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# Overcoming Obstacles to Justice

Improving Access to Judicial Remedies for  
Business Involvement in Grave Human Rights Abuses





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Anita Ramasastry

**Overcoming Obstacles to Justice**  
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Based on the proceedings of the Conference Conflict, Commerce and  
Access to Justice, Identifying Practical Challenges to Judicial Remedies  
for Corporate Participation in Human Rights Abuses, Oslo,  
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An elderly woman waits for the verdict in the premises of Bhopal court in Bhopal, India, June 7, 2010. The court convicted seven former senior employees of Union Carbide's Indian subsidiary of "death by negligence" for their roles in the Bhopal gas tragedy that left an estimated 15,000 people dead more than a quarter century ago in the world's worst industrial disaster.

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*“Some complainants have sought remedy outside the State where the harm occurred, particularly through home State courts, but have faced extensive obstacles. Costs may be prohibitive, especially without legal aid; non-citizens may lack legal standing; and claims may be barred by statutes of limitations. Matters are further complicated if the claimant is seeking redress from a parent corporation for actions by a foreign subsidiary. . . . These obstacles may deter claims or leave the victim with a remedy that is difficult to enforce.”*

John Ruggie<sup>1</sup>

<sup>1</sup>John Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, United Nations Human Rights Council, A/HRC/8/5, para. 89, 7 April 2008. Professor. Ruggie is the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.

# Preface

There is ample evidence that business activities can have a detrimental impact on human rights, not least in countries affected by conflict, or where the rule of law is weak or absent. Yet, there are few effective remedies available. In many states, laws to protect human rights from harmful business activities either do not exist or are inadequately implemented. This problem appears to be particularly prevalent in poor, developing or conflict-affected countries, where governments may lack the capacity or the will to enforce domestic laws relating to business conduct. When corporate human rights abuses occur, the victims often face tough and sometimes insurmountable obstacles to judicial remedies. Weak regulatory systems, corruption, and legal and financial obstacles all contribute to the problem. Where countries are emerging from conflict, the system of justice may be broken, lack legitimacy, or both. The institutional, legal and financial obstacles can be exacerbated by a context in which economic interests and influence override other societal values, including the protection of human rights.

In most countries, courts have little experience with cases involving business entity involvement in human rights abuses or international crimes, let alone international cases where the incidents may have occurred thousands of miles from the court room. Indeed, some home states of multinational companies may be likely to promote their businesses' interests rather than to hold them accountable for their involvement in human rights abuse abroad. At the same time, there are no international fora available for bringing cases against business entities. It is little wonder that, to date, no business entity has been prosecuted for aiding and abetting a grave breach of international law, and there is very little precedent for civil liability arising from corporate abuse of human rights. This report is intended as a contribution to changing this status quo.

The report is based on the proceedings of a meeting held in Oslo in September 2009 at the invitation of Fafo, Amnesty International and Noref, the Norwegian Peacebuilding Centre. It builds on several years' work by organizations such as Fafo to map out the existing and potential liabilities for business entities under national and international law<sup>2</sup> and draws from Amnesty International's extensive research on and

<sup>2</sup> See, e.g., A survey of sixteen jurisdictions published as Business and International Crimes [www.faf.no/liabilities](http://www.faf.no/liabilities), including *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, Anita Ramasastry and Robert C. Thompson; see also [www.redflags.info](http://www.redflags.info) for a list of cases and updates. For a range of initiatives on legal accountability, see <http://www.business-humanrights.org/LegalPortal/Home>

knowledge of obstacles to effective remedy facing victims of corporate human rights abuses. It forms part of a larger project supported by Noref which seeks to develop policy and regulatory options for states in responding to the economic dimensions of armed violence, of which the problem of business involvement in the economies which undermine peacebuilding is one part.

Thanks to both Benedetta Lacey, Amnesty International, and Mark Taylor, Fafo, for their efforts to bring the group together. Special thanks to Ida Barry, Fafo, for her hard work in ensuring the participants arrived and departed safely and enjoyed their stay in Oslo, and to Gabriela Quijano, Amnesty International, for her excellent critical input on drafts of this report. Thanks also to Rachel Davis, Legal Advisor to the United Nations Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (the UN SRSG), for her input both before and during the meeting, and to Miriam Saage-Maaß, European Centre for Constitutional and Human Rights, for advice on the selection of Conference participants at an early stage.

By bringing practicing lawyers – both litigators and prosecutors - from around the world for a meeting in Oslo, the organizers hoped to distill the collective experience of those who have tried to end impunity in their own countries or internationally. This report is the authors' attempt to synthesize that discussion into policy advice to governments. There was a diversity of experience and views at the table and we are indebted to all participants for their insights and openness. It must be emphasized that the Oslo meeting did not attempt to reach a consensus on recommendations or ways forward. The views expressed in this report are those of the individuals who authored this paper only and are not necessarily shared by all of the participants or the organizations hosting the event. To the extent that this report will be able to make a contribution to the debate, it will have been due to the collective wisdom of the participants in the Oslo meeting. For that we are truly grateful.

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# Introduction

Recent studies provide evidence of an expanding “web of liability”<sup>3</sup> with respect to business entities associated with the worst forms of human rights abuse. A survey<sup>4</sup> of the laws of sixteen countries that was conducted in 2005 and 2006 under the auspices of the Fafo Institute for International Studies found that:

- International Criminal Law (ICL) from a number of international covenants, including the Rome Statute of the International Criminal Court, has been incorporated into the penal codes of many countries.
- Under the civil (tort/delict) jurisprudence of most countries, persons injured by the wrongful conduct of another have a right to bring a lawsuit for damages against the wrongdoer.
- In many countries, businesses and other legal persons are subject to criminal or civil actions in the domestic courts.
- In most countries, aiding and abetting a crime (complicity) is punishable and may also be the basis for a civil (tort/delict) remedy.

The apparently expanding “web of liability” for corporate human rights abuses, including international crimes, begs the questions: Are the existing legal avenues adequate to redress the harm caused by corporate involvement in human rights abuses and, are they accessible to the victims? Do home or host states provide practical access to judi-

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<sup>3</sup> Robert C. Thompson, Anita Ramasastry and Mark B. Taylor, *Translating Unocal: The Expanding Web of Liability for Business Entities Implicated in International Crimes*, 40 *Geo. Wash. Int'l. L. Rev.* 841 (2009). Available at [www.gwilr.org](http://www.gwilr.org). (tracing the origins of international criminal law and the mechanisms whereby individual countries have been required or incited to incorporate that law into their domestic penal codes, thereby leading to expanding criminal and civil liability at the domestic level).

<sup>4</sup> See [www.fafo.no/liabilities](http://www.fafo.no/liabilities); The countries that were surveyed are: Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom and the United States.

cial remedies for the victims of human rights abuses?<sup>5</sup> The UN SRSG has identified “governance gaps” as the “root cause of the business and human rights predicament.” Alongside the potential for economic benefits which come from international commerce, he argues, governance gaps, “provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”<sup>6</sup> In other words, the victims of transnational corporate human rights abuses in which international business entities may be implicated are often left without recourse to a remedy. The justice systems or political leadership in host jurisdictions are frequently either unable or unwilling to hold corporations to account for their adverse human rights impact in order to provide an effective remedy to the victims. The state may not have the capacity to provide adequate access to justice or may itself be involved in the perpetration of the harms. The home jurisdiction can become an important alternative venue for civil litigation, administrative oversight or criminal prosecution of the corporate entity. For example, governments have taken measures to regulate the conduct of multinational enterprises and their affiliates – both at home and abroad – in recognition of the role they play in bribery. However at present, home jurisdictions do not offer effective and accessible avenues of redress for human rights abuses involving businesses. The end result is widespread corporate impunity and denial of justice.

