

Access to Remedy

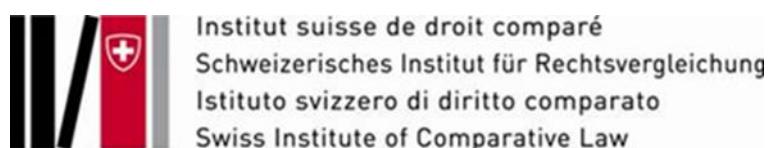
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LIST OF ABBREVIATIONS

Art.	Article
BBI	Bundesblatt (Federal Gazette)
BGE	Bundesgerichtsentscheid (Decisions of the Swiss Federal Supreme Court, published in the official collection)
BGer	Bundesgerichtsentscheid (Decisions of the Swiss Federal Supreme Court, not published in the official BGE collection)
BSK	Basler Kommentar (Basel Commentary)
CC	Swiss Criminal Code of 21 December 1937, SR 311.0
Chapt.	Chapter
cit.:	cited as
CivC	Swiss Civil Code of 10 December 1907, SR 210
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911, SR 220
CoE Rec.	Council of Europe, Recommendation of the Committee of Ministers to member States on human rights and business (Adopted by the Committee of Ministers on 2 March 2016, at the 1249th meeting of the Ministers' Deputies)
CPC	Swiss Civil Procedure Code of 19 December 2008, SR 272
CrimPC	Swiss Criminal Procedure Code of 5 October 2007, SR 312.0
EAER	Federal Department of Economic Affairs, Education and Research
ECHR	European Convention on Human Rights (Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms), SR 0.101
ECtHR	European Court of Human Rights
ed.	edition
eds.	editors
e.g.	for example
esp.	especially
et al.	and others
etc.	et cetera
EU	European Union
FADP	Federal Act on Data Protection of 19 June 1992, SR 235.1
FC	Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101
FDF	Federal Department of Finance
FDFA	Federal Department of Foreign Affairs

FDPIC	Federal Data Protection and Information Commissioner
FINMA	Swiss Financial Market Supervisory Authority
Fn.	Footnote
GEA	Federal Act of 24 March 1995 on Gender Equality (Gender Equality Act), SR 151.1
i.a.	inter alia
ibid.	ibidem
ICoC	International Code of Conduct for Private Security Providers
ICoCA	International Code of Conduct Association
i.e.	id est (that is)
IFC	International Finance Corporation
IFI	International Financial Institution
incl.	including
lit.	litera (letter)
LugC	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Lugano Convention) of 30 October 2007, SR 0.275.12
NAP	National Action Plan for implementing the UN Guiding Principles on Business and Human Rights
NCP	National Contact Point
NGO	Non-Governmental Organisation
NKPV-OECD	Ordinance on the Organisation of the National Contact Point for the OECD Guidelines for multinational enterprises and on its Advisory Committee of 1 May 2013, SR 946.15
No.	Number
OECD	Organisation for Economic Co-operation and Development
p.	page
para.	paragraph
PIL	Swiss Federal Act on Private International Law of 18 December 1987, SR 291
Pra.	“Die Praxis” (archive of translated French and Italian decisions of the Swiss Federal Supreme Court)
pt.	point
resp.	respectively
SCHR	Swiss Centre of Expertise in Human Rights
SECO	State Secretariat for Economic Affairs

SERV	Swiss Export Risk Insurance
Seq.	subsequently/following
SFBC	Swiss Federal Banking Commission
SIF	State Secretariat for International Financial Matters
SIFEM	Swiss Investment Fund for Emerging Markets
SR	Systematische Sammlung des Bundesrechts (Systematic Collection of Federal Law)
SZW	Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht (Swiss Review of Business and Financial Market Law)
Trademark Law	Federal Law of 28 August 1992 on the Protection of Trademarks and Indications of Source (Trademark Law), SR 232.11
UCA	Swiss Federal Act against Unfair Competition of 19 December 1986, SR 241
UN/UNO	United Nations Organisation
UNGA	United Nations, General Assembly
UNGP	Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/17/31, 21 March 2011

ACCESS TO REMEDY

Study in fulfilment of Postulate 14.3663

EXECUTIVE SUMMARY

[1] The third pillar of the United Nations Guiding Principles on Business and Human Rights (UNGPs) is the call for states to ensure that individuals who are the victims of abuse by companies have paths available to them to obtain redress for the violation of their human rights. The availability of redress for abuse is an integral part of the state's duty to protect individuals from violations of their human rights. As Art. 25, the "foundational principle" of the "Access to Remedies" part of the UNGPs, states:

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

[2] With a focus on the need to offer practical, effective remedies to victims, the subsequent articles of Part III of the UNGPs provide that ensuring victims' "access to remedies" may include not only judicial/legal processes and non-judicial state-based practices or procedures, but also non-governmental grievance mechanisms. Thus, in addition to states' actions and measures to improve access to remedies, the UNGPs emphasize the importance of having multi-stakeholder initiatives or industry-led processes for remediation as well as redress mechanisms at the level of the business enterprise itself.

[3] Following the wishes expressed by the Swiss ministry of foreign affairs, this report focuses on state-based mechanisms, examining both judicial and non-judicial remedies. Enterprise-level operational mechanisms are not within the scope of the study as commissioned.

[4] In the report, the current status of the availability of judicial and non-judicial remedies in Switzerland for victims of human rights violations caused by an enterprise abroad is set forth first. Then follow comparative analyses of access to judicial remedies (Part III) and to non-judicial remedies (Part IV) in other States. The way in which the judicial and non-judicial remedies interact is then set out (Part V) before a statement on the international trends and recommendations for Switzerland (Part VI). The annexes contain detailed accounts of criminal, private international, tort, procedural, and corporate law, as well as the collective redress possibilities for victims' access to justice in Germany, France, Denmark, the UK and the U.S.

I. JUDICIAL REMEDIES

[5] Judicial remedies for human rights victims may arise from civil liability of companies and/or their managers or from individual or enterprise-based criminal liability. The extent to which an individual harmed by a foreign company's actions can access the courts of the company's home state varies within and between civil and criminal law. The variations are not only in the substantive law, but also in the procedural rules that permit or deny victims' standing.

1. Criminal Law

[6] Except for Germany, the legal systems studied all provide for the possibility of prosecuting companies. Thus, the company itself – as well as or instead of – the actual perpetrator, the officer responsible for the conduct, or possibly the managers of a company may face criminal sanctions.

[7] Despite the openness to corporate criminal liability, in general, of the jurisdictions studied in this report, the report indicates that the degree to which a victim of a human rights violation will have access to remedies is currently low. This is due to: (1) the lack of statutory criminalization of company-inflicted human right abuses, combined with (2) the jurisdictional limitations on courts faced with claims of human rights injuries sustained abroad at the hands of a foreign company. In addition, the often -required *dual criminality* (the action must constitute a crime in both jurisdictions) limits the scope of possible prosecutions to violations which take place in a jurisdiction that recognizes potential criminal liability of corporations. However, where criminal liability in such cases exists, victims in several jurisdictions generally do have some rights to participate in the proceedings and to claim compensation.

[8] To access criminal law remedies, a victim must first ensure that the injury sustained was caused by an act or omission that falls within the provisions of criminal law in the court's jurisdiction. At present, none of the jurisdictions studied recognize a specific crime of corporate abuse of human rights. Abuses, for example, resulting in physical injury or death, however, can be reported to police for prosecution under general statutes.

[9] Whether the court will consider a criminal accusation depends on both the domestic legal system's general attitude toward corporate criminal liability and the connections of the action and injury to the court's seat. In the systems examined in this report, most civil law countries generally recognize jurisdiction on the basis of active (nationality of the accused) and passive (nationality of the victim) personality for a relatively large number of relatively serious offences. The common law systems are more restrictive, recognizing prosecutorial jurisdiction for extraterritorial acts only when a national is accused of having committed particular types of crimes. Universal jurisdiction is granted for a small number of particularly serious criminal offences in all of the systems studied except the United States.

[10] The most frequent criminal law sanction faced by a convicted corporate defendant is the imposition of a fine. The amount may be fixed or limited by statute. In a number of jurisdictions, the court may also order compensation payments to be made to the victim. Further penalties to sanction the guilty corporation are found in the criminal law of France, the Netherlands, the United Kingdom and the United States, where measures range from probationary periods or bars on public procurement tendering and other commercial activities, to dissolution of the company.

[11] Most jurisdictions provide for the right of victims to be involved in some way in the criminal process. The level of participation varies widely, with France, Germany, and the Netherlands even permitting victims to pose questions to the court and to request evidence. In these jurisdictions as well as in Denmark, victims also have a right to a lawyer, while in the common law jurisdictions reviewed, a Victim's Bill of Rights explicitly gives victims a right to be protected from the accused.

2. Civil Law

[12] Civil law remedies in the jurisdictions studied differ significantly, as the law of obligations, corporate law, and competition law differ among jurisdictions in ways that affect business and human rights-based claims. Most of the jurisdictions studied fail to impose clear and legally binding

human rights obligations on private actors for behaviour abroad. The United States' Alien Torts Claims Act could provide a basis for such an obligation, but its availability to foreign victims of human rights abuses has been limited by the Supreme Court. The French National Assembly's February 2017 passage of a law requiring large companies to exercise human rights diligence concerning their own as well as their subsidiaries' foreign activities makes France a significant exception to the general absence of such a statute. It is too early, however, to know how effective this law will be in actually opening the system to victim redress.

