of European Companies: Getting a Glimpse of the Picture’ (IPIS 2014) <http://www.corporatejustice.org/IMG/pdf/ahrri_report_final-2.pdf>; Annebritt Dullforce, ‘FT 500 2014’ *Financial Times* (London, 27 June 2014) <<http://www.ft.com/cms/s/0/988051be-fdee-11e3-bd0e-00144feab7de.html#axzz3PHPgFIEI>>.

³ European Commission, Flash Eurobarometer 363: How Companies Influence our Society: Citizens’ View, 2013. At p.13 the report documents that: “a large majority (79%) [of Europeans] say they are interested in what companies do regarding social responsibility.”

⁴ IPIS (n 2) 2.

⁵ For a summary of recent oil spills, see ‘Shell’s False Claims on Niger Delta Oil Spills Exposed’ (*Amnesty International*, 7 November 2013) <<http://www.amnesty.org/en/news/shell-s-false-claims-niger-delta-oil-spills-exposed-2013-11-07>>. On 7 January 2015, Nigerian subsidiary of Royal Dutch Shell, plc. agreed to compensate 15,600 Nigerian fishermen and their community affected by two massive oil spills in the Niger Delta in 2008 and 2009. See ‘Shell’s Nigerian subsidiary agrees £55 million settlement with the Bodo community’ (Shell, 7 January 2015) <<http://www.shell.com/global/aboutshell/investor/news-and-library/2015/shells-nigerian-subsiary-settlement-with-bodo-community.html>>.

⁶ See FIDH, ‘Surveillance Technologies “Made in Europe”: Regulation Needed to Prevent Human Rights Abuses’ (FIDH 2014) <https://www.fidh.org/IMG/pdf/surveillance_technologies_made_in_europe.pdf>.

containing carcinogenic agents in concentrations that exceed legal limits by 800%. This air pollution results largely from the activities of the steel industry.⁷

When such human rights impacts occur, affected people should be able to access justice, ideally in the State in which the impact occurred. However, this is often not possible due to corruption, lack of rule of law or because the company alleged to have caused the impact does not have major assets in that State. Principles of international law require that steps be taken to ensure access to justice in EU Member States where impacts involve companies within Member States' jurisdiction. This applies to cases in which harm is alleged to have been caused within the EU as well as in other States.

In 2011, the UN Human Rights Council unanimously endorsed the UN Guiding Principles, the third pillar of which addresses the need for victims to have greater access to effective remedies. Following the adoption of the UN Guiding Principles, the EU and its Member States pledged to support fully the Principles' implementation. However, a recent study published by ICAR, CORE and ECCJ found that the existence of legal, procedural and institutional barriers still prevent victims of corporate abuses from gaining access to an effective remedy in the EU.⁸ Therefore, steps must be taken to address these obstacles.

In 2014, Association Sherpa, CORE, the European Center for Constitutional and Human Rights the ECCJ and Frank Bold launched a project to tackle the challenges identified in the abovementioned report and to improve access to judicial remedy in the EU. Throughout 2014, a series of high-level conferences were held in Paris, London, Berlin and Brussels to facilitate discussion of existing challenges associated with access to justice and seek to identify tangible actions that would support EU and domestic policy-makers to implement the third pillar of the UN Guiding Principles, which addresses access to remedy. The discussions in these conferences revealed that similar problems are encountered across jurisdictions; there are clear opportunities for the EU to provide leadership and guidance to Member States to support them to address these issues.

This paper summarizes the outcomes of these discussions and presents a plan of recommended actions for the EU and its Member States on how to tackle identified barriers to access to justice.

For more information about barriers to access to justice and recent policy developments, visit the project's website at <http://www.accessjustice.eu/> and follow the discussion in the 'Access to Justice and Corporate Accountability' group on LinkedIn.

THE BARRIERS TO ACCESS TO JUSTICE

There are multiple obstacles to gaining access to a judicial remedy in a transnational context which, when combined, make it exceptionally difficult – and frequently impossible – for victims to access justice. Many of these obstacles arise in respect of domestic cases involving human rights violations as well as different

⁷ Friends of the Earth & CEE Bankwatch Network, 'ArcelorMittal: Going Nowhere Slowly (Friends of the Earth & CEE Bankwatch Network 2009) 11 <http://www.foeeurope.org/sites/default/files/publications/FoEE_arcelormittal_going_nowhere_0509.pdf>. In 2012, the levels of benzo(a)pyrene, the indicative carcinogenic agent, rose to 10,8 ng/m³, i.e. 108 % of the legal limit. See 'Jsou Dodržovány Imisní Limity Znečišťujících Látek Pro Ochranu Lidského Zdraví?' (Czech Ministry of the Environment, 26 August 2013) <<http://issar.cenia.cz/issar/page.php?id=1531>>.

⁸ See 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 2013) available at: <<http://accountabilityroundtable.org/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>>.

contexts, such as cases concerning consumer, environmental and labour issues. These existing barriers can be categorized as follows:

1. Financial, procedural and evidentiary issues

Transnational litigation is incredibly costly, most notably because of the costs associated with gathering evidence to support a claim in a foreign State and the retention of legal and technical experts, and also the sheer length of litigation processes, the duration of which can exceed a decade. The cost of litigation can preclude access to a judicial remedy by human rights victims, who may lack significant financial resources and be opposed by a powerful counterparty.

In domestic contexts, such as consumer and environmental cases, the situation is similar. These cases are generally characterized by power and information imbalances between the parties. Several additional factors further undermine the financial viability of litigation and deter potential plaintiffs from seeking justice. These include: the costs of obtaining evidence; the “loser pays” principle; and limitations on the quantum of damages obtainable by individual plaintiffs, which may result from the spread of harm across a large group of people or the nature of harm as “damage to the commons”.