The problem of the involvement of transnational businesses in human rights abuse arises in situations in which business operations directly cause or contribute in some material way to harms suffered by people. Even where state actors or governments are those who commit human rights abuses, businesses can be implicated by the circumstances of the partnerships they forge with states, through their trade and investment activities. For example, a business involved in extracting natural resources may provide financing, transportation, weapons or other equipment or logistics to state security forces that perpetrate serious human rights abuses in furtherance of their assignment to protect company assets; or a subsidiary business or joint venture partner tasked with implementing a large infrastructure project may cause significant environmental damage, property destruction, or forced displacement of local populations; or a business may allow the government access to private information about their citizens, which is then used by the government to target opposition political activists for imprisonment or torture. These are just a few examples of the situations in which businesses cause or become involved in human rights abuses. In most of these situations, victims of human

<sup>5</sup> The home state (or home jurisdiction) is typically understood to be the state where a multinational corporation is domiciled or registered. However, other factors are also commonly invoked to link a multinational corporation with a state, and justify calls for greater responsibility of that state to ensure corporate accountability and access to justice. The host state (or host jurisdiction) is the state where a multinational corporation, its subsidiaries or affiliates may be present and where the harm occurs.

<sup>6</sup> Ruggie, *supra*, note 1, at para. 3.

rights abuse have few effective judicial remedies to turn to. Some of the reasons for this being so are explored in this report.

On September 11, 2009, over 34 participants, representing international human rights NGOs, private practitioners active in civil and criminal matters and prosecutors from both international and domestic criminal courts gathered in Oslo at the invitation of Amnesty International, Fafo and the Norwegian Peacebuilding Centre (Noref) to compare notes on the basis of their direct experience as prosecutors or litigators in both criminal and civil cases. A list of the participants and their respective affiliations is attached to this report as Appendix A.

The agenda for the two-day Conference centered on presentations of criminal and civil cases involving business involvement in human rights abuses, with an eye toward identifying the principal obstacles to justice for such abuses. In addition to informing the policy discussion amongst states, business and civil society, an additional goal of the Conference was to provide legal and factual material for the use of the UN SRSG in operationalizing his framework for approaching issues involving business and human rights.

The cases, issues and situations discussed at the Conference covered a wide geographic distribution, in both developed and developing countries, including South Africa, Philippines, Colombia, India, Argentina, Canada, Norway, UK, Germany, Netherlands, Japan, France, Australia and the US, as well as a cross-section of today's human rights "docket." Discussions focused on many of the leading examples today of efforts by victims of international crimes and other human rights violations to access existing court systems. In general, the issues raised can be grouped into a series of obstacles – legal, financial and political – and a set of possible solutions. We have organized this report accordingly. The objective of this report is to reflect the principle themes of the discussion which took place in Oslo and, on that basis, suggest an agenda for reform that would overcome the existing obstacles to justice, improve victims' access to the courts and ensure that states are able to fulfill their duty to protect human rights.

The Conference was conducted according to the Chatham House Rule. Accordingly, none of the remarks at the Conference are attributed to specific individuals and the views presented here and conclusions reached in this report are not necessarily those of the participants in the Oslo meeting.

# 1 Legal Obstacles

The overarching legal obstacle identified by participants involves the challenge of applying the relevant law to business entities. As noted above, there appears to be substantive domestic law on the books in many countries that creates criminal and civil (tort/delict) liability for business entities and/or their managers, employees and agents who become involved in human rights abuses or crimes under international law, whether committed at home or abroad (using the principle of extraterritorial jurisdiction). Instances where civil justice has been sought have occurred with great frequency in the United States under the Aliens Tort Statute (ATS) and with increasing frequency in other jurisdictions: e.g. Australia, Ecuador, France, Indonesia, Japan, the Netherlands, the United Kingdom and other countries.

However, the role of courts and lawyers in applying these laws and precedents via domestic judicial procedures against business entities alleged to have committed human rights abuses or be involved in human rights violations is new legal terrain. The gap between the rising number of allegations, and the scarcity of criminal and civil cases, let alone actual convictions or findings of liability, indicates that impunity for business-related human rights abuse is in part a function of the inability of domestic civil and criminal justice systems to permit access to justice.

There are numerous obstacles that stand in the way of access to civil and criminal justice. Participants indicated that the principle legal obstacles consisted of the following:

## **Corporate Structures are Complex and Opaque**

Lawyers for private plaintiffs and government prosecutors pointed to the complexity and opacity of corporate/business structures as a serious obstacle to prosecution of or a suit against a business entity. This is even more challenging when business groups conduct operations in multiple jurisdictions. Several dimensions of the problem of complex corporate structures were highlighted by participants.

The transnational nature of large corporate groups, especially when coupled with a lack of transparency as to the ultimate ownership or control of companies, poses significant challenges in gathering evidence, both for public prosecutions as well as private civil actions. In some cases, a business entity operating in a particular country

may be owned by a number of other foreign businesses, none of which has majority control. The corporate shareholders, partners or investors may be domiciled in numerous countries.

It is often difficult to identify the particular business entity involved in an alleged violation. Even assuming that one can identify the particular entity, the use of intermediary holding companies, joint ventures, agency arrangements and the like, often protected by confidentiality arrangements, makes it difficult or impossible to establish a connection between that entity and its parent ownership, or to pinpoint the persons or entities within the complex structure that should bear civil or criminal responsibility for their part in a violation. It was suggested at the Conference that a prosecutor may use search and seizure tools to obtain corporate files or compel the testimony of corporate actors. However, even these tools require enough preliminary evidence for a showing of reasonable cause. Human rights attorneys and advocates may lack the resources and requisite training to engage in research about corporate ownership and control structures.

### **The “Separate Entity” Doctrine**

The “separate entity” doctrine – meaning the separate legal treatment of parents and subsidiary companies - also poses a challenge to criminal prosecutions and civil suits for human rights abuses. In many domestic jurisdictions, a business entity is not subject to criminal liability for the actions of a subsidiary. Similarly, the actions of a subsidiary are not typically attributable to a parent business for purposes of civil liability.

In order to prosecute a business for the activities of a subsidiary, a prosecutor must present evidence that the managers, employees or other agents of the business directly or indirectly participated in the criminal act. Civil plaintiffs must also produce the evidence necessary to prove a parent company’s involvement in the actions or omissions of its subsidiary that resulted in the abuse. Given the complex structure of many transnational business enterprises and the difficulty accessing relevant evidence (much of which may be in the hands of the parent company itself), this may prove to be an insurmountable obstacle. The challenges for victims and their representatives of proving the responsibility of the parent company are exacerbated when the company is located in a jurisdiction other than where the harm occurred, and much of the information necessary to prove its involvement in the abuse is therefore also abroad.