[13] Nevertheless, even where specific legislative duties of corporations are lacking, civil claims victims may generally raise claims of abuses by companies on the basis of contract or tort law. The standing of victims to bring such claims is subject to the ordinary requirements for civil claims. This can be particularly difficult to overcome if the violation occurred outside the jurisdiction of the home state and if either the victim or the perpetrator is foreign.

[14] Beyond the question of whether the violation of the victim's rights occurred in the company's home jurisdiction – a fundamental requirement for applying the law of this jurisdiction – other basic questions to be answered include:

- the extent to which a subsidiary – as opposed to a branch – of a home state company is potentially liable for its actions toward individuals in its jurisdiction of operation and, as a related question
- whether the parent company can be liable by attribution.

[15] On the procedural level, the questions such as

- which party bears the burden of proof;
- the permitted scope of requests for evidence; and
- whether the statute of limitations still permits a claim of personal injury to be heard (as in a number of jurisdictions, the statute of limitations for such claims is only three or four years from the time of injury)

have a direct impact on plaintiff's likelihood not only of winning his or her case, but of being able to bring it at all.

[16] Finally, practical aspects of judicial processes may also hinder effective victim access to civil law remedies. These include access to representation, the availability of collective redress mechanisms as well as court and legal costs.

3. National Reports on Access to Judicial Remedies (Annex I)

[17] The Report contains an Annex with thorough coverage of the judicial remedies available to victims of business-inflicted human rights violations in Germany, France, Denmark, the United Kingdom, and the United States.

II. NON-JUDICIAL REMEDIES

[18] Non-judicial remedies for human rights victims harmed by foreign companies are a separate source of possible action. This report examines four types of nationally based non-judicial

remedies: National Contact Points, National Human Rights Institutions, Ombudspersons, and the development finance institutions.

1. National Contact Points

[19] National Contact Points (NCP) are bodies to whom complaints against multinational companies can be brought. Not necessarily solely state-based, the establishment of a NCP is a requirement of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises for every member state. As a result, NCP have the advantage of permitting complaints concerning corporate actions occurring in any of the member states' territories.

[20] The wide discretion left to governments to organise their NCP, however, leaves little upon which one can generalise. From the institutional structures and financing, to the procedures of the complaint mechanism, the extent of their investigatory powers, and the relief offered to victims, these bodies differ significantly from state to state. The most successful of the NCP are well-funded, adequately staffed, and independent bodies that can investigate and mediate in ways that make their services easily accessible to those who have grievances against companies.

2. National Human Rights Institutions

[21] National Human Rights Institutions (NHRI) are a second form of state-based bodies that may offer non-judicial remedies to victims of corporate abuses. The role of a NHRI, as set out in the UN General Assembly's 1993 adoption of the *Principles relating to the Status of National Institutions* ("Paris Principles"), is to "promote and protect human rights" within the country by issuing "opinions, recommendations, proposals and reports", ensuring that domestic legislation is in harmony with international human rights law, encouraging the adoption of further international legal instruments, cooperating on national reports to human rights bodies, educating the public about human rights, and publicizing efforts to combat discrimination. Their principle tasks may include offering advice to victims of human rights violations about possible remedies, and may extend to investigating complaints, offering conciliation services, and making recommendations to authorities on legislation or administrative practices.

[22] The Paris Principles, like the UNGP, are open as to the formal structure of NHRI. However, these documents insist that the institutions are to be formally established entities composed of representatives from a variety of institutions and interests (academic, NGO, governmental, religious) and that they be independent from the government in structure and financing.

3. Ombudsperson Office

[23] As an additional remedial mechanism, states may establish an ombudsperson office to address grievances relating to business and human rights. Often utilized in institutions as a neutral instance through which complaints from one actor against another actor internal to the institution can be brought to the attention of hierarchically higher officers, a public office of an ombudsperson is generally established by the legislature or executive as a means to ensure governmental offices adhere to laws benefitting the public. The Report reveals that the role of ombudsperson offices in the investigated systems varies greatly in function and scope. While there were no examples of ombudspersons for business and human rights *per se*, there were several examples of ombudspersons for specific aspects of the business and human rights relationship – offices

specifically established to focus on anti-discrimination, data protection, or the rights of children, for example, or offices that review the legality of administrative decision-making of public authorities.

[24] Whereas all ombudsperson offices can investigate complaints from individuals or groups, the competence to investigate violations *ex officio* is rare. Similarly, while the authority to issue recommendations to the violating governmental actor as to how to remedy its behaviour is common to most offices, some of the offices examined additionally have quasi-judicial powers to issue orders directing particular behaviour or the payment of fines. While the latter competences are the exception, the potential for offering an effective remedy to individuals whose human rights have been harmed by corporate acts exists, given adequate authority to investigate complaints against state agents and corporate actors and to respond decisively.

[25] For the business and human rights field, further development of ombudsperson offices will require considering the expansion of the subject-matter scope of these offices (to cover more human rights), broadening the targets of complaints (to include actions of private actors), and clarifying the offices' competence to address violations of human rights that occur extraterritorially.

4. Export Finance Institutions and Development Finance Institutions

[26] The final state-based non-judicial remedy mechanisms studied are those related to public financial instruments, in particular export credit agencies and national ("bilateral") development finance agencies. Export credit agencies (ECA) are institutions offering export transaction-based private enterprises funds or insurance coverage to engage in export activities abroad. Whereas many ECA provide direct lending, some are more constrained and provide only insurance cover ("pure cover"). For the latter, the export transaction is completed once the insurance contract is terminated. By helping reduce the financial risks of doing business, ECA financing can indirectly support economic growth in developing countries. Moreover, it may motivate companies to do business in geographic areas that would otherwise involve a substantial (and therefore unacceptable from an economic perspective) degree of uncertainty.

[27] Development Finance Institutions (DFI) are government-backed institutions that invest in private-sector projects in low- and middle-income countries. DFI are generally structured as bilateral organizations that seek to invest in commercially sustainable projects often along private investors.

[28] The UNGP suggest that states require any funding directed to businesses' foreign activities under ECA or development agencies to be made conditional on the recipient company's carrying out human rights due diligence where appropriate. By offering their own grievance mechanisms, financing agencies can provide remedies for victims within a broader system of remedy in line with UNGP 25. In addition, such mechanisms can enhance their due diligence procedures.

[29] The comparative report shows that non-judicial remedy mechanisms are not yet widely found in the ECA frameworks of the reviewed countries, with the exception of the United States. However, there are such mechanisms in Canada and several other jurisdictions not within the scope of the study. Given the lack of in-depth experience with such mechanisms, questions as to the most effective way to ensure access to remedies remain open.

[30] Most of the bilateral DIF reviewed contain grievance mechanisms. The report indicates no standard model of mechanism, with some being internal to the financing institution and others being independent.

III. INTERNATIONAL TRENDS AND RECOMMENDATIONS

1. Important International Drivers

[31] This report identifies not a uniform trend but important drivers at the international level to foster the implementation of the access to remedy pillar in the UNGP. The general international consensus to improve victims' access to remedy is *inter alia* reflected in the Access to Remedy Project initiated by the Human Rights Council, the EU funded project on Removal of Barriers to Access to Justice, and the recent G20 leaders' declaration of July 2017 announcing their support for access to remedy and non-judicial mechanisms such as the NCP system.

[32] Against this general background, states' approaches to access to remedies are highly diverse both within Switzerland and across Europe and North America. The study shows that the extent to which the examined systems refer to and fulfill the requirements of the UNGP varies substantively and procedurally. As a result, there is not a uniform trend throughout all systems but rather a number of elements which can be identified as potential drivers for future developments of state-based remedy mechanisms:

1. *Existing non-judicial mechanisms* are gaining importance for resolving business-related human rights grievances. In this regard, the number of human rights related cases brought before National Contact Points for the OECD Guidelines on Multinational Enterprises has increased significantly since 2011.
2. *Existing judicial mechanisms* are increasingly used by victims and civil society organisations to test the ground for holding companies accountable, both for their own actions as well as for the actions of their subsidiaries abroad. The resulting questions have so far only been addressed by a few countries, often with differing approaches and often only in specific contexts, such as business operations in conflict-affected areas.
3. None of the legal regimes explored in this study provides a clear answer on the *legal interplay between judicial and non-judicial remedies*. Given the increasing number of non-judicial procedures, there have been very different approaches as to their implications for, or even reliance on, judicial proceedings. In the absence of an international trend, a number of practical questions in this context need to be addressed such as confidentiality or the possibility of waiver or temporary stay of judicial proceedings.

2. Switzerland's position in the international context

2.1. Judicial Remedies

[33] In the area of *Judicial remedies*, the 2016 Report of the OHCHR offers "Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse" (Guidance). The Guidance distinguishes between enforcement of public law offences and private law claims. It provides a framework that allows for contextualizing the access to remedy framework in the two areas.

[34] With regard to *corporate criminal liability*, Swiss criminal law provides for criminal corporate liability, although either restricted to cases where an individual cannot be held responsible due to "organizational failure" (a concept which remains relatively unclear) or limited to specific offences

(mainly bribery-related and financial offences). Therefore, Swiss criminal law will not necessarily include all grave human rights abuses. While the uncertainties and limitations of Swiss corporate criminal law are common features of corporate criminal liability in many jurisdictions, this does not protect it from falling short of features provided for in the OHCHR Guidance (that can be found in some jurisdictions).