The ability of victims to access evidence is crucial. In transnational cases, plaintiffs must generally prove that the defendant company designed, managed or was otherwise involved in a harmful activity carried out by its subsidiary or business partner. However, such information is rarely publicly available. In most situations, it is in the possession of the defendant. Further, in both transnational and domestic contexts, plaintiffs must provide evidence that the commercial operation caused the harm suffered, which may be particularly burdensome in environmental cases. Effective rules of disclosure introduced in the UK enable plaintiffs to overcome these hurdles. However, in other EU Members States, the absence or limitations of such rules often present significant challenges to a plaintiff seeking to establish the role of a parent company, and preclude access to remedy.

2. Issues concerning standards of care

The complex corporate structures and value chains that characterize the organization of modern business are at the heart of the obstacles facing victims in transnational cases. In practice, victims must deal with the combined impacts of the twin principles of separate legal personality and limited liability, as well as the abovementioned evidentiary burdens.

The concept of human rights due diligence, which occupies a central position in the framework set out in the UN Guiding Principles and which was globally endorsed within a brief period following the Principles’ finalisation,⁹ offers a potential solution to this issue. The UN Guiding Principles identify human rights due diligence as the principal tool that a business should use to identify risks related to its activities and relationships, and set out the steps it should take both to prevent its infringement on the rights of others

⁹ The UN Guiding Principles are reflected in the European Commission’s 2011 Corporate Social Responsibility Policy; the Organization of American States’ 2014 endorsement of the Guiding Principles; the International Organization for Standardization’s ISO26000 social responsibility standard; the OECD Guidelines for Multinational Enterprises; the African Union’s ‘Africa Mining Vision’; as well as the work of the ASEAN Intergovernmental Commission on Human Rights.

and to account for its actions. However, the ways in which human rights due diligence could inform the application of civil and tort law, or be incorporated into the circumstances in which tortious standards such as “reasonable steps” will be considered to have been met, requires further clarification.¹⁰

There have recently been some significant developments in this area. In the UK, the Court of Appeal held in 2012 that, in appropriate circumstances, the law may impose a duty of care on a parent company for the health and safety of its subsidiary's employees. The position of plaintiffs who pursue claims in continental European countries is, in this respect, complicated by absence of effective procedures for the disclosure of evidence, which prevent plaintiffs from identifying and adducing evidence of the role of a parent company. More recently, in November 2013, a draft bill was presented to the French Parliament calling for the establishment of a duty of vigilance for parent and controlling companies with respect to their subsidiary companies, subcontractors and suppliers. This bill is based on a different logic; that is, if a company is part of an economically integrated enterprise, a controlling company should be vicariously liable for the company's human rights impact, even if it did not itself directly contribute to that impact. This type of liability requires precise definition to distinguish an investment relationship from economic control.

3. Issues concerning the rules of private international law

Given the hurdles many plaintiffs face when seeking to pursue claims against businesses in the State where the harm occurred (host State), courts in the home State of a multinational business that are able to consider these claims will sometimes provide the only avenue to remedy. The Brussels I Regulation mandates national courts of EU Member States to accept jurisdiction in civil liability cases filed against defendants domiciled in the forum State. Courts' jurisdiction over defendants not domiciled in the EU (such as foreign subsidiaries of European companies) continues to be addressed by Member States' own laws, and these national legal systems adopt a variety of approaches.

When courts consider cases concerning harm that occurred in another jurisdiction, they undertake analysis to determine which States' law should be applied to decide the claim. The Rome II Regulation, which harmonized the jurisdictional rules across EU Member States, establishes as a general rule that courts should apply the law of the State where the harm occurred. This may present barriers to victims if the host State: either does not recognize, or limits, vicarious or secondary liability (including parent company liability); requires claimants seeking remedies in tort to meet a higher burden of proof; provides stricter immunities than is provided in the laws of the forum State; or limits the remedies that claimants can be granted. The Rome II Regulation creates several exceptions to the application of the general rule that courts should apply the law of the State where the harm occurred, but these exceptions require further clarification.

The debate on access to justice in the business and human rights context is often conflated with debate about extraterritoriality. The consultations with national experts carried out at and prior to the conferences organised in connection with this project concluded that the existing rules of private international law do not constitute a major obstacle. Certain elements of the Brussels I Regulation and the Rome II Regulation should be adjusted or clarified, but the basic principles of this regime do not need to be reformed. By contrast, the need to address evidentiary, procedural and financial obstacles, and to

¹⁰ As explained in greater detail in the second paragraph at page 14, the concept of due diligence predates the Guiding Principles.

clarify the implications of the concept of human rights due diligence for tort/civil law duty of care, is much more pressing.

A Note on Non-judicial Mechanisms

The UN Guiding Principles identify three types of grievance mechanisms: state-based judicial mechanisms, state-based non-judicial mechanisms and non-state-based grievance mechanisms (including company grievance mechanisms). In discussions about the implementation of the UN Guiding Principles, non-judicial mechanisms, including company grievance mechanisms, are sometimes presented as a satisfactory substitute for judicial mechanisms. Non-judicial mechanisms may play a very positive role, and as such should be supported. However, the exclusive pursuit of out-of-court solutions at the expense of ensuring access to effective judicial remedy is not grounded in human rights law, the UN Guiding Principles or practical experience.

Accordingly, States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms, including by considering ways to reduce legal, practical and other relevant barriers that could inhibit access to remedy. States should also ensure access to non-judicial mechanisms to complement, but not replace, judicial mechanisms.

THE ROLE OF THE EU

As EU Member States develop National Action Plans addressing how they will implement and promote implementation of the UN Guiding Principles, it is becoming clear that they find it difficult to address issues associated with access to remedy. In these national discussions, access to judicial remedy is often reduced to an argument about extraterritoriality, is completely avoided or replaced with a focus on non-judicial grievance mechanisms or is recast as a debate about the steps that can be taken to improve access to remedy in host States. While these are important issues, discussion of them should not entirely replace discussion about the need to improve access to remedy in Member States.