### **Differing Positions on the Legal Test for “Corporate Complicity”**

The second Conference session focused on the ways in which businesses and others may incur legal liability for the actions of others through various ‘modes of participation’

found in international and domestic law, both civil and criminal. These various tests for what, in the business context, has been called “corporate complicity” include:

- (a) ‘aiding and abetting’ (complicity) found in decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), in the Statute of Rome and in most domestic jurisprudence;
- (b) ‘joint criminal enterprise’ (‘JCE’) or ‘common plan,’ found in ICTY and ICTR decisions and in the Statute of Rome (with variations found in the jurisprudence of many countries);
- (c) ‘conspiracy’ found in many common law countries;
- (d) ‘superior responsibility,’ found in the jurisprudence of most international and domestic courts; and
- (e) ‘co-perpetration,’ a concept found in several recent pre-trial decisions of the ICC.

Although the elements of these modes of participation are too complex to be described in this report, several observations are pertinent here.

First, it was clear from the presentations that these modes of participation offer prosecutors a wide variety of legal tools that can be used to respond to the problem of business actors who become involved in dealings with those who perpetrate international crimes or commit serious violations of human rights.

Second, it is unclear, at present, what standard to apply when an international crime is prosecuted in a domestic forum – an international standard or a domestic standard. It was noted that a Dutch court struggled with this issue in the case of defendant and trader Frans van Anraat who was prosecuted for aiding and abetting both war crimes and genocide (but found guilty only of the war crimes charges).<sup>7</sup> The Dutch standards for aiding and abetting are different from the standards found in international criminal law.<sup>8</sup>

In the United States, courts have had to grapple with the use of international criminal law standards within civil lawsuits brought under the Alien Tort Statute

<sup>7</sup> Van Anraat, Rechtsbank [Rb.] Gravenhage [District Court of’ The Hague], 6.4, 23 December 2005, LJN AU8685 (Neth.); See also [http://www.trial-ch.org/en/trial-watch/profile/db/facts/frans\\_van-anraat\\_286.html](http://www.trial-ch.org/en/trial-watch/profile/db/facts/frans_van-anraat_286.html)

<sup>8</sup> See, e.g., Harmen van der Wilt, Harmen, *Equal Standards? On the Dialectics between National Jurisdictions and the International Criminal Court*, 8 International Criminal Law Review 229, 272 (2008)). Dutch law provides for several approaches to complicity, including a standard based on reckless behavior (dolus eventualis). The Dutch court elected to apply the “knowledge”: standard used by the international tribunals.

(ATS). In a number of ATS cases, businesses have been sued for aiding and abetting violations of international law. As ATS cases are civil lawsuits, it is unclear whether the civil (tort) standard for aiding and abetting should be applied, or standards derived from US criminal law or international criminal law. At present, U.S. federal courts have disagreed on this point, some pointing to US civil tort standards as the source of attribution rules.<sup>9</sup>

Third, in many jurisdictions, there is uncertainty as to which mental element (*mens rea*) of aiding and abetting is most appropriate for human rights cases involving business entities. Some jurisdictions have differing tests, and several have more than one test depending on the nature of the crime.<sup>10</sup> For example, in the Rome Statute of the International Criminal Court (ICC Statute), the test for the mental element of aiding and abetting an individual's crime requires that an accomplice must act "for the purpose of facilitating the commission" of a crime.<sup>11</sup> This seems to suggest that those who aid and abet the crime of another individual must share the intent of the principal perpetrator. However, there are other modes of participation provided for in the ICC statute that appear to require different tests. For example, the ICC Statute requires that a participant in a group crime must either share the intent of the principal perpetrator or act "in the knowledge of the intention of the group to commit a crime."<sup>12</sup> This "knowledge" test appears to resemble ICTY jurisprudence on complicity and also one of the tests used by the ICTY for determining liability for participation in a joint criminal enterprise. In several recent pre-trial decisions, the ICC has adopted a mode

<sup>9</sup> See *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158-59 (11th Cir. 2005); *Khulumani v. Barclay Nat'l Bank*, 504 F.3d 254 (2d Cir. 2007) (*per curiam*); *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244 (2d Cir. 2009).

<sup>10</sup> See, Thompson, Ramasastry and Taylor, *supra*, note 3, at 860 ("At the risk of oversimplification, it can be said that there are three main tests used in criminal law for determining whether a party has had the requisite *mens rea* to be convicted for aiding and abetting a crime. The term 'specific' or 'shared' intent, refers to situations where an accomplice desires the same outcome as a perpetrator-- that the crime be committed. There must have been a willingness that a crime result. A lower threshold is found in the 'knowledge' test, which requires only that accomplice knew or should have known (given all information available to him) that his actions may assist the commission of a crime, but the accomplice does not need to have shared the intent or desired the outcome. .... A third standard, referred to as the 'recklessness' test, or *dolus eventualis* test, relates to situations whether an accomplice is aware of the risk that the perpetrator might commit a crime, but nonetheless proceeds to provide assistance.").

<sup>11</sup> Article 25 [3] [c], Individual criminal responsibility, Rome Statute of the International Criminal Court. The ICC Statute language with respect to individual crimes has been interpreted by several recent decisions in the U.S. federal courts as requiring that evidence be produced to show "intent" rather than "knowledge". See Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 Nw. U.J. Int'l Hum. Rts. 304, 319 (2008).

<sup>12</sup> Article 25 [3] [d] [ii], Individual criminal responsibility, Rome Statute of the International Criminal Court.

of participation called “co-perpetration,” which contains three alternative mental tests for a defendant’s liability: intent, knowledge or recklessness (*dolus eventualis*).<sup>13</sup>

The issue of the mental element test is critical to the prosecution or attribution of civil liability for human rights abuses. This is because a business or its agents may not in fact share the same intent of the perpetrator of a grave human rights abuse, or because proving intent in a court of law raises serious evidentiary challenges. It may be that company employees or agents know or have reason to know that their activities, including commercial transactions, are facilitating a crime or a serious human rights abuse. It may be that they are aware of a serious risk of such acts being committed, and yet do nothing. Such situations will not be captured by a mental element test which required the prosecution or plaintiffs to show that the company shared the intent of the offender to commit the human rights abuse. In addition, the obstacles to gathering evidence of shared intent may be insurmountable, given the challenges noted elsewhere in this report. A mode of participation, such as “co-perpetration,” which, as stated above, allows for the alternate mental states of intent, knowledge and negligence, each of which implies different evidentiary challenges and such standards which require evidence of accomplice knowledge are likely to provide prosecutors with greater flexibility in meeting evidentiary standards in cases involving business entity involvement in human rights abuse than a standard which is based on shared intent alone. Drawing on a survey of these standards, the UN SRSR has stated that “knowingly providing a substantial contribution to human rights abuses could result in a company being held accountable in both legal and non-legal settings.”<sup>14</sup>

### **The Absence of Rules which Permit Aggregation of Claims, including Class Action Proceedings**

There are trends in some countries towards what has been termed “aggregate litigation”.<sup>15</sup> Several practitioners at the Conference decried the lack of procedural rules in many countries that would allow a representative group of victims with common claims to file

<sup>13</sup>See, *The Prosecutor v. Germaine Kantanga and Mathieu Ngudjolo Chui* (Pre-Trial Chamber), ICC-01/04-01/07, 30 September 2008; see also, *The Prosecutor v. Thomas Lubanga Dyualo*, (Pre-Trial Chamber), ICC 01/04-01/06, 30 September 2008.