[35] Other factors mentioned in the Guidance, such as responsibility for supply chains or group operations, are generally not addressed explicitly in most legal frameworks under review. French law provides an exception to this. Swiss criminal law follows the more common pattern, as, under the current legal framework, there is no primary liability for acts of subsidiaries.

[36] Another feature of criminal liability is the possibility for the *victim to participate in proceedings*. According to the OHCHR Guidance, criminal sanctions should allow for an “effective remedy for the relevant loss” (Policy Objective 11), and the victim should be consulted. There are various international instruments that require considerable protection of the victim’s interests. From a comparative perspective, there are substantially different approaches to offering victims the possibility of taking part in criminal proceedings. From an international comparative viewpoint, Swiss law generally provides a high degree of victims’ participation and protection, though victims’ assistance is limited for foreign victims of criminal acts committed abroad.

[37] For *jurisdiction and applicable law* – a key issue in cross-border cases – there are relatively few differences within the European context. In all jurisdictions under review, there will generally be jurisdiction over parent companies domiciled within a state. This is also the case under Swiss law. It will, however, be more difficult to find jurisdiction over subsidiaries not domiciled within the state. For companies not domiciled within a state, additional fora are (i) the place where a tort was committed (such as, arguably, decisions taken), (ii) a forum resulting from joinder of actions, or, in some jurisdictions (including Switzerland), (iii) a forum of necessity that could be construed to include cases of grave human rights violations. More notably, Switzerland does not have mechanisms that would allow a court to refrain from exercising its jurisdiction (*forum non conveniens*), as common law jurisdictions generally have. As to applicable law, there is a general rule (valid also in Switzerland) dictating the application of the law of the place where the “tortious act” was committed, so the law of the home state of the corporation will generally only apply to acts (including possibly decisions taken) in Switzerland. Many jurisdictions also allow the application of the law of the forum if imperative reasons of public policy (*ordre public*) so require. Swiss law is in line with international trends in this respect, too, although there is considerable uncertainty concerning whether courts would construe the exceptional clauses in this way.

[38] In the field of *corporate and tort law*, it should be noted that the jurisdictions under review generally do not comply with the basic principle of the OHCHR Guidance of establishing clear rules when it comes to liability for acts of subsidiaries in the area of business and human rights. With the exception of recent statutory due diligence obligations introduced in some jurisdictions and often limited to specific issues (conflict minerals, child labour), the cases decided by several courts leave the result of any particular future case uncertain. While the current Swiss legal framework is arguably clear and restrictive, it remains possible (as cases in other jurisdictions have shown) that test cases will be brought before Swiss courts to explore the limits of the current legal framework.

[39] With regard to *burden of proof*, the Guidance refrains from giving precise indications, referring only to the need to strike an appropriate balance. The comparative analysis shows a trend in some jurisdictions such as the Netherlands or France (though not in all), to reverse or slightly adjust the

burden of proof (in favour of the victim) in some relevant liability cases. In Swiss law, there do not currently appear to be similar developments.

[40] The final element addressed in the Guidance is that of the *financial obstacles to private law claims*. According to Policy Objective 15, claimants should have access to diversified sources of litigation funding such as *pro bono* legal services, state funding in cases of hardship, and even collective redress mechanisms and private funding arrangements (including contingency fee arrangements). This is an area where the jurisdictions under review vary considerably. Some provide (mainly) state funding to litigants, others provide for contingency fee arrangements. Swiss law has mechanisms similar to many European jurisdictions but radically different from the ones in the United States. The only common trend in this area is an increasing willingness, also within continental European jurisdictions, to introduce mechanisms of collective redress. The European Union has adopted recommendations in this context. While Swiss law does not seem particularly reluctant, as compared to other jurisdictions, it is not particularly innovative, either. A proposed amendment of the CPC aims to reduce financial obstacles and introduce possibilities for mass claims. This would be in line with the current international trend.

2.2. Non-judicial remedies

[41] In contrast to judicial remedies, the OHCHR has not yet published Guidance on non-judicial remedies but has been mandated by the Human Rights Council to conduct research on the subject. In this context, the OHCHR published a scoping paper in February 2017. It calls for coordinating non-judicial and judicial mechanisms with a view to offering a coherent framework for victims of corporate human rights abuses. The study identifies two key functions of non-judicial remedies: *complaint handling* and (alternative) *dispute resolution*. These key functions are complemented by a set of “other” important functions for providing effective access to remedy, such as preventative work, supervisory functions and regulatory analysis.

[42] Apart from the NCP, there is no state-based non-judicial mechanism in Switzerland specifically designed to address business-related human rights abuses. However, a variety of existing instruments can also be used in this context. Within the access to remedy framework, existing institutionalised non-judicial mechanisms in Switzerland serve different purposes:

- Ombudsperson offices may receive *individual and collective complaints* in areas defined by law or non-binding instruments related to existing law. Typically, ombudspersons in Switzerland can issue recommendations but not binding decisions.
- The Swiss NCP receives *complaints* and may offer mediation services. According to its mandate, it cannot provide for compensation.
- A third group of bodies in Switzerland, such as the Federal Commission against Racism, does not receive complaints but offers *consultation services* for victims. In addition, arbitration and conciliation bodies may receive complaints, offer mediation or arbitration and in some cases provide compensation or reconciliation.

[43] This variety of approaches, both with regard to purposes and institutional models, is not unique to Switzerland but can be found in all the reviewed jurisdictions. It raises questions about the coordination among the different mechanisms with regard to their functions and their integration into the broader legal system.

[44] Several states have launched initiatives in the context of their National Action Plans on Business and Human Rights (NAP) for better coordinating and/or enhancing access to non-judicial remedies. The jurisdictions reviewed for this study, pursue different approaches in this regard with many focusing on the key role of the NCP in providing a remedy mechanism and others emphasizing the NHRI's mandate as a coordinating or even monitoring body.

[45] In line with other countries, the Swiss NAP mentions the key role of the NCP as a forum for mediation and the settling of disputes. With the proposal to examine the potential of representations abroad to serve as an easily accessible forum for supporting the settlement of disputes, the Swiss NAP could – depending on the outcome – cover new grounds. Unlike other countries, the Swiss NAP does not mention existing non-judicial mechanisms which are not specifically designed for addressing business-related human rights issues but could nevertheless be used for this purpose.

[46] Overall, with its current landscape of state-based non-judicial mechanisms Switzerland positions itself somewhat in the middle of the countries reviewed for this study, thus it is neither at the forefront nor lagging behind. This being said, distinctions may be made: With the NCP playing a very important and recognized role for settling and mediating disputes – and thereby being rather at the forefront than in the middle – the lack of available remedy or compensation measures has not yet received the same level of attention as in other countries or the OHCHR. Finally, like other countries, Switzerland has other less specific mechanisms which may be used for business-related human rights disputes.

3. Recommendations

3.1. Need for Conceptualization

[47] The access to remedies system is currently highly under-conceptualized in Switzerland. This is not only true for Switzerland but as confirmed by the OHCHR's recent studies for other (compared) countries alike. While there are numerous state and non-state based non-judicial mechanisms for access to remedies in Switzerland, there is limited awareness of what these institutions do and how – if at all – they work together, e.g. how the results of non-judicial mechanisms play into judicial mechanisms. The link between non-judicial and judicial mechanisms needs to be clarified conceptually in order to avoid operational difficulties.

[48] The theory behind non-judicial access to remedy mechanisms should be investigated in order to set a foundation for a more unified approach to addressing human rights violations outside the courts. While the practical benefits of fostering non-judicial resolution of disputes are clear, the theoretical underpinnings of these mechanisms are not. Clarity would shed light on the extent to which these mechanisms do indeed foster more complete enjoyment of human rights by disadvantaged individuals.

3.2. Policy Recommendations

[49] Before taking any further steps, a *political decision* needs to be taken on how Switzerland wants to position itself in the context of the described recent international developments and emerging trends. The current lack of clarity has different consequences: Open or unclear procedural or substantive provisions may incentivize the filing of pilot proceedings to test the

system and trigger an interpretation by a court or the respective non-judicial mechanism. Such proceedings have been launched or are currently ongoing in several countries.

[50] From a legal perspective, Switzerland has three basic options, all of which come with advantages and disadvantages:

- a) *Scenario (1)*: In a first scenario, Switzerland could opt for not taking any additional measures but *wait and see* how the identified trends and international developments manifest themselves and what their impact on Switzerland and Swiss companies will be. Overall, scenario (1) would be a *re-active* concept, rather than a pro-active or active approach as described in scenarios (2) and (3).
- b) *Scenario (2)*: In contrast to scenario (1), Switzerland could opt for being *at the forefront* by developing a comprehensive access to remedy framework, including both judicial and non-judicial remedies. With such a *pro-active* approach, Switzerland would be among the pioneers should it opt for not only clarifying existing regulatory uncertainties but also for completing the existing fragmented access to remedy framework with the addition of an overarching concept and the missing elements for effective compensation and remedy.
- c) *Scenario (3)*: The third scenario which Switzerland may opt for is somewhere in the middle between scenarios (1) and (2) and can be described as an *active* approach. It would entail clarifying existing uncertainties and gaps to the extent that international developments and trends can be identified. It would be a dynamic, progressive approach by attempting to be in sync with international developments.