The cautious approach adopted by EU Member States is understandable. Legal reforms imply changes to long-standing principles and mechanisms of civil justice systems. If such reforms were to enable human rights victims to effectively assert their rights, they would change the playing field for business and in particular, for large multinational corporations. There are also implicit concerns that such reforms may put companies at a competitive disadvantage against peers from other Member States. These concerns have been raised explicitly in France in the course of debate about a bill seeking to introduce a duty of vigilance for parent companies.

The EU performs an irreplaceable role in facilitating discussion to enable progress. The rationale for EU action is further supported by the EU's previous commitments. The Council of the EU has committed to encouraging and contributing to the implementation of the UN Guiding Principles.¹¹ Further, the EU repeatedly expressed its commitment to the UN Guiding Principles during the Second Annual UN Forum on Business and Human Rights, which was held in December 2013, most notably by emphasizing

¹¹ Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 11855/12 (25 June 2012).

adherence to the Principles.¹² Finally, the EU should act in accordance with the provisions of the Charter of Fundamental Rights of the EU, Article 47 of which explicitly provides for the rights to an effective remedy and a fair trial.

The EU has already harmonised most rules of private international law and is therefore responsible for adjusting these rules as needed.¹³ The EU may also set minimum standards for the enforcement of existing EU law, for example with respect to the protection of the environment,¹⁴ consumer affairs¹⁵ or fundamental rights.¹⁶ The competence that the EU shares with its Member States in relation to the internal market could justify harmonisation of civil liability standards for the implementation of human rights due diligence.¹⁷

Before moving to specific recommendations, it should be noted that, although many obstacles are common to all European jurisdictions, there are also many others that can only be addressed domestically. In principle, the EU and Member States have shared competence in relevant matters. Ideally, the EU should not only focus on strengthening relevant EU legislation but should also foster action by Member States and facilitate consensus on how to tackle the most difficult issues.

AREAS FOR EU ACTION

1. Tackle financial and procedural burdens

For human rights victims, who often have extremely limited financial resources and who face a powerful counterparty, the cost of litigation can preclude access to judicial remedy. At the London conference, one participant identified the practical challenges of an ongoing case, which involves 28 expert witnesses and more than 20,000 pages of evidence for a trial listed to last five months. Further, the costs (which are estimated to be £35–£40 million between the two parties) exceed the value of the claim. The financial resources of the defendant enable it to spend up to £20 million to save its reputation by defending these allegations.

These obstacles are exacerbated by the difficulties associated with the need to obtain evidence of the defendant company's involvement in the activities the subject of the claim, which will often have been carried out by the company's subsidiary. Such evidence is typically held by the defendant and, in the

¹² EU, *Statement at the UN HRC Forum on Business and Human Rights* (Geneva 3-4 December 2013) <http://eeas.europa.eu/delegations/un_geneva/documents/eu_statements/human_right/2013-1203_forum_buz_hr-panel-i.pdf>; Stavros Lambrinidis, Keynote address by EU Special Representative for Human Rights, UN Forum on Business and Human Rights (Geneva 4-5 December 2012) <http://www.eeas.europa.eu/delegations/un_geneva/documents/eu_statements/human_right/20121204_eusrkeynote_speech_buz_humanrights.pdf>.

¹³ Article 81/TFEU

¹⁴ Articles 191–193/TFEU

¹⁵ Article 169/TFEU

¹⁶ Article 67(1)/TFEU

¹⁷ Article 4–2(a)/TFEU

absence of effective disclosure rules, remains inaccessible to plaintiffs. These hurdles and suggested solutions are described in the next subchapter.

During the conference held at the European Parliament on 12 November 2014, legal experts emphasised that issues related to access to collective redress mechanisms, access to evidence, standing for NGOs and citizens, and high-cost litigation also remain problematic in consumer law and environmental law.¹⁸

The last European Commission explored the possibility of a common European framework for collective redress, which may alleviate certain of the abovementioned hurdles. This process resulted in the adoption in 2013 of a Recommendation addressed to Member States.¹⁹ The current Commission is expected to assess the state of play and to evaluate further measures to strengthen the approach adopted in the 2013 Recommendation. In essence, collective redress facilitates access to justice by reducing the burden on claimants. Collective redress offers an important mechanism that could be used to ensure realisation of the rights of victims of corporate abuse.

Legislative Action 1: Adopt a directive introducing binding minimum standards for collective redress mechanisms

Collective redress mechanisms should not be restricted exclusively to either the protection of specific categories of rights or specific categories of defendants or plaintiffs. Instead, the European Commission should draft an overarching proposal that refers to “fundamental rights” as articulated in the Charter of Fundamental Rights of the EU.²⁰ This proposal should clarify that collective redress mechanisms should be available where claimants seek to litigate violations of rights protected by the EU, even in circumstances where victims are located outside of the EU and where non-EU law is to be applied to determine their claim (following the rules of the Rome II Regulation).

Further Steps:

The European Commission as well as individual EU Member States should explore funding models that would enable foreign victims of business-related human rights abuses to seek compensation in the defendant company’s home State (where this is an EU Member State). Such models should seek to alleviate costs and risks directly connected to legal proceedings, such as litigation fees and the risks associated with the “loser-pays” principle, as well as costs associated with taking legal action, such as travel, translation and expert-related costs.

¹⁸ See, for example, United Nations Economic Commission for Europe, ‘Findings and Recommendations with regard to Communication ACCC/C/2008/33 concerning Compliance by the United Kingdom of Great Britain and Northern Ireland’ (24 August 2011) ECE/MP.PP/C.1/2010/6/Add.3 <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-33/Findings/ece_mp.pp_c.1_2010_6_add.3_eng.pdf>.

¹⁹ European Commission, ‘Towards a European Horizontal Framework for Collective Redress’ (Communication) COM(2013)401; European Commission, ‘Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights Granted under Union Law’ 2013/396/EU.

²⁰ See Charter of Fundamental Rights of the European Union [2010] OJ C83/389, article 47 on the right to an effective remedy and to a fair trial.