<sup>14</sup>John Ruggie, *Promotion And Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including The Right To Development -- Clarifying the Concepts of ‘Sphere of Influence’ and ‘Complicity’*, *United Nations Human Rights Council A/HRC/8/16*, 15 May 2008; para. 70.

<sup>15</sup>For a useful discussion see Mark A. Behrens, Gregory L. Fowler, and Silvia Kim, *Global Litigation Trends*, 17 *Michigan State Journal of International Law* 165 (2008-09)-193 )(discussing the trend of other countries to permit “aggregative” litigation rather than US style class action lawsuits).



a single lawsuit covering all victims.<sup>16</sup> Many jurisdictions require that each plaintiff in a civil action must be expressly named in the court filings. Victims may decline to join in such suits for a variety of reasons, including fear of reprisals or exposure to adverse costs. (See discussions of these issues below.) In addition, settlements may run only to the benefit of named plaintiffs in a particular lawsuit, meaning that other victims may not be compensated. The lack of aggregation mechanisms in many countries may mean that only a few plaintiffs are actual parties in a lawsuit. It was pointed out that even the ability to file complaints using fictitious ‘John Doe’ plaintiffs (as is permitted in the U.S.) would greatly benefit civil practice in this area.<sup>17</sup>

Under the class action system in the U.S. and approximately seventeen other countries,<sup>18</sup> a core group of representative plaintiff-victims may bring an action on behalf of all victims of a tort or delict. Thus several ‘named’ plaintiffs might represent a class of hundreds or even thousands of victims and their dependents. For example, over ten thousand victims of the Marcos regime were successful in obtaining a judgment of hundreds of millions of dollars against the deposed dictator’s estate in a lawsuit brought under the Alien Tort Statute.<sup>19</sup> Class action lawsuits against European insurers and

<sup>16</sup>Generally, “aggregation” of claims can take various forms, such as allowing two or more named plaintiffs to bring the same suit in a single action, allowing two or more suits that were brought separately to be later joined in a single suit, or allowing multiple suits to be “coordinated” in a single proceeding before a single judge (although each such suit in a coordinated proceeding is a separate legal case). The most comprehensive form of “aggregation” is the class action lawsuit, where all victims of a tort or delict may be represented in a single lawsuit, as discussed below.

<sup>17</sup>Under U.S. law, plaintiffs can be named as “John Does,” meaning that their real name(s) need not be stated in a complaint or indictment. The actual names can be revealed later, e.g., when necessary to call them as witnesses or to ascertain their actual damages.

<sup>18</sup>Deborah R. Henseler, *The Globalization of Class Actions, An Overview*, Appearing in *The Annals of the America Academy of Political and Social Science* 2009: 622. The article reports the findings of a study which surveyed the state of aggregate action laws of 29 countries, plus the European Union. She states: “What is exceptionable is to allow private actors (individual and associations) to bring civil lawsuits on behalf of large numbers of identifiable but absent parties: other actors who have standing to bring their own lawsuits but are not formally present in court. In this article, I call any civil procedure that permits such representation a *class action*. As will become clear, the requirements for and operations of such class actions differ significantly among jurisdictions, and few share all the characteristics of a U.S. class action brought under F.R.C.P 23. At the time of this writing [2009], at least 18 countries had adopted some form of class action as defined above: Argentina, Australia, Brazil, Canada, Chile, China, Denmark, Finland, Israel, The Netherlands, Norway, Portugal, South Africa, Spain, Sweden, Taiwan, and the United States. At least four more—Austria, England, France, and Poland—plus the European Union were said to be debating the adoption of such a procedure.”

<sup>19</sup>Draft Chronology *Efforts to Recover Assets Looted by Ferdinand Marcos of the Philippines* (August 2007), International Center for Asset Recover, Basel Institute of Governance available at <http://www.assetrecovery.org/kc/resources/org.apache.wicket.Application/repo?nid=62506d95-a33e-11dc-bf1b-335d0754ba85> (copy on file with authors).

corporations with respect to their actions during World War II were settled and funds were set up to provide compensation to members of the relevant classes – Holocaust survivors and their heirs.<sup>20</sup> The financial and other advantages to plaintiff/victims are considerable: they can pool resources for a single legal team, they can see justice served in a single case instead of having to wait years for the courts to process a multiplicity of actions; and they can all take advantage of a single ruling on common legal issues. The potential for a compensation award covering a large number of victims makes the case more financially attractive for attorneys, which is important to ensure a wider pool of lawyers is able and willing to take on these cases. Awards in such cases are then dispensed through an administrative claims procedure.

Not all U.S. ATS cases have been class action lawsuits, however. Many of the recent cases against corporations have involved groups of plaintiffs rather than a class of plaintiffs. In some situations, there may be a limited group of people impacted or harmed. There may also be practical difficulties for attorneys in finding or locating a class or providing notice to an entire class in the event of a settlement, when plaintiffs are located overseas and may be widely dispersed. An ATS lawsuit filed against Unocal, for example involved a group of plaintiffs as opposed to a class. Plaintiffs were refugees from Myanmar (Burma) and it would have been difficult, if not impossible, to reach all potential class members located inside Myanmar.

### **Short Statute of Limitations**

Several practitioners pointed to short statutes of limitations as a major obstacle to civil justice. In a complex case, a two-year statute of limitations as reported in Peru, three-years as reported in India, or even four-years as reported in the Philippines, makes it extremely difficult for victims to organize themselves and complete preparations for the filing of a lawsuit. The problem is compounded if the victims live in a country where the courts are overburdened or ineffective, or where they face threats and repression if a case were to be launched. In Argentina, a civil case filed against executives of Ford Motor Company of Argentina who were alleged to have been complicit in crimes occurring during that country's 'dirty war' was rejected by the country's Supreme Court on the grounds that the case was filed beyond the statute of limitations.<sup>21</sup>

<sup>20</sup> Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, Vanderbilt Journal of Transnational Law, Vol. 31, 1998

<sup>21</sup> See, *Argentina Response* Survey conducted as part of Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities, <http://www.fao.no/liabilities/CCCSurveyArgentina06Sep2006.pdf>

## Settlements May Come with Onerous Terms

A discussion of out-of-court settlements in civil litigation highlighted a number of problems that victims and their legal representatives face. It was pointed out that settlements often forestall legal developments by preventing a decision by a court that would set a legal precedent concerning behavior by businesses that the decision found unacceptable. A settlement will provide some form of redress, usually monetary, but terminates the litigation. For plaintiffs, this allows them to receive some compensation rather than waiting for a case to wind its way through the court system, which can take many years.<sup>22</sup>

Several practitioners pointed out that companies may impose conditions as part of any settlement that may contravene basic notions of fairness. For example, several practitioners pointed to instances where the business defendant required that the law firms make commitments in the settlement documents that were clearly not in the public interest, such as a commitment to not representing any other plaintiff in any similar case for a period of several years, or not providing even general information about the kinds of harms identified during the case to any other person. Such commitments may be enforced by a threat that a breach of the commitment by the law firm will result in the plaintiffs having to forfeit the settlement.

Participants at the conference acknowledged that settlements can impact future corporate behavior and create incentives for other business entities to change their business practices. Yet, there is an inevitable tension between the benefits of settlements versus cases proceeding to trial. Lawyers, of course, have an ethical duty to serve their clients and this includes working towards a settlement if their clients so wish, even if this means a case is withdrawn.