[51] Whether Switzerland opts for scenario (1), (2) or (3) is not, primarily, a legal issue but rather a political decision. This report presents the following recommendations for addressing some of the key issues identified in this study to improve access to remedy, their implications depending on the political scenario chosen by Switzerland:

- (1) The first suggestion is that Switzerland *increase the visibility* of its access to remedies mechanisms. Such a measure could be envisaged under all three scenarios.
- (2) Except for scenario (1), a broadly inclusive *multi-stakeholder dialogue* which includes not only representatives of business, government and civil society but also of existing remedy mechanisms, such as members of the judiciary, attorneys, the NCP, ombudspersons, could represent a good initial step towards obtaining a clearer picture of perceived obstacles for an effective and adequate access to remedy in line with the UNGP. Under scenario (2), it could serve as a basis for achieving agreement on potential next steps for complementing existing judicial and non-judicial remedy mechanisms with a view to implementing the third pillar of the UNGP. In scenario (3), such a dialogue could help identify relevant international developments and explore options for their implementation in Switzerland (binding, non-binding etc.).
- (3) With a view to coherence in the area of state-based non-judicial mechanisms, it would help to *unify or align the procedures of the state-based non-judicial mechanisms* more than they are currently. Under scenario (1) this recommendation would not go beyond the mapping of existing mechanisms as outlined in this study. In scenario (3), the mapping would first be complemented by a categorisation according to the criteria developed by the OHCHR. The next step in this scenario (3) would then be an analysis of whether international trends and developments call for adaptations. In scenario (2), the results of the mapping, the categorization and the analysis of the OHCHR's findings on international developments will

serve as a basis for the development of a comprehensive framework for access to non-judicial remedies in Switzerland.

- (4) An alternative to establishing harmonized rules for the different non-judicial remedies would be to have a “one-stop shop” for complaints, from which the complainant would be directed to the most effective mechanism for the particular case. Under scenario (3), implementing this recommendation would entail providing a portal for accessing existing mechanisms. In line with international developments, such a guiding – not a monitoring – function could, for example, be part of the mandate of a Swiss NHRI. In scenario (2), Switzerland could consider creating a new body or vesting an existing institution with the coordination of existing procedures. From a legal perspective, the key concern that existing mechanisms are not always visible for victims would be addressed with the introduction of a guidance system.
- (5) Institutionally, the comparative analysis in this study shows that *National Human Rights Institutions* and *National Contact Points* are obvious potential platforms for improving access to remedy. At this stage, NHRIs are not commonly vested with a mandate to investigate business related human rights disputes. Strengthening the institutional framework for access to remedy in Switzerland could, under scenario (2), include entrusting a future Swiss National Human Rights Institution based on the Paris Principles with a mandate to provide human rights remediation and thereby go beyond what can currently be considered an international trend. Under scenario (3), Switzerland could consider strengthening its NCP by attributing additional staff positions and further clarifying the roles of the different actors (e.g. advisory council). This would permit the NCP to play a more active role, particularly with regard to promoting the OECD guidelines and thereby also the UNGP, and increase its visibility and transparency.
- (6) For judicial remedies, scenario (1) would leave it to the courts to clarify the criminal liability of Swiss-domiciled corporations with regard to their actions abroad and, to plaintiffs to explore how far courts are willing to go when assessing civil liability of corporations, especially with regard to the burden of proof. Under scenario (3), legislative intervention could clarify the notion of organizational failure in corporate criminal liability, potentially inspired by examples in Canada or the Netherlands. In addition, as intended by the recently proposed amendments to the CPC, Switzerland might introduce mechanisms of collective redress as other European jurisdictions have done. Such mechanisms could be generally applicable or specifically address victims of corporate human rights abuses.

Under scenario (2), an essential measure would consist in introducing clear obligations for corporations to monitor and mitigate the potential adverse human rights impact of their activities (including through subsidiaries) abroad (human rights due diligence). Corresponding tort provisions should make it clear that proof of appropriate human rights due diligence would lead to exoneration from liability. The French legislation adopted in 2017 would provide an example for such a measure. A more limited approach (though rather atypical for the Swiss regulatory tradition) would consist in adopting legislation only with regard to a specific issue (e.g. child labour). In addition to the changes in substantive law, scenario (2) might also entail a regulation of litigation funding, given the current limitations on legal aid.

- (7) The Swiss Investment Fund for Emerging Markets (SIFEM) could be encouraged to further explore the potential of establishing or participating in mechanisms allowing victims to

directly raise complaints about client projects by sharing experiences with DFIs that already have such mechanisms. Under scenario (2) SIFEM could explore possible options to participate in the joint grievance mechanism currently established by FMO and DEG within the framework of EDFI association.¹

Finally, with regard to scenarios (2) and (3), it is suggested that the Swiss Export Risk Insurance consider updating its current complaint strategy by taking into account the effectiveness criteria of UNGP 31.

¹ Given the broad membership of EDFI, on the one hand, and the innovative concept of the new joint grievance mechanism, on the other hand, one could argue that Switzerland would position itself somewhere between scenarios (2) and (3).

ACCESS TO REMEDY

Study in fulfilment of Postulate 14.3663

I. CONTEXT, METHOD AND SCOPE

1. Context

[1] This Study has been commissioned by the Federal Department of Foreign Affairs with a view to fulfilling Postulate 14.3663 of the Foreign Policy Commission of the Council of States. The Postulate asks for an analysis of the judicial and non-judicial measures in other states to facilitate access by victims of human rights violations caused by an enterprise abroad to remedies in the home state of this enterprise.² In addition, the study's insights on judicial and non-judicial remedy mechanisms for human rights violations occurring in a business context may also inform ongoing work in the context of the Swiss National Action Plan (NAP) to implement the UN Guiding Principles on Business and Human Rights (Postulate 12.3503) published in December 2016.

[2] The report presents first existing remedy mechanisms in Switzerland (II), which are available for potential victims of human rights violations in the context of business activities abroad of Swiss companies. In combination with an analysis of measures taken in jurisdictions other than Switzerland with comparable human rights standards (chapters III, IV and V), it will provide proposals for improving access to remedy (VI).

[3] As previously agreed, the report covers Denmark, Germany, the UK, France, the Netherlands, the U.S. and Canada. The literature was reviewed for the period up to 31 December 2016. While some developments beyond that date were included, literature from January 2017 onwards is not comprehensively taken into account.

2. Questions

[4] According to the terms of reference as published in 2015, the purpose of this study is as follows:

- (a) By presenting some exemplary cases, show the importance of access to remedy in the home states of companies for vulnerable groups whose human rights are violated by business activities.
- (b) Identify within present Swiss legislation and policy any existing gaps with regard to access to remedy and to suggest potential measures with which they could be closed (incl. *de lege ferenda*).

² „Der Bundesrat wird beauftragt, in einem Bericht zu analysieren, welche gerichtlichen und nichtgerichtlichen Massnahmen in anderen Staaten umgesetzt werden, um Personen, deren Menschenrechte durch ein Unternehmen in einem Gaststaat verletzt wurden, einen effektiven Zugang zu Wiedergutmachung im Heimatstaat der Unternehmen zu ermöglichen.“

Der Bundesrat wird gebeten, ausgehend von dieser Analyse die Umsetzung allfälliger gerichtlicher und nichtgerichtlicher Massnahmen zu prüfen, welche auch in der Schweiz, dem Heimatstaat der Unternehmen, einen effektiven Zugang zu Wiedergutmachung ermöglichen können.“, Postulat 14.3663.

- (c) Present and compare measures / laws / policies that states currently implement to provide access to remedy for victims of human rights violations in the context of business activities.
- (d) Present an assessment of the of the identified measures / laws / policies efficiency to provide remediation to victims of human rights violations in the context of business activities.
- (e) Evaluate the applicability of measures / laws / policies implemented by other countries in the specific Swiss context.

The political appreciation and the presentation of potential measures for Swiss action will take place at a later stage by the federal administration, and will be reflected within the report of the Federal Council in fulfillment of Postulate 14.3663 *Access to remedy*.

[5] In order to achieve this purpose and as agreed upon by all the parties, the study deals with the following questions.

- (a) Situation in Switzerland
- (b) Overview of *judicial measures* that facilitate the access to remedy for victims of human rights violations caused by companies in countries that have a similar social and economic structure as Switzerland, as well as similar human rights standards. These should cover in particular the following issues:
 - (i) Are there possibilities of enabling/facilitating prosecutions?
 - (ii) What are the territorial limits of punishability?
 - (iii) Punishability of companies
 - (iv) Victims' rights in criminal proceedings
 - (v) What is the judicial situation with regard to enabling/facilitating civil remediation?
 - (vi) Jurisdictional issues (general principles, "extraterritorial" jurisdiction, *forum non conveniens*, *forum necessitatis*)
 - (vii) Applicable law (human rights as *lois d'application immediate*, positive and negative *ordre public*)
 - (viii) Accountability with regard to liability law in the context of multinational companies (responsibility for activities of a subsidiary company or affiliated company?)
 - (ix) Other substantive obstacles for law enforcement (for example limitation of actions)
 - (x) Reduction of procedural obstacles for law enforcement (cost issues, advance, burden of proof)
 - (xi) Specific norms for collective redress (participation of NGOs and "collective redress" to "class actions")
- (c) Overview of existing *non-judicial* measures that facilitate an effective access to remedy for the victims of human rights violations caused by companies, in states that have a similar social and economic structure as Switzerland, as well as similar human rights standards. Special attention should be paid to neighboring countries, important trading partners of Switzerland, and developments at the international level (NCP, other approaches and mechanisms, truth commissions, ombudsmen, voluntary measures, Ethik-Charta etc.). Where available/relevant case studies are to be included.