2. Clarify the standards of human rights due diligence in civil justice systems across the EU

The UN Guiding Principles recommend that both State and non-State actors take steps to promote the implementation of human rights due diligence. As part of their duty to protect against human rights abuses by business actors, States are encouraged to promote and, where appropriate, require businesses to undertake human rights due diligence through legislation, policies, regulations and enforcement measures. The concept of human rights due diligence addresses the challenges created by complex corporate structures and value chains. It supports companies to meet their responsibility to identify and address adverse human rights impacts that they cause or contribute to, or that are linked to their operations, products or services by a business relationship.

The UN Guiding Principles – and more specifically the concept of human rights due diligence – have achieved global recognition in a very brief period of time.²¹ The 2012 study, “Human Rights Due Diligence: the Role of States”, found that the concept of human rights due diligence reflects legal tools (such as legally mandated standards) that States already use to ensure that business behaviour meets societal expectations. The study analysed more than 100 examples of due diligence regimes in more than 20 States, in areas of law that are either analogous or directly relevant to human rights. However, the authors of the study found that in many cases existing due diligence regimes either do not address human rights, or address them only tangentially. They found more examples of due diligence regimes that address issues such as environmental protection, product safety and money laundering than human rights.²²

In the area of civil justice, the concept of human rights due diligence resonates with existing standards of duty of care in civil law and tort law. It may be used to clarify these standards’ application in the context of complex corporate structures and value chains, which characterize the organization of modern business. UN Guiding Principles 15b, 18, and 19 provide relevant guidance in this respect.

In the UK, the Court of Appeal in London’s 2012 decision in *Chandler v Cape plc* held that, in appropriate circumstances, the law may impose a duty of care on a parent company for the health and safety of its subsidiary’s employees, if the parent company had a direct role in the deficiencies of functions and/or activities that had given rise to the harm.²³ The principles established by the court in the Chandler decision undermine the assumption that the “corporate veil” completely shields a parent company from liability. The issue of whether the corporate veil should be lifted becomes irrelevant in situations where the parent company may owe a duty of care directly to its subsidiaries’ employees. At present, due to the operation of the Rome II Regulation, the principles established in that decision will only apply directly where the harm occurs in England and Wales. Where overseas operations are located in countries that have laws based on the English common law system, (for example, former British colonies), the principles established in the Chandler decision will apply indirectly through the international influence of English law. Arguably, similar principles regarding parent companies’ duty of care should be found in civil law as well.

²¹ The UN Guiding Principles are reflected in the European Commission’s 2011 Communication on corporate social responsibility; the Organization of American States’ 2014 Endorsement of the UN Guiding Principles; the International Organization for Standardization’s ISO26000 social responsibility standard; the OECD’s Guidelines for Multinational Enterprises; the African Union’s ‘Africa Mining Vision’; as well as the work of the ASEAN Intergovernmental Commission on Human Rights.

²² Olivier de Schutter, Anita Ramasastry, Mark B. Taylor & Robert C. Thompson, ‘Human Rights Due Diligence: The Role of States’ (ICAR, ECCJ & CNCA 2012) 8.

²³ *Chandler v Cape plc* [2012] EWCA Civ 525.

However, the application of these principles by courts in continental Europe is made difficult, if not impossible, by the absence of effective procedures for the disclosure of evidence. Information that may be crucial to establishing and proving the involvement of a defendant parent company is, in most cases, in the possession and control of that defendant. For example, in the Netherlands, there is no general obligation for parties to produce evidence to the opposing party and any request to obtain evidence is treated cautiously by the courts. This situation presented obstacles to Nigerian farmers who sought to pursue a claim in tort against Royal Dutch Shell Plc and its Nigerian subsidiary for damage resulting from oil spills in the Niger Delta. In that case, the claimants' requests to access evidence in the defendants' possession were rejected by Dutch courts on the basis that the requests constituted so-called "fishing expeditions". However, access to these documents was necessary to demonstrate the involvement of the different companies in the oil spills. At the Paris, Berlin and Brussels conferences, it was reported that the practice of German and French courts would make analogous requests for disclosure of evidence in those jurisdictions impossible.

In continental European States, in the absence of analogous case law and effective procedures for the disclosure of evidence, discussion has focused on proposals for legislation that would introduce the concept of mandatory human rights due diligence.²⁴ In November 2013, a draft bill was presented to the French Parliament that called for the establishment of a duty of vigilance for parent and controlling companies with respect to their subsidiary companies, subcontractors, and suppliers.²⁵ If the draft bill is passed, where a company is part of an economically integrated enterprise, its controlling company would be vicariously liable for human rights abuses with which the controlled company was involved, even if the controlling company did not itself directly contribute to the human rights violation. This type of liability requires a precise definition that distinguishes an investment relationship from economic control. Similar legislation is being considered in Switzerland²⁶ and Austria.²⁷

The application of these types of laws in transnational cases requires that exceptions to the Rome II Regulation general rule (that applicable law should be the law of the State in which the damage occurred) would allow their application in transnational cases. This is discussed further in the next subchapter.

A consistent and harmonised approach to the incorporation of human rights due diligence standards into the civil law of EU Member States is necessary to ensure the effective protection of human rights, the implementation of the UN Guiding Principles and a level playing field.²⁸ The EU should explore the concept of mandatory human rights due diligence. Indirectly, the EU can foster the practice of human rights due diligence by requiring it be incorporated in business activities where there is a state-business nexus, such as public procurement. Finally and most importantly, the EU could give effect to existing principles of duty of care by harmonising procedures for the disclosure of evidence and/or reversing

²⁴ The concept of mandatory human rights due diligence is similar to the concept of "entreprise liability" known, in particular, in competition law and accounting law.

²⁵ Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre n° 1524 (6 November 2013), available at <<http://www.assemblee-nationale.fr/14/propositions/pion1524.asp>>.