## The Community of Practice is Relatively Small and Lacks Experience

Participants reported that victims can have difficulty finding an attorney who is willing to represent them. It was pointed out that in many emerging market countries, the relatively few major law firms are primarily working for the large companies, and conflict of interest issues could arise if one of their attorneys undertook a suit against

<sup>22</sup> It was noted that this generally occurs when the company perceives a risk of a substantial loss. Some settlement agreements have been used to create mechanisms intended to benefit entire communities or larger groups of victims. For example, the settlements reached in the case of *Wiwa v. Royal Dutch Petroleum Co* (settled out of court in 2009), and *Doe v. Unocal Corporation* (settled out of court in 2005) resulted in community development funds being established to ensure that the funds agreed as part of the settlement would benefit the affected community as a whole. *Final Settlement Reached in Doe v. Unocal*, 21 March 2005, <http://www.earthrights.org/legal/final-settlement-reached-doe-v-unocal>; *Shell Settles Wiwa with Humanitarian Gesture*, 8 June 2009, [http://www.shell.com/home/content/media/news\\_and\\_library/press\\_releases/2009/shell\\_settlement\\_wiwa\\_case\\_08062009.html](http://www.shell.com/home/content/media/news_and_library/press_releases/2009/shell_settlement_wiwa_case_08062009.html)

one of their clients. One practitioner who sought the assistance of a large law firm on a lawsuit involving a multinational business was told that such litigation was simply not within the ‘culture’ of the firm.

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

In addition, it was noted that international criminal investigations are relatively new. While there is an emerging community of practice at the domestic level, neither the ICC nor any other current international tribunal has sought to prosecute an individual business actor, such as a company manager (the ICC has no jurisdiction over legal persons, i.e. business entities). It was suggested that the ICC could have a significant impact on a corporate boardroom merely by bringing a case against an individual businessperson. However, it was pointed out that, first, the ICC prosecutor is unable to do so unless the crime is sufficiently serious and widespread to meet the “gravity” threshold contained in the ICC Statute. It was also noted that such a case would need to be well chosen, for an easy acquittal would have serious consequences for the ICC, diminishing its credibility at a time when its work has just commenced.

### **Prosecutors’ Offices Lack Specialized Units for International Crimes**

Domestic prosecutors’ offices in many countries do not have specialized units with staff dedicated solely to the enforcement of international crimes or other human rights laws. One exception discussed was The Netherlands, but even there the competence and experience being developed was relatively recent and the focus of that unit has so far not fallen on allegations of business involvement in international crimes. Generally, prosecutors face real dilemmas with respect to priorities: there is an inevitable conflict between the priority to be given to international crimes – with which only a few prosecutors have much experience - and that of all of the other types of crime within a prosecutor’s jurisdiction. International crimes of the type discussed at the Conference involves distant events and mostly foreign victims. Thus, while constructive steps forward with respect to international crimes have been taken in some jurisdictions (e.g. Canada, Norway, The Netherlands, the U.S.), the extra efforts required to get access to victims, to evidence, the unfamiliarity of the judges with the issues at hand, and the costs of undertaking international prosecutions, all militate against prosecutors taking

on such cases. Given the obstacles identified in this report, it will require significant political will, backed by resources, before such prosecutions become a priority. The establishment of offices dedicated to human rights cases would be a welcome signal that the country takes its human rights responsibilities seriously.

Lawyers and analysts working for Non-governmental Organizations (NGOs) have begun to try to address the problem by preparing evidentiary files that they believe represent a compelling case for enforcement. It was noted that prosecutors and human rights advocates often have a mutual interest in sharing information, including assessments of relevant laws and the practical options available for tackling the burdens associated with investigating and prosecuting human rights violations and international crimes. Practitioners at the conference provided examples which indicated that such exchanges were few and often dependent upon the openness of the individuals and institutions involved.

### **Lack of Transparency Surrounding Prosecutorial Decision-Making**

A number of participants complained about being met with silence from prosecutors when attempting to bring cases to their attention, or a lack of transparency as to what the prosecutor was doing or had done with respect to a particular matter. Others pointed out that prosecutors may be prevented by government policy, backed by criminal penalties, to disclose information about potential or pending enforcement matters.

In certain civil law countries, the victim of a crime may commence a criminal proceeding against the perpetrator of a crime by filing a formal complaint with the office of the prosecutor (e.g. *action civile* in France). Even where victims are permitted to initiate a criminal proceeding, the duties of the prosecutor vary from state to state (some jurisdictions make the follow-up to such a complaint a matter of prosecutorial discretion and others mandate a follow-up investigation and prosecution, where justified by the law and the evidence).

The advantages of using an *action civile* mechanism such as that available in France are that the state bears the expense of investigation and prosecution and there is the possibility of a civil damages award if the state obtains a conviction. However, this depends entirely on the willingness of the state to expend the effort in the matter. It was reported that French prosecutors have no legal obligation to pursue an *action civile*. Thus, if a prosecutor is unwilling to proceed in the case, the matter dies. Here again, there may be a lack of transparency in explaining why a case does not move forward. Even where a prosecutor accepts the case, there may be no official will to expend state resources. In such a case, the burden of the investigation and the efforts during the trial are left to the private complainant. This can nullify the benefits of the filing of the *action civile* in the first place.

## **2 Financial Obstacles**

The financial disincentives to prosecute an international case or to bring a civil suit are significant. The costs to defendants are also high, but large multinationals have shown themselves capable of assuming these costs and deploying legal teams that are better resourced than plaintiffs or even public prosecutors. Participants indicated that the principle financial obstacles faced by prosecutors and victims consist of the following:

### **International Criminal Investigations are Not Properly Resourced**

A number of participants pointed to the lack of national resources dedicated to international criminal investigations as the fundamental obstacle preventing state prosecutors from taking on such cases. The likelihood that a state prosecutor will take on a complex case of alleged corporate involvement in international crimes is to a significant extent a function of the size and adequacy of his or her budget. A prosecutor at the Conference reported that legal staff in one country was adequate to support only two or three cases involving human rights issues out of a docket of over sixty cases. Only one national prosecutor indicated that financing was adequate for the task. It was noted that the level of public interest in the enforcement of human rights cases is best gauged by the national willingness to devote resources to the area.

### **Legal Aid is Either Inadequate or Unavailable**

State funding for legal aid for victims' civil actions, like all resource-dependent activities involving accountability for human rights violations, is closely tied to the overall question of the state's and society's will to ensure that human rights are legally protected. It was reported that many countries do not provide legal aid at all and in other countries it is available only for criminal defendants. In countries where it is available for civil plaintiffs, it may not be sufficient to pay the high costs of international human rights litigation.

### **Victims are Unwilling to Take the Risk Imposed by the “Loser Pays” Rule**

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

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

### **Bans on Contingency Fees Limit the Financial Viability of Cases**

The conference heard that contingency fees are prohibited in many countries, either by law, as in India, or by restrictions imposed by professional codes of ethics, as in the Philippines. In some countries – such as Canada, Japan, South Africa and the U.S. – contingency fees are allowed.<sup>23</sup> Under the contingency fee system, attorneys agree to be paid only if they are successful as a result of either a trial or a settlement. The use of a contingency fee can be attractive for both victims and attorneys: victims are willing to agree to pay a part of the judgment or settlement in exchange for services that would otherwise be beyond their reach; and attorneys are willing to fund the case initially out of their own pockets in exchange for the possibility of obtaining an ultimate return on their investment. Most jurisdictions that permit such arrangements have regulations governing what is a fair fee. In some instances, where public interest lawyers have collected contingency fees, the funds have been used to finance other public interest litigation. In the absence of other forms of financing, these kinds of arrangements are important to making civil actions financially viable.