- (d) For both judicial and non-juridical remedies, assess the possibility to implement them in Switzerland.
- (e) Show how the different measures (judicial/non-judicial, state/non-state) *go together*, and how they can be balanced.
- (f) Present *international trends*: What efforts and developments are taking place in order to improve the access to remedy for victims of human rights violations in the context of business activities in general.
- (g) A summary of *recommended measures*, possibly referring to their potential application in Swiss law.

[6] In addition, in preliminary discussions, the parties agreed upon the following aspects :

- (a) For both judicial and non-judicial remedies, an assessment of the efficiency of the measures was excluded.
- (b) The analysis of judicial remedies was limited according to the following indications, given the broad scope of the questions:
 - (i) For the criminal law aspects, the territorial limits to jurisdiction, punishability of corporations and victims' rights were identified as primary issues. The analysis was limited, in some jurisdictions, to relevant crimes only.
 - (ii) The corporate and tort law questions focus on the liability of the corporations and its directors for activities abroad, including of subsidiaries.
 - (iii) The civil procedure part will deal with the possibility of including associations in proceedings, and class actions.
 - (iv) Aspects relating to facilitating (criminal or civil) proceedings will only be included as far as they were adopted specifically in the context of business and human rights, as a genera presentation would imply a complete presentation of the different civil and criminal procedural systems. This includes aspects relating to costs, proof and statute of limitation.
- (c) The part on non-judicial remedies does not cover non-state remedies, but it focuses on OECD National Contact Points, National Human Rights Institutions as well as Ombuds institutions. Non-judicial remedies of international development banks will be briefly discussed for the banks of which Switzerland is a member.
- (d) The study does not deal with issues of prevention.

3. Geographical Scope

[7] The jurisdictions were chosen, as requested, on the basis of their similarity with Switzerland, especially with regard to the social and economic structure and human rights standards. An additional criterion was the inclusion within previous studies. On this basis, it was agreed that the report covers Denmark, Germany, the UK, France, the Netherlands, Canada and the U.S.

4. Method

[8] The study was elaborated by two teams, one at the Swiss Centre of Expertise in Human Rights, which focused on the situation in Switzerland and the state-based, non-judicial remedies, the other at the Swiss Institute of Comparative Law. The analysis is based essentially on desk-research, on the basis of available legal materials and publicly available secondary sources.

[9] The literature was reviewed through 31 December 2016. While some developments beyond that date were included, literature from January 2017 onwards is not comprehensively taken into account.

5. Structure

[10] The report presents first existing remedy mechanisms in Switzerland (II), which are available for potential victims of human rights violations in the context of business activities abroad of Swiss companies. In combination with an analysis of measures taken in other jurisdictions than Switzerland with comparable human rights standards (chapters III, IV and V), it will provide proposals for improving access to remedy (VI).

II. CURRENT SITUATION IN SWITZERLAND

1. Judicial Remedies

1.1. Introduction

[11] The question of judicial mechanisms to remediate business-related human rights violations has not yet been thoroughly discussed in Switzerland. Relevant court decisions are rare³ and the academic debate on the issue is still in its infancy.⁴ The following chapter highlights potential entry points within existing judicial mechanisms for claims relating to companies' involvement in human rights violations and presents different possible procedural avenues. Furthermore, special emphasis is given to the main procedural and practical constraints on effective access to legal remedy in cases where companies domiciled in Switzerland are – directly or indirectly – involved in human rights violations that took place abroad.

³ For civil law claims see BGE 131 III 153 and BGE 132 III 661 (both related to claims against IBM regarding its alleged involvement in the Holocaust) and BGer 4C.379/2006 (22.05.2007). Even though the second case is related to a claim against the state, it contains important procedural deliberations that could potentially be applied by analogy in cases against companies. A criminal law based approach was tried against exponents of Nestlé regarding the alleged involvement of the company in the killing of a former trade unionist in Colombia. In May 2013, the prosecutor's office dismissed the complaint because it was filed after the expiration of the statute of limitations. The appeals against this decision were dismissed by the Swiss Federal Supreme Court (BGer 6B_7/2014 (21.07.2014) and the ECtHR.

⁴ See e.g. SCHWENZER & HOSANG; GEISSER, Ausservertragliche Haftung; KAUFMANN *et al.*, Baseline Study; KAUFMANN *et al.*, Extraterritorialität; KAUFMANN, Konzernverantwortungsinitiative. The results of a two-year project in the European Union to study barriers to access to judicial remedies offer support for the insights contained in the present report. See RUBIO & YIANNIBAS.

1.2. Potential Avenues to Remediation and General Problems

[12] It is crucial to clarify the different constellations of business involvement in human rights violations before analysing potential judicial remedies as the answer to the initial question of this study will differ depending on the context⁵:

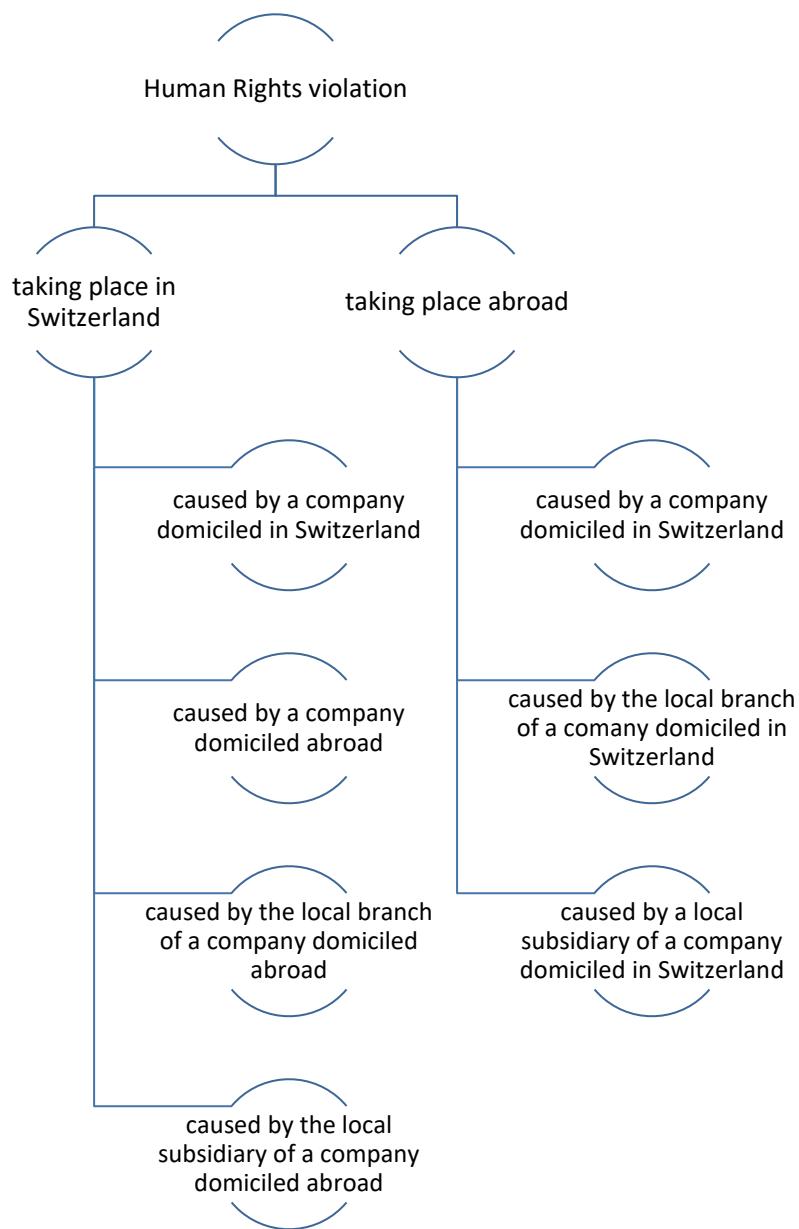


Fig. 1: potential constellations of corporate involvement in human rights violations with a link to Switzerland.

[13] A *first essential preliminary question* refers to the location where the concrete human rights violation takes place, either in Switzerland or abroad.

⁵ See N [18] regarding supply chain responsibilities of corporate actors .

[14] For violations taking place in Switzerland, the procedural access to judicial remedy mechanisms may depend on whether the violation is allegedly caused by a company domiciled in Switzerland, a company domiciled abroad, or the branch or subsidiary of a company domiciled abroad. Generally speaking, no serious procedural difficulties persist in cases where the human rights infringements in Switzerland are attributed to companies domiciled in Switzerland (and local subsidiaries of companies domiciled abroad as long as the claim addresses the local subsidiary). For potential civil law and criminal law based claims, the jurisdictional provisions of Art. 9 *et seq* CPC and Art. 22 *et seq* CrimPC, respectively, are applicable. However, attributing a subsidiary's actions in Switzerland to its parent company abroad may pose procedural and substantive challenges for victims (see below N [16] *et seq*).⁶

[15] A similar distinction applies if human rights violations with a link to Switzerland take place abroad: They may be attributed to a Swiss company, to the local branch of a company domiciled in Switzerland, to a local subsidiary of a company domiciled in Switzerland or to their suppliers.