²⁶ Mise en oeuvre du rapport de droit comparé du Conseil fédéral sur la responsabilité des entreprises en matière de droits humains et d'environnement 14.3671 (Motion) (1 September 2014) <http://www.parlament.ch/e/suche/Pages/geschaefte.aspx?gesch_id=20143671>.

²⁷ As proposed by Netzwerk Soziale Verantwortung, a civil society and trade union platform in 'Menschen, Rechte, Wirtschaft: Rechtsgutachtem zum Menschenrechtsschutz bei Auslandaktivitäten österreichischer Unternehmen' (Netzwerk Soziale Verantwortung 2014), <http://www.netzwerksozialeverantwortung.at/media/Studie_Menschen_Rechte_Wirtschaft_Web.pdf>.

²⁸ For a discussion on the level playing field in the context of the debate about bill on the duty of vigilance, see Viviane de Beaufort, 'Comment les Députés Veulent Insécuriser Encore les Entreprises' *La Tribune* (Paris, 30 September 2014) <<http://www.latribune.fr/opinions/tribunes/20140930tribd0f85608e/comment-les-deputes-veulent-insecuriser-encore-les-entreprises.html>>.

the burden of proof so as to require a defendant company to prove that it was not in control of a group activity that had given rise to the harm.

Legislative Action 2: Reverse the burden of proof / establish minimum standards for evidence disclosure procedures

Procedures for the disclosure of evidence in the UK enable evaluation of the role of a parent company in causing or contributing to abuse, and allow courts to consider whether a company has breached its duty of care.²⁹ Restrictive disclosure rules elsewhere in Europe, for example in France and Germany, are very problematic in this regard. The introduction of an EU directive that provides for reversal of the burden of proof with respect to the role of a parent or controlling company, or establishes common standards for the disclosure of evidence, would constitute a very significant advance. Examples of situations in which the burden of proof has been shifted to defendants can be found in several areas of law, including health and safety³⁰ and anti-discrimination.³¹

Legislative Action 3: Incorporate the concept of human rights due diligence into existing EU legislation and policies governing public procurement, export credit assistance and EU institutions' interactions with companies.

The EU could implement the concept of human rights due diligence as a compulsory transparency requirement for companies that enter into business relationships with States or benefit from their direct support – financial or practical –, as explicitly encouraged by the UN Guiding Principles. The same standards should be applied to EU institutions' interaction with companies, including in particular to the European Investment Bank's lending policies. These measures would not improve access to justice directly, but would lead to a proliferation of human rights due diligence which, in turn, would alleviate barriers to access to remedy as well as address underlying causes of human rights violations.

Further Steps:

The EU could play an important role in coordinating and supporting reflection on the implementation of human rights due diligence by Member States and companies by taking the following actions:

- The EU should organise a series of high-level meetings by future EU presidencies, the Council of the EU, and the European Commission that focus on potential solutions for implementing human rights due diligence in civil and tort law.
- The European Commission should commission a study – and establish an expert group consisting of distinguished legal academics and practitioners with expertise in civil

²⁹ It was reported at the London conference that despite the existence of reasonable disclosure rules, access to evidence can still be problematic in the UK.

³⁰ See, for example, Section 40 of the UK Health and Safety at Work etc. Act 1974, <<http://www.legislation.gov.uk/ukpga/1974/37>>, which puts the burden is on the defendant/employer to prove that it was not practicable or reasonably practicable to do more than was in fact done to prevent injury.

³¹ See, for example, Council Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex [1998] OJ L14. According to the Directive, EU Member States shall ensure that, where the plaintiff establishes, before a court or other competent authority, facts from which discrimination may be presumed to exist, it is for the defendant to prove that there has been no contravention of the principle of equality.

law, commercial law, and human rights law – to develop recommendations for the implementation of the concept of human rights due diligence in civil and tort law across the EU. The conclusions of the expert group should be discussed at relevant committees of the European Parliament. Special attention should be given to the concept of mandatory human rights due diligence in light of the legislative discussion in France and other European States.

- In line with Guiding Principle 2, the European Commission should set out in a communication that it expects all EU-domiciled businesses to meet their responsibility to respect human rights in all their activities, both within the national territory of their home State and extra-territorially, and both in their operations and with respect to the operations of their business partners.
- The European Commission should embed the expectation that companies respect human rights in guidance for non-financial reporting, and clarify associated transparency requirements in line with the UN Guiding Principles. The Commission is mandated to develop such guidance by the 2014 Directive on disclosure of non-financial information.³²

3. Clarify the EU rules of private international law

In the EU, the Brussels I Regulation mandates national courts of EU Member States to accept jurisdiction in civil liability cases filed against a defendant domiciled in the forum State, regardless of either the nationality of the defendant or plaintiff or, in cases of extra-contractual liability, the location in which the damage occurred. In recent years, victims have increasingly relied on the Brussels I Regulation where an EU-domiciled business has caused or contributed to the impact the subject of the claim. Where the business is not domiciled in the EU – for example, foreign subsidiaries of European companies – the question of the courts' jurisdiction will be determined through the application of domestic law. To date, EU Member States' approaches to this have varied.

The Rome II Regulation, which addresses the law to be applied to determine non-contractual obligations, harmonises fully the “conflict of laws” principles applied by EU Member States in transnational proceedings. As a general rule, the applicable law will be the law of the State in which the damage occurred. Accordingly, courts should apply that law to determine not only liability, but also other issues arising in connection with the proceedings, such as time limitations, immunity and remedy. To date, this situation has created certain obstacles for victims seeking to pursue human rights claims against business enterprises, particularly where: the law of the host State either does not recognize or limits vicarious and/or secondary liability (including parent company liability); provides for a higher burden of proof to establish a claim in tort; or provides stricter immunities than does the forum State's law. It would be desirable to clarify the extent to which the exceptions incorporated into the Rome II Regulation may be used to address these problems, including in particular Article 16 (which addresses the public policy exception) and Article 17 (which addresses application of domestic rules of safety and conduct).