<sup>23</sup> See Behrens, Fowler, and Kim, *supra*, note 15, at p. 183-187.

### **Compensation Awards for Victims are Unreasonably Low**

Several practitioners noted that compensation awards for civil claims in some jurisdictions are frequently so low that a civil lawsuit is not financially viable. Such low awards make such cases especially unattractive for use of contingency fee arrangements. This contrasts with jurisdictions where courts are authorized to make awards that include all measures of damages, i.e. medical costs, future medical monitoring, loss of past and future earnings, loss of a spouse or other relative, and pain and suffering. In some jurisdictions, such as the U.S., courts are authorized to award exemplary, or punitive damages, designed to deter others from similar conduct and to advance important societal values.

### **Plaintiffs Lack Resources to Retain Relevant Technical Experts**

Victims of human rights abuses are often poor and lack the resources to retain the services of scientific and technical experts crucial to proving their case. In cases of serious environmental or health harms, for example, scientific evidence is crucial to establishing causality. Technical analyses of pollutants (or other evidence requiring qualified scientific expertise) and the presentation of such evidence by expert witnesses can be prohibitively expensive for indigent victims. In several cases discussed during the Conference, the lack of technical data on the pollutants involved and their resulting health effects was a serious handicap in presenting the cases to authorities and to the courts. In addition, it was pointed out that large companies with big budgets, may be able to monopolize the available pool of technical expertise on a specialized topic.



## 3 Political Obstacles

Under international human rights law, states have a duty to protect individuals and communities from human rights abuses by non-state actors. States also design and implement the regulatory frameworks that apply to business activities. States are ultimately the place where prosecutors and courts reside, and through these institutions they enforce laws as well as judgments and settlements in civil suits. However, these institutions are often not up to the task. The legal and financial obstacles to justice outlined above are often aggravated by what participants identified as obstacles that are political in nature, including the following:

### **Corporate Power and Influence and the State-Business Nexus**

Some participants at the Conference noted that the power and influence that companies are often able to exert over political decision-makers and state institutions can have a negative impact on the ability of victims to seek redress and the capacity of the state to ensure access to justice, particularly in host countries that lack the institutional capacity to regulate companies effectively to protect human rights, or are reluctant to do so for fear of losing much needed foreign investment. Where host states are heavily dependent on a particular industry or generally rely on foreign direct investment for their economic growth and development, or where corruption is pervasive, corporate bargaining power increases, and the political will or capacity of the state to pursue or enforce remedies against powerful corporations may diminish. Existing institutional, legal and financial obstacles to justice may be greatly exacerbated. Participants noted how in these contexts economic interests may be involved in creating, aggravating or exploiting obstacles to justice, particularly for those whose human rights are directly affected by business activity.

The benefits the state derives from the business activity may act as a strong incentive to overlook potential or actual adverse human rights impacts, and a disincentive to intervene when abuses occur. In this way, a business' relationship to state regulators may amount to a significant power over its own regulatory environment. This may be exacerbated when the state is a majority or part owner of certain businesses, creating in effect a conflict of interest between the state's duty to protect human rights and its interests as an investor. Together, the economic interests of businesses and govern-

ments may combine and represent in practice an insurmountable obstacle to advancing human rights claims. For example; the conference heard how, in Colombia, state legislation had in many cases secured land tenure over lands that had been obtained by force by paramilitaries and in some cases passed on to the private sector.<sup>24</sup> The Conference heard, for example, how, in one country, a company was permitted to draft and propose legislation restricting the rights of citizens to sue it, how in other contexts criminal investigations were suspended based on strong pressure from international economic actors.

### **Limited Public Awareness**

One prosecutor pointed out that the growth of international criminal law is a relatively recent phenomenon and that this has not yet translated into public awareness. As a result, the necessary public pressure on governments to prosecute such crimes as a matter of course will take time to mature. For example, in 2008 and 2009, Canada and Norway prosecuted their first international crimes cases in over a half century. By contrast, in The Netherlands, there is an established consensus that prosecutors should pursue international criminal and human rights cases and, as a result, successive governments have ensured that resources are dedicated to this task.

### **Physical Security of Witnesses and Plaintiffs**

Practitioners reported numerous instances where the perpetrators of crimes in host countries, particularly if holding the reins of state authority, have taken steps to intimidate victims, their legal counsel and their witnesses. In Angola, it was declared illegal at one point even to publically discuss the oil industry.<sup>25</sup> Plaintiffs have also been deliberately prevented from filing a lawsuit in the home state. In Papua New Guinea, a law was passed criminalizing the filing or pursuing in foreign courts of compensation claims arising from mining and petroleum projects in the country. Contravening this prohibition could result in a fine or imprisonment for up to five years. Plaintiffs can become targets of threats and intimidation, forcing some to leave the country to

<sup>24</sup> Samir Elhawary, *Between war and peace: Land and humanitarian action in Colombia*, HPG Working Paper , Overseas Development Institute (December 2007) available at [www.odi.org.uk/resources/download/1912.pdf](http://www.odi.org.uk/resources/download/1912.pdf)

<sup>25</sup> See Human Rights Watch Report "*Some Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights*" (2004) (discussing Angola's State Secrets Law and its use to prevent disclosure of information about oil activity by companies to third parties). Report available at [www.hrw.org/reports/2004/angola0104/angola0104.pdf](http://www.hrw.org/reports/2004/angola0104/angola0104.pdf)

escape harm, while witnesses or NGO workers active on cases have been paid off and/or threatened to ensure their silence.

One practitioner reported that, when initial human rights complaints have been made to some companies, the latter demanded the names of the complainants, ostensibly so that they can investigate the situation. As mentioned earlier, some courts require that each plaintiff be identified in the pleadings by name. In some cases, witnesses have been 'disappeared' by officials claiming that it is for the safety of the witnesses. Although witness protection programs exist in some countries for criminal cases, that does not appear to be the case in civil matters. Thus, it may be dangerous, illegal or even impossible to carry out the necessary steps to file a lawsuit in a host state forum.

### **Amnesties**

In post conflict transitions, or when a government grants amnesties to those who have committed human rights violations, both criminal and civil avenues for redress may be closed permanently. It may also mean that legal steps against the accomplices of those given amnesty may also be prevented. Where amnesties or immunities are given in exchange for testimony, it may be possible to develop cases, but it has been observed that often the state may be more interested in generating an inflow of foreign direct investment and does not want to signal to investors that their jurisdiction is likely to prosecute. Amnesties may forestall politically difficult choices, but by forestalling accountability they may ultimately promote further instability.<sup>26</sup>

<sup>26</sup> See, e.g., *Selling Justice Short: Why Accountability Matters for Peace*, Human Rights Watch, July 7, 2009 <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short-0>

## Solutions: An Agenda for Legal Reform

The state duty to protect human rights includes a duty to provide an appropriate forum for legitimate claims to be brought against businesses for their involvement in human rights abuse. Where no forum exists, or where there are significant obstacles to justice in an existing forum, the state has a duty to act to ensure that adequate forums are established and that obstacles are removed so that justice is available, accessible and effective. If justice is to be accessible to all, the state must also ensure that it provides positive assistance to those victims who would otherwise not be able to access the courts in their claims for justice. By ensuring that the national penal system has the power not only to punish corporate perpetrators and accomplices, but also to deprive them of their ill-gotten gains, states will be fulfilling their duty to ensure that there is a full accounting for human rights abuses that amount to crimes, including international crimes, that healing for the injuries suffered can begin, and that would-be perpetrators might be deterred. Equally, by ensuring that the judicial system is amenable to entertaining civil claims for corporate human rights abuses, and capable of affording effective and enforceable remedies to plaintiff/victims in such claims, states would be taking important steps towards fulfilling their duty to protect human rights against abuses by non-state actors.