[16] A *second important preliminary question* relates to corporate law and concerns the relationship between a subsidiary and its parent company and its legal consequences. According to Swiss law, as in other legal systems, the subsidiary has its own legal personality even if the subsidiary is economically dependent and factually bound by instructions in relation to the parent company.⁷ Thus, in principle, a legally independent subsidiary (of a Swiss parent company) which is domiciled abroad is not subject to Swiss law. Accordingly, as a rule, a legal attribution of the subsidiary's action to the parent company is not possible. The same reasoning applies to a foreign parent company of a subsidiary in Switzerland.⁸ In recent years, however, the Swiss Federal Supreme Court has developed two main exceptions to this general rule, establishing certain avenues of liability between parent companies and their subsidiaries ("piercing the corporate veil"):

- *Liability due to a relationship of trust* (*Vertrauenshaftung / responsabilité fondée sur la confiance*): a parent company can be held liable due to the trust created as a group if its conduct may be construed as taking responsibility for its subsidiary.⁹ Jurisprudence particularly refers to cases where the parent company created trust in the subsidiaries' creditworthiness.¹⁰ With regard to human rights violations by subsidiaries, this instrument could be applicable in situations where the parent company publicly affirms the human rights compliant behaviour of its subsidiaries, while having knowledge of violations. According to Art. 154 para 1 PIL, the law of the state according to whose provisions the company concerned was organised, would be applicable in such cases.¹¹
- *Manifest abuse of a right* (Art. 2 para 2 CivC): a parent company's accountability may also be at stake if it incorporates or establishes a subsidiary for the sole purpose of gaining an

⁶ Regarding potential material claims see KAUFMANN *et al.*, Baseline Study, pp. 20 *et seq*; according to Art. 129, para. 1 PIL, and Art. 5 para. 5 LugC, respectively, the access is similarly regulated in civil cases where the human rights violation is caused by a company abroad or the local branch of a company domiciled abroad (for further details see SCHWENZER & HOSANG, pp. 281 *et seq*).

⁷ See e.g. BAUDENBACHER, N 23.

⁸ See SCHWENZER & HOSANG, p. 282; KAUFMANN *et al.*, Baseline Study, p. 53.

⁹ For an overview, see BURG & VON DER CRONE, pp. 417 *et seq*.

¹⁰ See e.g. BGE 120 II 331 E. 5; FORSTMOSER, pp. 720 *et seq*.

¹¹ See e.g BGE 128 III 346 E. 3.1.3; DASSER, Durchgriff, p. 41.

unfair advantage, and as such, merely uses the subsidiary as a pretext to avoid prosecution.¹²

[17] Courts apply both exceptions with caution and interpret them in a restrictive manner. In recent years, potential new avenues of liability between parent companies and their subsidiaries have been discussed in the literature, relying on the functional or personal overlap between the two companies.¹³

[18] Even looser legal ties exist in situations where a supplier of a Swiss company is involved in human rights violations.¹⁴ In such cases, ordinarily, a contractual relationship between the company and its suppliers exists. However, potential victims are not generally party to supplier contracts. The relationship of the company to the affected victims of its supplier's wrongdoing is – if at all – purely factual.¹⁵ Hence, the contracts between a company and its suppliers do not grant legal grounds for direct claims of potential victims. Therefore, irrespective of the question of whether the supplier is domiciled in Switzerland or abroad, according to Swiss law in general, the attribution of the potential wrongdoing of a supplier to the Swiss company is excluded for the same reasons as in the aforementioned cases of subsidiaries (see N [16]). This dichotomy between legal responsibility and factual or perceived control over suppliers along the value chain and the related due diligence is not only being discussed internationally¹⁶ but is also at the heart of the pending "Responsible Business Initiative".¹⁷ It attempts to expand a company's duty of care beyond its contractual relationships to situations of actual control.¹⁸

[19] Current proposed amendments to the CO, such as the suggested new reporting obligations on non-financial matters (social reporting obligations) point in a similar direction¹⁹. However, it is as yet undetermined whether these avenues will gain practical traction in the future.

[20] The *third important preliminary question* regards the legal grounds based on which a human rights-related case against a company could be brought before a court in Switzerland. The protection of human rights is, with few exceptions²⁰, exclusively a duty of the state, Swiss law does not provide for direct, comprehensive human rights obligations of companies. However, as an implementation/application of the state duty to protect, certain statutory connection points exist. They potentially provide for direct corporate liability for business-related human rights violations and infringements. Within the current legal framework in Switzerland, four main avenues could

¹² For a practical example from the banking sector see SFBC-Bulletin 49/2006, pp. 36 *et seq.*; for the area of competition law see DRUEY *et al.*, p. 20.

¹³ With regard to "*de-facto executive body*" and "*double affiliation*" see KAUFMANN *et al.*, Baseline Study, p. 54.

¹⁴ For an overview see KAUFMANN *et al.*, Extraterritorialität, pp. 63 *et seq.* with further references.

¹⁵ Where a contractual agreement between a company and its supplier entails the supplier's binding responsibility to respect clearly defined human rights in its activities, the relationship between the affected victims and the company does not change with regard to the procedural access to remedy. In such cases only the contracting company itself has potential claims against the supplier based on breach of contract.

¹⁶ See below N [157] *et seq.*

¹⁷ BBI 2017 6379; Botschaft des Bundesrates zur Volksinitiative „Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt“, BBI 2017 6335. For an overview of the initiative's objectives GEISSE, Konzernverantwortungsinitiative, pp 945-962; for a critical assessment of the practical legal consequences of the initiative see KAUFMANN, Konzernverantwortungsinitiative.

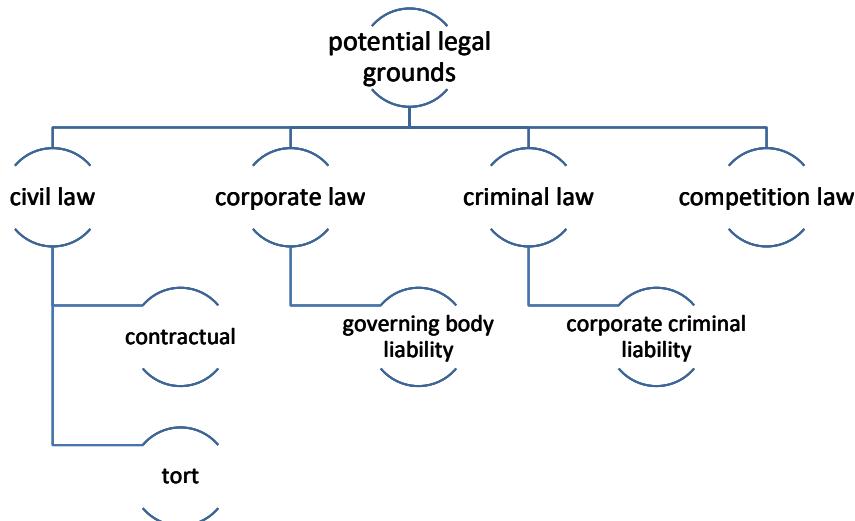
¹⁸ KAUFMANN, Swiss Finish, pp. 968-970; HANDSCHIN, pp. 1000-1003.

¹⁹ For a general overview on these new developments, see WEBER, Unternehmensverantwortlichkeit, pp. 25 *et seq.*

²⁰ The only exception is the discussion on direct horizontal third party effects of human rights; see e.g. AUBERT & MAHON, p. 315 and WALDMANN, N 5 and N 56 *et seq.*

hypothetically be taken by individuals (victims): a) civil law claims, b) corporate law claims, c) criminal law claims and d) competition law claims.²¹

Fig. 2: Potential legal grounds – overview



[21] With regard to civil law claims, two main subtypes can be distinguished: contractual (Art. 97 *et seq.* CO) and non-contractual liability claims (Art. 41 *et seq.* CO). Liability claims based on contractual obligations may play an essential role concerning workplace related human rights infringements (e.g. gross violations of working hours and conditions, discrimination at the workplace, health and safety issues, violations of union rights). Non-contractual claims (torts) could especially be a potential avenue for all non work-related human rights infringements.²² In particular, a company is liable for damages caused by the unlawful behaviour of its governing officers (Art. 55 para. 2 CivC in connection with Art. 41 CO). The term “governing officer” is interpreted very broadly and includes persons, who, *de facto*, make decisions reserved to governing officers, or who are actually responsible for management and decisively influence the formation of the corporate will (so-called *de facto* corporate bodies).²³ A company is also vicariously liable for damages to third parties caused by the unlawful behaviour of its employees and ancillary staff, who may be linked to the company by a subordination relationship such as an employment contract (Art. 55 CO). In contrast to the governing body liability where exculpatory evidence is excluded from the outset,²⁴ the principal can be relieved of its liability if it proves that due diligence was applied or that the damage would have occurred even if due care had been exercised when selecting, instructing or supervising the person who caused the damage.²⁵

[22] Claims based on an *employment contract* can be brought either before the court at the domicile or registered office of the employer or the one where the employee normally carries out his or her work (Art. 34 CPC). Actions in tort (non-contractual claims) on the other hand, can either be brought before the court at the domicile of the aggrieved person or the defendant, or the courts at the place

²¹ For a holistic overview, see KAUFMANN *et al.*, Baseline Study, pp. 20 *et seq.*

²² To be precise, Art. 41 CO does not establish a horizontal direct third party effect of human rights guarantees. Nevertheless, the provision provides access to remedy for specific human rights related damages such as homicide (Art. 45 CO), personal injuries (Art. 46 CO) and the injury of personality rights (Art. 49 CO); see also GEISSER, *Ausservertragliche Haftung*, p. 16.