³² Directive 2014/95/EU amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups [2014] OJ L330.

Further, the Rome II Regulation requires damages to be assessed with reference to the levels of damages in the State where the harm occurred (which may be much lower than the damages awardable according to EU Member States' laws). In the UK, this principle interacts with a domestic requirement that recoverable lawyers' fees must be proportionate to the value of the claim.³³ This can be particularly problematic in cases that involve fewer claimants, as the amount of damages will inevitably be lower (even in cases of serious harm), whilst the nature of the litigation may result in the cost of pursuing the claim being extremely high. Accordingly, such claims may be significantly less financially viable – or even impossible – to pursue.

The conferences in Paris, London, Berlin and Brussels revealed that experts and practitioners do not consider the existing rules on jurisdiction to be among the biggest current obstacles to access to justice. The conflict of law rules received more attention, and participants offered a number of suggestions for their clarification.

Legislative Action 4: Modify the text of the Rome II Regulation to ensure protection of human rights, the application of high standards of care and the financial viability of human rights-related litigation

The Commission should focus in the upcoming review of Rome II Regulation on the abovementioned barriers and explore opportunities to modify and/or incorporate exceptions to the general rule of the Regulation, which sets as the applicable law the law of the State in which the damage occurred. Such amendments may include clarifying the exceptions provided in Article 16 (which addresses the public policy exception) and Article 17 (which addresses the rules of safety and conduct), and the expansion of Article 7 (which recognises the right of victims of environmental damage to elect whether the court will apply the law of the State in which the harm occurred or the law of the State in which the event that gave rise to the harm took place) to encompass human rights violations.

Further Steps:

The European Commission could also clarify the application of Articles 16 and 17 in business and human rights context, and also of Article 7, through a communication or a recommendation that could subsequently be endorsed by a resolution of the European Parliament.

Legislative Action 5: Propose modifications of the Brussels I Regulation that would allow EU Member States courts to:

- assert jurisdiction to decide a claim where there is no alternative available forum able to guarantee the right to a fair trial (forum of necessity);
- hear a claim against the parent company of a corporate group even where that parent company is domiciled outside the EU, provided that the corporate group has a strong presence in the EU; and
- hear a claim against a parent company domiciled in the forum state, as well as against the foreign subsidiary of the company or its business partner, where the victim can establish that both defendants are a proper and necessary party to the claim.

³³ Legal Aid, Sentencing and Punishment of Offenders Act 2012 <<http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted>>.

4. Support the implementation by EU Member States of the third pillar of the UN Guiding Principles, which addresses access to remedy

The EU could adopt a number of measures to foster a debate on ways to improve access to justice through implementation of the UN Guiding Principles. In this respect, the UN Working Group on Business and Human Rights and the EU have encouraged States to develop National Action Plans (NAPs) that outline how they will implement – and promote implementation of – the UN Guiding Principles. However, only four EU Member States have published an NAP to date; namely, the UK, the Netherlands, Denmark and Finland.³⁴ In addition, analysis of the content of these NAPs has revealed that these States have neglected to address properly the implementation of the third pillar, which addresses access to remedy, especially as regards access to judicial remedies.³⁵ The European Commission should:

- Produce a study that identifies examples of best practices in the area of civil procedure and in addressing barriers to access to civil justice across EU Member States.
- Produce guidelines for the elaboration of National Action Plans for the implementation of the UN Guiding Principles in the European context that encourage a strong focus on the UN Guiding Principles' third pillar, which addresses access to remedy. Such guidelines should reflect the Recommendation of the European Commission on collective redress.³⁶
- Develop a peer review mechanism to support, guide, advise on, review and encourage further development of National Action Plans.
- Commission an independent expert study to analyse respective EU and Member States competences to implement the UN Guiding Principles that specifically addresses barriers to remedy in relation to civil justice. This study should assess how existing EU treaties and Article 47 of the Charter of Fundamental Rights of the EU may provide a basis for action to improve access to justice.
- Develop an EU-level action plan identifies actions at the EU level as well as at the EU Member State level. This plan should build on both the abovementioned actions and on the Staff Working Document on EU priorities in the implementation of the UN Guiding Principles, and should address explicitly the third pillar of these Guiding Principles on access to remedy.

³⁴ As of 19 December, Spain has produced a draft National Action Plan. Italy, France, Germany, Greece Ireland, Latvia, Lithuania, and Slovenia have committed to developing a National Action Plan or were in the process of doing so.

³⁵ ICAR & ECCJ, 'Assessment of Existing National Action Plans on Business and Human Rights' (ICAR & ECCJ 2014) <http://www.corporatejustice.org/IMG/pdf/icar-eccj_assessments_of_existing_naps.pdf>.

³⁶ European Commission, 'Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States concerning Violations of Rights Granted under Union Law' 2013/396/EU.



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Annexure – Summary of the situation in France, Germany and the United Kingdom

This Annexure provides a summary of the existing situation in France, Germany and the UK with regard to access to judicial remedies by foreign victims of human rights abuses involving European multinational companies. A set of specific recommendations is provided for each country.

This summary is based on the outcomes of four conferences held in 2014 to explore how existing law affects the pursuit of transnational tort claims against multinational enterprises and to identify and analyse potential reforms to improve access to justice.



France

Over the past ten years in France, there has been an increase in claims seeking recognition of corporate liability and financial compensation pursued by foreign victims of business-related human rights abuses in developing countries. Progress has been achieved in a limited number of these cases: in the *Erika* case, the parent company of Total was recognized as being liable for oil pollution caused by its subsidiary; in *Venel*, judges recognised and applied the concept of “co-employer”, finding a parent company liable for labour rights’ abuses committed by its subsidiary, (although the Court of Appeal subsequently overturned this judgement); and in the *COMILOG* case, the concept of “denial of justice” was drawn on to gain access to French courts.