There is an increasing global demand for justice for human rights abuses that remains largely unsatisfied.<sup>27</sup> Significant obstacles stand in the way of victims of abuses accessing justice. The obstacle to justice more frequently mentioned during the Conference was the high cost of civil litigation, particularly for human rights cases that are brought in jurisdictions outside of the host state. Victims living on marginal incomes have enormous difficulties in obtaining resources to pay for attorneys' fees, court costs, factual investigations, use of experts, needs for translation and interpreting services, travel costs for parties and witnesses and the other expenses involved in modern civil litigation.

<sup>27</sup> In the past decade, victims from over 50 countries have sought civil justice in the United States with respect to alleged human rights violations.. For a listing of the cases and the countries involved, see, Thompson, Ramasastry and Taylor, *supra* note. 3., Appendix A. The kinds of human rights abuses raised in those cases are an increasing part of victims' complaints in courts around the world. For a good overview of such cases see the "Corporate Legal Accountability Portal", Business and Human Rights Resource Centre, <http://www.business-humanrights.org/LegalPortal/Home>

Many participants raised the issue of the great disparity in money and political “clout” in such cases. Those who take on a multinational business in a human rights case – whether supported by NGOs or state prosecutors – face well-funded, well-staffed and well-organized opposition. Business defendants generally have access to large law firms and can afford to engage in extensive motion practice, or attempt to manipulate the discovery process, in order to wear down the plaintiffs in an endless battle of legal papers and delays.

Inequality of bargaining power may become an issue in settlement negotiations. Corporate defendants use their financial leverage to extract terms that plaintiff-victims - who need the money or other benefits of settlement – may find hard to refuse. Power imbalances affect not only individuals or groups that are party to a particular dispute, but may also impact on the bargaining capacity of the state itself. Multinational corporations are sometimes able to obtain beneficial terms and conditions for their investment. These may affect not only the regulatory environment in which they operate, but also the way in which the host state deals with allegations of corporate human rights abuses and claims for redress.

The problem becomes greater when a state weighs in on behalf of business. This is especially common where a state has a pecuniary interest in the success of a particular business operation, whether as equity owner or as the recipient of royalties or taxes from a project. The lack of transparency in the arrangements between states and business entities makes it difficult to call public attention to situations where states place commercial or economic goals, or simply corporate interests, ahead of protection of their citizens from human rights abuses.

Reforms are urgently needed if there is to be improved access to justice for victims of human rights abuses generally, including victims of business related harms. The following are options developed to address the obstacles outlined above. These options assume that each jurisdiction is different and each country has its own legal tradition that will shape any such reform agenda. One size will not fit all. In many circumstances, host states will be best situated to deal with civil actions in the case of a dispute. In other circumstances, this role may be best carried out by the home states: there may be no effective forum in the host state; there may be clear connections between the alleged abuses and the host state itself, one of its state-owned enterprises, or a particular private multinational business entity that the host state may move to protect; or it may be that acts by the company in connection with certain abuses were undertaken at company headquarters and would fall outside the jurisdiction of the host state, but within the jurisdiction of the home state. Whatever the circumstance, there can be no doubt that

the problems are significant enough to require urgent action to repair what amounts to a large gap in human rights protection in both home and host states:<sup>28</sup>

1. *Remove Obstacles to Justice*: States should ensure that both criminal and civil forums are open and readily available to victims who seek effective remedies for human rights abuses. To achieve this, they should fully identify, and take the necessary steps to remove, existing obstacles to justice.
2. *Clarify the Legal Framework*: States should clarify the legal framework applicable to business entities' involvement in human rights abuses, including international crimes. Individually and in multilateral forums, states should identify what business activities are unacceptable under international human rights standards, determine if existing laws would apply to such activities, and enact new laws to cover any gaps or remove obstacles. As one criminal attorney at the conference noted the more specific and prescriptive the regulatory regime becomes, the greater the level of compliance is likely to be.
3. *Eliminate Obstacles to Justice Related to the "Separate Entity" Doctrine*: States should revise their laws to ensure that the separate legal treatment of parents and subsidiary entities is not an obstacle to justice for victims of human rights abuse. In cases where overseas subsidiary entities are involved, states should consider permitting civil actions in the home jurisdictions of parent entities against both the parent entities and the responsible foreign subsidiary entities for the actions of such entities that parents own or otherwise control.
4. *Promote Greater Transparency in Corporate Structures*: States should ensure information on corporate ownership of subsidiaries and participation in joint ventures, as well as managerial and decision-making structures within corporate groups, is made publicly accessible.

<sup>28</sup> As Professor Ruggie has noted: "Clearly, both home and host states are most apprehensive about direct extra-territorial jurisdiction—often viewing it as inappropriate interference in others' domestic affairs. Business too has concerns—particularly the uncertainty and competitive disadvantage that can result from conflicting requirements. These are legitimate issues. But the debate must be had...To take one striking example, the international human rights regime cannot possibly work as intended in a conflict affected area where functioning institutions may not exist. What message should home countries send the victims of corporate-related human rights abuses in those situations? Sorry? Good luck? Or that, at a minimum, we will work harder to ensure that companies based in our jurisdictions do not contribute to the human rights abuses that so often accompany such conflicts, and to help remedy them when they do occur? Surely the last is preferable." Keynote Presentation at EU Presidency Conference on the "Protect, Respect and Remedy" Framework Stockholm, November 10-11, 2009 available at [198.170.85.29/Ruggie-presentation-Stockholm-10-Nov-2009.pdf](#)

Within these broad areas, many important changes concerning both criminal and civil law and practice were suggested. In the context of criminal law, states should give serious consideration to the following recommendations:

5. *Specialization within Prosecutors' Offices*: States should create specialized, and properly-funded units within prosecutorial institutions dedicated to the investigation and prosecution of international crimes and human rights abuses that amount to crimes under the national legislation. Just as with specialized economic crimes units within criminal investigation and prosecutorial offices, these units should be supported by adequate technical, investigatory and other resources to ensure their effectiveness.
6. *International Communication and Cooperation*: Such specialized units should have regular and sustained communications, training sessions, conferences and other contacts so as to share information, methodologies and legal tools. Collectively, they should operate as a worldwide network dedicated to detecting and prosecuting international crimes and other serious human rights abuses amounting to crimes, wherever they occur. In some situations, conferences could include NGO representatives and private attorneys as well. Building on the bi-annual INTERPOL conferences which bring together war crimes investigators and prosecutors would be a good place to start.
7. *Promote Mechanisms for Transparency Around Prosecutorial Decision-making*: Prosecutors should recognize that there is an important public interest in making known the legal and factual bases and justifications upon which decisions to investigate and/or prosecute grave violations of human rights law are made (including decisions not to undertake such investigations and/or prosecutions). They should endeavor to make such information available to the public, within the limits of existing policies and laws regarding the nondisclosure of prosecutorial information. They should also recognize the compelling public interest in revising any such existing policies and laws so as to except publicly-needed information regarding human rights matters from such limits.