²³ See e.g. BGE 114 V 218 E. 4e; BGE 117 II 570 E. 3; BGE 81 II 223 E. 1b.

²⁴ See HAUSHEER & AEBI-MÜLLER, p. 331.

²⁵ See BREHM, Art. 55, N. 45.

where the act occurred or had its effects (Art. 36 CPC). Thus, on both grounds, the current legal system provides potential victims with a local jurisdiction at different places.

[23] In *corporate law*, as one concrete application for governing body liability, a joint stock corporation is liable for the unauthorized acts of the board of directors (Art. 722 CO). Members of the board of directors and all persons engaged in the business management or liquidation of the company are liable for any losses or damages arising from any intentional or negligent breach of their duties both to the company and to individual shareholders and creditors (Art. 754 para. 1 CO). There are no specific provisions dealing with the accountability of management to the company for human rights violations caused by corporate activities. However, an implicit human rights accountability of the board of directors may occur in two specific contexts: in cases of violation of general human rights guidelines within a company, or in cases of disregard for reporting obligations.²⁶ While these potential grounds for claims according to Art. 754 para. 1 CO sound promising, it is questionable whether they can be seen as an effective avenue to a functioning access to remedy for victims of business-related human rights violations: Under current law, only the shareholders (and under certain circumstances the creditors) of the company have legal standing in such a procedure and therefore the capacity to bring a claim. Typically, victims will not fall in either of these categories. If a victim has standing or is indirectly supported by a proxy such as a shareholder activism organisation, both the court at the domicile of the director who caused the damage or the court at the registered office of the company has jurisdiction (Art. 40 CPC).

[24] With regard to *criminal law*, Art. 102 para. 1 CC articulates the principle that in the exercise of commercial activities, first and foremost, the natural person who committed the act is responsible for the felony or misdemeanour.²⁷ If, however, the perpetrator cannot be determined, the felony or misdemeanour can be attributed to the undertaking in the second degree.²⁸ A primary criminal liability of undertakings is provided for in Art. 102 para. 2 CC, and relates only to the exhaustive list of offences defined therein.²⁹ Furthermore, Art. 182 CC stipulates that trafficking in human beings is an intrinsically punishable offence, for companies as well as individuals. Thus, the ability to punish a company for this criminal offence subsists directly and not only as liability secondary individual culpability. In addition, the offense of contaminating drinking water under Art. 234 CC applies both to individuals and companies. However, in contrast to the scope of Art. 182 CC, Art. 234 CC applies only to actions committed in Switzerland. A person whose human rights have been infringed by punishable behaviour of a company can report the offence to a criminal justice authority (Art. 15 and 301 CrimPC). In cases where a reasonable suspicion is given that an offence has been committed, an investigation will be launched (see Art. 306 and 309 CrimPC). The place of jurisdiction for criminal proceedings under Art. 102 is the domicile of the company (Art. 36 para. 2 CrimPC).

[25] In the area of competition law, Art. 7 of the Federal Act against Unfair Competition (UCA) may serve as a basis for legal proceedings in case of social dumping. The scope of Art. 7 UCA is however limited to non-compliance with those provisions on working conditions provided for by law,

²⁶ For further details on these possible constellations, see KAUFMANN *et al.*, Baseline Study, pp. 21 *et seq.*

²⁷ In detail see FORSTER.

²⁸ See e.g. STRATENWERTH & WOHLERS, pp. 241 *et seq.*

²⁹ Explicitly mentioned are the participation in a criminal organization (260^{ter} CC), the financing of terrorism (Art. 260^{quinquies} CC), money laundering (Art. 305^{bis} CC), bribery of Swiss public officials (Art. 322^{ter} CC), the granting of advantage to a member of a judicial or other authority (Art. 322^{quinquies} CC) and the bribery of foreign public officials (Art. 322^{septies} CC).

contract or collective work agreements, or those customary in a specific profession or location.³⁰ Furthermore, the non-compliance with working conditions must serve an economic purpose and have a noticeable effect on market conditions. As a result, the UCA could provide an entry point for legal redress in cases of work-related human rights violations, including asserting the prohibition, elimination or detection of the violation as well as compensation for the damages incurred.³¹ Still, Art. 9 UCA limits standing to persons whose economic interests are threatened or violated by behaviour qualified as unfair under the UCA. Under certain circumstances, customers (Art. 10 para. 1 UCA), trade associations and consumer protection organisations (Art. 10 para. 2 UCA) or the Swiss government (Art. 10 para. 3 UCA) may file an action.³² Only rarely will the victim of a human rights violation fit in one of these categories. It is however conceivable that, for example, a consumer protection organisation would act as a proxy for victims and take legal action in its own name.

[26] Already this short overview on potential substantive grounds demonstrates the complexity of accomplishing access to judicial remedies for business-related human rights violations that take place in Switzerland. The most promising avenues to putting into practice the right to remedy seem to be civil law and criminal law claims. In civil law matters, potential victims could bring their cases to the courts in their own name, and in criminal law proceedings, they could participate as a party. With regard to corporate law and competition law claims, only a small number of potential victims will have direct access to courts but rather will depend on proxy agents such as consumer protection or shareholder activism organisations. Therefore, it seems questionable whether existing mechanisms in corporate and competition law can fully implement UNGP 25 and 26 and provide individuals with effective access to *judicial* remedies.

1.3. Procedural Barriers to Accessing Judicial Remedies for Violations Taking Place Abroad

[27] A further essential layer of complexity is added with regard to the remediation of human rights violations that take place *abroad* but with a link to Swiss companies.³³ To clarify the potential access to judicial mechanisms in such cases, the question whether Swiss courts have jurisdiction at all must be answered. Once their jurisdiction has been established, the question of the applicable substantive law arises. In the following, these matters will be analysed only with regard to the two most promising avenues, namely transnational civil law claims and transnational criminal law claims.

1.3.1. Procedural Aspects of Transnational Civil Law Claims

[28] Regarding the question whether a Swiss court has jurisdiction over civil law claims related to a corporate involvement in human rights violations or infringements abroad, two main sets of regulations must be taken into consideration: the *Federal Act on Private International Law* (PIL) of

³⁰ See JUNG, pp. 832-3 *et seq.*

³¹ See WEBER & WEBER, p. 907.

³² For disputes under the UCA, the Cantons designate the court that has jurisdiction as sole cantonal instance, as long as the amount in dispute does not exceed 30'000 Swiss Francs or the Swiss government files the action (Art. 5 para. 1 lit. d CPC).

³³ For a general overview regarding the legal consequences of extraterritorial constellations, see KAUFMANN *et al.*, Extraterritorialität.

18 December 1987 (Swiss statutory law) and the *Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* (LugC) of 30 October 2007. International treaties, including the LugC, take precedence over national law. This is also expressed in Art. 1 para. 2 PIL. Even though the list of signatory states of the LugC is limited to the member states of the EU, Switzerland, Norway and Iceland, the territorial scope of the convention is not necessarily limited to cases arising in these countries. The LugC is also applicable when only the defendant is domiciled in a member state of the convention.³⁴

[29] As a general rule, Art. 2 para. 1 LugC provides that persons domiciled in a member state shall be sued in the courts of that state regardless of their nationality.

[30] For *employment contract related matters*, in addition to the general jurisdiction rule of Art. 2 para. 1 LugC, Art. 18 *et seq* LugC are applicable for defining the possible jurisdiction of Swiss courts. According to Art. 19 para. 1 LugC, an employer domiciled in a state bound by the convention may *inter alia* be sued in the courts of the state where he or she is domiciled.³⁵ Therefore, in all cases where the employer is domiciled in Switzerland, the jurisdiction of Swiss courts is established, regardless of where the employee works.³⁶ The PIL contains mandatory provisions for determining the applicable substantive law once the jurisdiction of a Swiss court has been established: In general, contracts are governed by the law chosen by the parties (Art. 116 para. 1 PIL). In the absence of a choice of law, the law of the state that is most closely connected applies (Art. 117 para. 1 PIL). For employment contracts, Art. 121 para. 1 PIL specifies that the law of the state in which the employee habitually performs his or her work is applicable. Thus, in cases where employment related human rights violations take place abroad, in general, Swiss law would only be applicable if the respective foreign law provisions collide with the Swiss *ordre public* (Art. 17 PIL).³⁷

[31] For non-contractual civil law claims, Art. 5 para. 3 LugC states that a company domiciled in Switzerland can be sued in a member state in matters relating to tort (additional to the general jurisdiction rule of Art. 2 LugC) "at the place where the harmful event occurred or may occur". This notion has been interpreted by the European Court of Justice and the Swiss Federal Supreme Court to include both the place where the event giving rise to the harm occurred ("Handlungsort") or the place where the harm arose ("Erfolgsort").³⁸ In addition, regarding civil claims for damages or restitution that are based on an act giving rise to criminal proceedings, jurisdiction is provided to the court seized for those proceedings – to the extent that that court has jurisdiction under its own law to entertain civil proceedings (Art. 5 para. 4 LugC).³⁹ For defendants not domiciled in a LugC signatory state, the PIL is applicable. According to Art. 129 PIL, Swiss courts at the place of establishment of the defendant also have jurisdiction to entertain actions based on tort resulting

³⁴ BGE 135 III 185 E. 3.3 regarding the territorial scope of the LugC.