However, the existence of legal, procedural and institutional obstacles has prevented most victims from accessing a judicial remedy. For example, it is almost impossible for parent companies to be held legally liable in France for the actions of their subsidiaries because of the strict application of the twin principles of separate legal personality and limited liability. Further, in the absence of disclosure rules, plaintiffs and their litigators struggle to gain access to evidence that is in the company’s possession and/or control, such as evidence proving the involvement of a French parent company in the operations of a foreign subsidiary.

Additional challenges such as the length of proceedings, the absence of collective redress mechanisms and the costs associated with transnational litigation have the effect that it can be extremely difficult for victims to pursue successfully claims against multinational enterprises. The restricted scope of the French Criminal Code in extraterritorial cases and the reluctance of French prosecutors to investigate and prosecute these claims also restrict the viability of accessing justice through criminal prosecutions.

The near-impossibility for corporate abuse victims to gain access to a judicial remedy in France triggered reflection on how to make progress on the issue of liability within a corporate group. In November 2013, a draft bill was presented to the French Parliament calling for the establishment of a duty of vigilance for parent and controlling companies with respect to their subsidiary companies, subcontractors and suppliers.¹ The purpose of the bill is to address legal uncertainty and the jurisprudential instability of the current legal framework.

¹ Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre n° 1524 (6 November 2013)
<<http://www.assemblee-nationale.fr/14/propositions/pion1524.asp>>.

Inspired by the concept of human rights due diligence as set out in the UN Guiding Principles on Business and Human Rights, this bill proposes that amendments be made to the Civil, Commercial, and Criminal Codes to clarify that all companies, including parent companies of corporate groups, have duty of vigilance to prevent negative impacts on people and the environment. The burden of proof would lie with the parent company, which would be required to demonstrate that it implemented an adequate due diligence process to identify and address potential violations of human rights.

This bill constitutes the first attempt worldwide to clarify companies' duty of care in a business and human rights context using legislative action. It has provoked intensive discussion among politicians, legal experts, civil society and business representatives about its legal feasibility and the risk that the bill may jeopardize the competitive advantage of French companies.

Based on the outcomes of the conference held on 30 June 2014, the following recommendations to the French Government have been formulated:

— **Enact the legislative bill on parent and controlling companies' duty of vigilance**

The conference participants recommended that the current focus of the bill on the performance of "subsidiaries" should be replaced with a focus on control and/or influence. A "subsidiary" is strictly defined in the Commercial Code. Accordingly, if the focus on "subsidiaries" is retained, where a company holds less than 50% of another company, its relationship will not attract the proposed duty of vigilance even if the subsidiary or some of its activities are tightly managed.

— **Reverse the burden of proof**

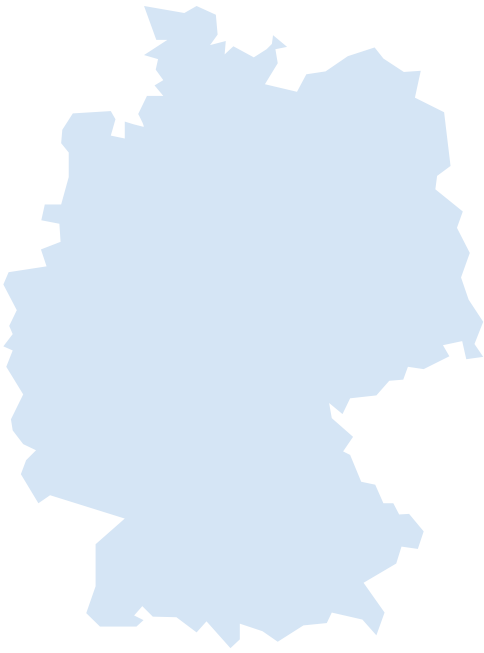
In accordance with the bill, the burden of proof would be placed on companies, requiring them to demonstrate that they took all reasonable steps to prevent the damage from occurring.

— **Improve rules addressing the disclosure of evidence**

The existing rules providing for access to evidence should be improved to empower a court to order the disclosure of information in the company's possession in cases related to human rights and environmental abuses.

— **Provide for group claims**

In cases concerning mass abuses of human rights or serious environmental damage, victims should be able to pursue and settle a claim as a group. This is presently not possible. The creation of such a mechanism would reduce the amount of time and financial resources that victims and their litigators expend on a case. Clear rules should be established to prevent the abuse of group claim processes, and to ensure both that all the victims have access to financial compensation and that the company is not sued multiple times for the same harm.



Germany

Rules regarding legal persons under German civil and commercial law were enacted at the beginning of the 20th century, and thus do not reflect contemporary challenges regarding corporate accountability. German corporate law respects the principle of separate legal personality; it does not recognize the liability of parent companies for the unlawful conduct of their subsidiaries, except where the parent company has encouraged its subsidiary to act unlawfully and the subsidiary is deliberately undercapitalized.

The direct liability of a parent company could be triggered by its liability for the knowledge and conduct of its employees. This is also true where an employee is part of the management team of both a parent company and its subsidiary. It is not required that a single employee meet each of the criteria for a breach of a duty of care. Rather, it is the company itself that is liable for the sum of knowledge possessed by, and conduct of, its employees.

Companies may also be held liable on the basis of safety obligations and organizational duties. The German legislator could formulate exceptions to the application of the principle of separate legal personality in cases concerning human rights violations where there is a strong connection between a parent company and its subsidiary. However, the Rome II Regulation may operate to prevent the application of such exceptions in transnational cases. Speakers at the conference in Berlin on 4 November 2014 suggested that, in such cases, the Rome II Regulation be amended or new corporate obligations under German law be formulated to ensure that German companies fall within one of the exceptions in the Rome II Regulation, i.e. Article 16 (which addresses the public policy exception) and Article 17 (which addresses the rules of safety and conduct).