Human rights abuses cause a wide range of injury, pain and suffering for which victims should be able to claim reparations. Civil law and courts offer the possibility to seek remedies for harms beyond the narrow set of prohibitions defined by criminal law. Victims of human rights abuse that amount to crimes under domestic or international law should be able to benefit from the advantages offered by civil procedures, such as: First, civil proceedings are commenced by the victims themselves, not by official prosecutors, thereby empowering victims to take charge of their own quest for justice. Second, the burden of proof in a civil case is generally easier to satisfy than the “beyond a reasonable doubt” standard used in criminal cases. Third, legal persons, such as busi-

such as businesses, who may be exempt from criminal liability in domestic courts in some cases, are generally subject to civil liability. Fourth, victims who win civil cases are more likely to obtain compensation or restitution from losing defendants than would be the case in a criminal proceeding.

In short, states should enable civil actions for human rights abuses, whether these amount to crimes or not, including those abuses related to business entities. With this in mind, states should give serious consideration to the following recommendations:

8. *Ensure the Availability of Civil Causes of Action*: States should ensure that their legal framework provides victims of human rights abuses with civil causes of action to claim reparations from any defendants implicated in those rights abuses, including legal persons such as corporations.
9. *Allow for Extra-territorial Jurisdiction*: States should ensure that their criminal and civil laws cover human rights abuses committed abroad by their own nationals, including business entities that are registered, domiciled or otherwise significantly present in their territories, and that both their criminal and civil courts have personal jurisdiction over such persons, taking into account international principles of comity.
10. *Modify Statutes of Limitations*: States should modify civil statutes of limitations (or even eliminate them for civil suits based on international crimes, as is the case under international criminal law) so as to provide victims with sufficient time to prepare their civil cases and so as to allow deadlines to be extended when circumstances outside of the control of the victims (e.g. state repression of victims' activities) have impeded their ability to investigate and otherwise prepare for civil litigation.
11. *Make Provision for Protection of Parties and Witnesses*. States should ensure that the intimidation of parties and witnesses is illegal, and that any allegations of intimidation are thoroughly investigated and perpetrators prosecuted. States should arrange for adequate police protection in situations where individuals have reason to fear for their safety in the context of human rights litigation.
12. *Allow for the Aggregation of Victims' Claims*: States should make provision for the aggregation of claims by victims through adoption of class action or similar rules.
13. *Fund Legal Aid and Other Forms of Financial Support to Victims*: States should implement legal aid programs designed to assist victims of human rights abuses, and provide sufficient levels of funding to meet victims' legitimate needs to cover the costs of civil litigation, including for cases involving business defendants and events occurring abroad.



14. *Allow Private Funding Mechanisms*: States should ensure that the funding of victims' efforts to obtain civil justice is not impeded by restraints on the use of contingency fees or similar arrangements satisfactory to victims and their attorneys.
15. *Modify the "Loser Pays" Rule for Victims*: States should modify the "loser pays" rules in specific types of human rights cases, so that victims are not discouraged or prohibited from asserting their legal rights.
16. *Provide for Adequate Victims' Compensation*: States whose courts are unable to award damages that provide complete and appropriate compensation for the suffering and losses of victims should rectify the situation by changing applicable rules.
17. *Develop Fairness Criteria for Settlements*: States should undertake to develop guidelines to help the courts in their oversight and approval of settlements between victims and corporate defendants, regarding what kinds of settlement clauses are unfair or against the public interest and should as a consequence not be approved.
18. *Allow Public Interest Lawsuits by NGOs*. States should allow qualified NGOs to have standing to bring representatives public interest lawsuits on behalf of victims of grave human rights abuses.

The Conference also produced several ideas that international human rights NGOs should consider implementing in order to increase their effectiveness as advocates for human rights victims:

19. *Develop Advocacy Programs Aimed at Removing Obstacles to Justice*: NGOs should actively participate in programs aimed at identifying and removing obstacles to justice for victims of business-related human rights abuses. Such efforts may include support to specific litigation as well as advocacy targeted at states to improve access to judicial remedies for victims. They should consider forming joint groups so as to coordinate and enhance their efforts to do so.
20. *Creation of Forums for Regular Communication Among Advocates*: There should be regular international meetings of human rights advocates and attorneys aimed at sharing information, experience and legal and other ideas. It would be worthwhile to have a wider exchange between human rights and environmental advocates. Strong links and cooperation should be developed between law firms working in the global North and South on cases of human rights abuse.
21. *Creation of a Clearing-House for Volunteer Technical Assistance*: There should be a web-based clearinghouse that serves to link victims' groups seeking technical support with willing volunteer experts.

The Conference discussed the following recommendations for that segment of the business community that wishes to demonstrate its willingness to respect human rights:

22. *Respect the Right to an Effective Remedy*: The responsibility of business to respect human rights includes showing respect for the rights of victims to seek effective remedies. Companies must ensure their actions or omissions, in court or out, do not impair access to the courts.
23. *Make the Case for Clarity*: Business has long argued in favor of clarity of rules governing business behavior. Given the significant relationship between many businesses and their “home” and “host” states, it would benefit both themselves and the cause of human rights for business to actively seek clarity from state policy makers and legislators about rules for business accountability for human rights abuse.
24. *Create Workable Due Diligence Protocols*. At this early stage in the development of standards for conducting due diligence in the human rights area, it is critical that business representatives devote time and attention to devising workable approaches to due diligence for the identification and prevention of negative human rights impacts of their operations. These approaches should make clear how businesses will ensure transparency of their due diligence efforts.

Finally, the Conference discussed the following recommendation pertaining to the legal profession:

25. *The Legal Profession Should Allow and Encourage Greater Participation in Legal Assistance for Victims*: The legal professions in a number of countries have developed innovative ways to finance public litigation involving human rights abuse. These include the pooling of funds by professional bar associations and the encouragement of pro bono services to victims of human rights abuses. These arrangements should be expanded within the legal profession in all countries.

## Appendix A Participants

Charles Abrahams	South Africa/US
Joseph Breham	Sherpa, France
Mariano Aguirre	Noref
Josalito Calivoso	Philippines, SALIGAN
Sarah Criscitelli	International Criminal Court
Rachel Davis	Australia / Office of UN SRSG
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# Overcoming Obstacles to Justice

Around the world, victims and lawyers are turning to the courts in order to hold businesses to account for involvement in serious human rights abuses. The scarcity of successful cases attests to the fact that the courts have little experience with such issues. The lack of effective remedy amounts to impunity for businesses involved in human rights abuse, yet governments may appear more likely to promote businesses' interests than hold them accountable for their involvement in human rights abuse. A change in government responses is needed urgently. In 2009, practicing lawyers from a number of jurisdictions gathered in Oslo at the invitation of Fafo, Amnesty International and Noref to map out the obstacles to effective remedy facing victims of business-related human rights abuses. This report draws on that discussion to offer suggestions about an agenda for legal reform. The report forms part of a larger project which seeks to develop regulatory options for states in responding to the connections between armed violence and commerce.



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