German civil procedure presents another set of challenges. The inaccessibility of evidence and the difficulties associated with proving relevant conduct are among the major obstacles confronted by claimants. German law permits requests for the disclosure of evidence. However, as noted by speakers at the conferences held in Berlin and Brussels, strict requirements restrict the possible benefits that could be gained by the use of these procedures. As a result, plaintiffs must rely primarily on the testimonies of the corporate defendants' employees. This situation presents serious risks regarding the objectivity of witness testimony.

The high costs of litigation make it difficult to pursue a claim against a multinational enterprise. Efforts to address these challenges have so far focused exclusively on criminal law. Transnational litigation

against multinational enterprises is only made possible by institutional support from NGOs, private foundations and pro-bono lawyers.

Finally, existing laws do not currently provide for group actions. Accordingly, every affected person must take individual legal action against any infringement of their rights, even where hundreds of people have suffered a similar harm caused by the same – or a related – event or action. Because plaintiffs cannot form a group, individual legal expenses are incurred for each and every plaintiff. Logistically and financially, law firms are only capable of representing a handful of plaintiffs. For some victims' groups, it may be difficult to understand why, of the thousands of affected families, only some are selected to act as claimants. Affected persons thus sometimes refrain from filing civil complaints in order to prevent internal conflicts within their community.

Based on the outcomes of the conference, three recommendations to the German Government have been formulated. They reflect the recommendations to the French Government:

— **Introduce legal provisions on the extent and content of corporate due diligence obligations for subsidiaries and suppliers**

The German legislator should extend existing due diligence obligations and clarify the duty of parent companies to take precautions to avoid negative human rights impacts. The content and extent of the obligation to monitor foreign subsidiaries and suppliers regarding their human rights risk management processes should be clearly defined. Attention must be paid to ensuring that any reform of German law is also applicable in transnational cases, i.e. that its application is permitted by the Rome II Regulation.

— **Reverse the burden of proof**

German law should provide for the reversal of the burden of proof so as to require a parent company to prove that it was not in control of a group activity that has given rise to harm.

— **Improve rules regarding the disclosure of evidence**

German law should allow affected parties to secure the disclosure of relevant information from an opposing party through preliminary proceedings or another form of discovery. Existing rules are, in this respect, ineffective.

— **Introduce group actions**

In cases where large groups of people have suffered the same injustice, it should be possible to group individual complaints together. In group actions, each plaintiff could continue to be represented as an individual party to the proceeding, but the complaint would be pursued jointly, thus reducing costs, risks and administrative burdens.



United Kingdom (UK)

On 17 July 2014, the CORE Coalition and the Business & Human Rights Resource Centre, in association with the British Institute of International and Comparative Law, organised a conference entitled “Transnational corporate human rights abuses: delivering access to justice” at the Law Society in London. The purpose of the event was to discuss how developments in case law and recent changes to legislation have affected transnational tort claims against multinational enterprises in the UK, and to identify possible reforms to improve access to justice for victims of corporate harm overseas.

In the last two decades there have been important developments towards improved access to remedy in the UK for overseas victims of corporate related harm, principally through civil claims which provide monetary compensation for harm. The legal and practical feasibility of these claims has been enabled by the availability of evidence disclosure procedures and group actions in UK law. However, challenges remain and have been exacerbated by recent domestic legislative changes, which in combination with the Rome II Regulation, have had the effect of reducing the financial viability of such claims.

In the UK, tort claims for corporate human rights abuses have been brought as direct negligence cases against parent companies of multinational enterprises for harms arising from the activities of their subsidiaries. Litigators have worked to establish that, in circumstances where a connection can be made between an alleged harm and the parent/controlling company’s responsibility for particular functions or deficiencies in functions within the corporate group, the parent company may owe a duty of care to those adversely affected. The notion of the parent company’s duty of care has gained increasing traction in the UK, culminating in a 2012 Court of Appeal ruling in *Chandler v Cape* which held that, under certain circumstances, a parent company could owe a legal duty of care to employees of its subsidiaries.

The feasibility of establishing this duty of care depend on the existence of effective disclosure procedures, which are available in UK law.

Despite this, there have been significant setbacks, principally, the introduction through the Legal Aid, Sentencing & Punishment of Offenders (LASPO) Act 2012 of changes to the civil costs regime, including the introduction of a more stringent proportionality test, which requires that the expense incurred in running a case should be proportionate to its value. Cases against controlling companies of multinational enterprises for harms caused by their subsidiaries overseas are intrinsically complex and often highly technical, making them incredibly expensive to run. While the proportionality test is

more easily met in mass tort claims (where the level of damages is likely to be high), in cases involving a relatively small number of claimants the costs will often exceed the value of the claim.

The combination of the proportionality requirement and the provision in the Rome II Regulation that requires damages to be assessed with reference to levels of damages in the country where the harm occurred (these cases generally deal with harms that occurred in developing countries, where appropriate levels of damages are deemed to be much lower than the damages available for equivalent harms in Europe) has made running these cases much less financially viable.

While tort law has been the favoured route in the UK for these types of cases, opportunities provided by criminal law as an avenue to hold businesses accountable should be explored. The UK Bribery Act could provide a model for creating direct liability for the acts of others and may offer greater accountability for harms which occur in UK companies' supply chains, which has so far proven elusive.

Based on the outcomes of the conference, the following recommendations to the British Government have been formulated:

— **Tackle cost barriers**

Ensure that the application of the proportionality test introduced by the LASPO Act does not create a barrier to remedy for victims of overseas corporate human rights abuse. More generally, options should be explored to address the cost barriers to bringing civil actions against multinationals for human rights harms.

— **Improve rules regarding the disclosure of evidence**

Take steps to ensure that claimants have timely access to the information needed to prove the role of the defendant company in causing the alleged harm, including if necessary reviewing the part of the civil procedure rules relating to disclosure and inspection of documents.

— **Reverse the burden of proof**

Reverse the burden of proof so that a multinational corporation parent is responsible for proving that it was not in control of relevant functions, and therefore did not owe a duty of care.

— **Address abuses in supply chains**

Explore options to improve access to effective remedy for harms which occur in the supply chains of UK companies.

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