³⁵ The question of where a company is domiciled is interpreted autonomously in Art. 60 LugC: For the purposes of the LugC, a company is domiciled at the place where it has its (a) statutory seat, or (b) central administration, or (c) principle place of business.

³⁶ Regarding the determination of the competent court see Art. 34 CPC.

³⁷ See e.g. BGE 119 II 264 E. 3b and BGE 132 III 389 E. 3. Related to a critical assessment of the non-application of Art. 17 PIL in BGE 132 III 661 see SCHMIDT, pp. 764 *et seq*; with regard to the imminent risk of „legal colonialism“ of a broad application of Art. 17 PIL in human rights related cases see SCHWENZER & HOSANG, pp. 289 *et seq*. Swiss law could also be applicable according to Art. 121 PIL in cases, where an employee – who habitually works in Switzerland – becomes a victim of human rights violations in the course of short "field missions" abroad.

³⁸ See ECJ, 1 March 2005, Andrew Owusu, ECLI:EU:C:2005:120, para. 24 *et seq*; BGE 125 III 346, 348.

³⁹ See SCHWENZER & HOSANG, pp. 284 *et seq*; GEISSER, Ausservertragliche Haftung, p. 229.

from activities of the establishment. Furthermore, Art. 129 PIL provides for the same grounds of jurisdiction as Art. 5 para. 3 LugC. Regarding the applicable substantive law, parties may, at any time after the damage occurred, agree to apply the law of the forum (Art. 132 PIL). If there is no (retrospective) choice of law by the parties, Art. 133 para. 2 PIL regulates the question as follows: When the tortfeasor and the injured party do not have a habitual residence in the same state, tort claims are governed by the law of the state in which the tort was committed. However, if the result occurred in another state, the law of the latter state applies if the tortfeasor should have foreseen that the result would occur there.

[32] Applied to the initial question of this study it can be said that the jurisdiction of Swiss courts in civil law matters is regularly recognised for those cases involving companies domiciled in Switzerland concerning human rights violations abroad. Whether the company's involvement is direct or indirect via their foreign branches is irrelevant. Generally, foreign law will be applicable in those cases. Exceptions to this rule may apply if contractual claims are combined with a choice of Swiss law or where collisions with the essence of the Swiss *ordre public* arise.

[33] A potential jurisdictional lacuna may occur when the foreign subsidiary of a company domiciled in Switzerland is involved in human rights violations abroad. As mentioned above (para. [16]), the legal independence of a Swiss parent company from its (foreign) subsidiary is assumed. Therefore, the establishment of jurisdiction of a Swiss court over the case seems impossible except if a duty exists. In this context, it is thus important to know at which stage of the proceedings a court checks whether one of the exemptions to the strict legal separation between a parent company and its subsidiaries applies (as mentioned above para. [16]). So far, there is very limited case law on this issue yet a promising avenue may be seen in the German theory of so called *twofold relevant facts* ("Theorie der doppelrelevanten Tatsachen"). This theory was applied by the Swiss Federal Supreme Court in its decision regarding a lawsuit against the European branch of IBM, which has its headquarters in the U.S., for IBM's alleged involvement in human rights violations against Gypsies (Travellers) during World War II.⁴⁰ In its decision, the court held that according to this theory, contested substantive facts of a case that are essential for the question of jurisdiction and the question of the applicable law may provisionally be assessed in order for the court to be able to decide on its jurisdiction. However, the court also stated that such a preliminary assessment would not preclude the findings on the merits but only express the court's view, that the case warranted further examination and was not manifestly ill-founded.⁴¹ Therefore, jurisdiction of a Swiss court could potentially be established in cases where the exceptions to the strict legal distinction of subsidiary and parent company play a role.⁴² Furthermore, a case of subsidiary jurisdiction in Switzerland for the behaviour of a foreign subsidiary could be established for cases where the criteria of a *forum necessitatis* according to Art. 3 PIL are fulfilled.⁴³

⁴⁰ BGE 131 III 153.

⁴¹ See also SCHWANDER, pp. 524 *et seq.*

⁴² See e.g. GEISSE, Ausservertragliche Haftung, pp. 350 *et seq.* and with regard to handling this question in cases where the LugC could be applicable see DASSER, Handkommentar LugÜ, N 4; WEBER & BAISCH, pp. 690 *et seq.*

⁴³ Cumulatively, the following three conditions must be fulfilled: a) PIL does not provide for jurisdiction in Switzerland, b) proceedings in a foreign country are impossible or cannot reasonably be required and c) the case has a sufficient connection to Switzerland; see also SCHWENZER & HOSANG, pp. 285 *et seq.*; BGER 4C.379/2006 (22.05.2007), E. 3.3 *et seq.*

1.3.2. Procedural Aspects of Transnational Criminal Law Claims

[34] The principles regarding the jurisdictional reach of the Swiss Criminal Code (CC) are defined in Art. 3 – 8 CC. As a general rule, the main criterion for establishing Swiss criminal jurisdiction is the place where the crime was committed. Art. 8 para. 1 CC provides that a felony or misdemeanour is deemed to have been committed at the place a) where the perpetrator commits it, b) where he or she unlawfully omits to act, or c) where the offence has taken effect. Whether victims of human rights violations taking place abroad can turn to Swiss courts to hold companies domiciled in Switzerland accountable based on Art. 102 CC depends on the interpretation of Art. 8 in connection with Art. 102 CC. One view states that Art. 8 CC relates to the place of commission of the crime itself and not the location of the company with inadequate organisation as required by Art. 102 CC. According to this view, Swiss courts would not have jurisdiction in cases where the human rights violation took place abroad. Another view states that in these cases Art. 8 should be interpreted in the light of Art. 102 CC and that it would accordingly be sufficient if the inadequate organisation took place in Switzerland in order to establish jurisdiction of Swiss courts.⁴⁴

[35] Furthermore, Arts. 4 – 7 CC explicitly relate to felonies or misdemeanours committed abroad. For the purposes of this study, Art. 5 (offences against minors abroad), the subsidiary jurisdiction clause concerning offences committed abroad that are prosecuted in terms of an international obligation (Art. 6 CC)⁴⁵ and Art. 7 CC (active and passive personality principles in relation to other offences committed abroad), in particular, may be relevant to establish criminal jurisdiction in Switzerland for business-related human rights violations abroad. Whereas Arts. 5 and 6 CC are limited to specific crimes, Art. 7 CC applies to all felonies and misdemeanours. The active and passive personality principles in Art. 7 CC establishing jurisdiction apply if the following three conditions are met: a) the offence in question may also be prosecuted at the place of commission, b) the perpetrator is in Switzerland and c) under Swiss law, extradition is permitted for the offence concerned. The first condition raises particular questions in the context of this study since the obligation to sanction refers not only to the crime itself but also to establishing a concept of corporate criminal liability. Given that the number of countries with corporate criminal liability laws is rather limited,⁴⁶ the requirement in Art. 7 para. 1 lit. a CC may constitute a serious barrier to effective access to remedy in criminal claims related to human rights violations abroad.

[36] The Criminal Code does not answer the question whether Swiss criminal jurisdiction can be established in the area of corporate criminal liability when human rights violations are committed abroad by a foreign subsidiary of a company domiciled in Switzerland. Thus, none of the aforementioned constellations of potential Swiss criminal jurisdiction apply and potential solutions are currently only the subject of academic debates.⁴⁷

⁴⁴ In favour of the first interpretation see DONATSCH, Art. 102 N 3. In favour of the second interpretation see, NIGGLI & GFELLER, , Art. 102 N 430 *et seq.* See also BGer 6B.7/2014 (21.07.2014), E. 3.

⁴⁵ Relevant obligations are i. a. the prosecution of the core crimes stated in the Rome-Statute (genocide, crimes against humanity, war crimes and the crime of aggression), all crimes, that could potentially be committed by companies; see MEYER, p. 59. Moreover, this subsidiary jurisdiction is the only ground for establishing Swiss criminal jurisdiction for crimes of an independent foreign subsidiary.

⁴⁶ Even though there is an “increasing willingness of lawmakers” to introduce systems of corporate criminal liability (see e.g. PIETH & IVORY, p. 626), these developments mainly take place in developed countries; for an overview see e.g. SEDDON, p. 69.

⁴⁷ For an overview on the ongoing academic debate see, NIGGLI & GFELLER, Art. 102 N 423.

1.4. Practical Barriers to Access Judicial Remediation

[37] The commentary to UNGP 26 names several additional, rather practical barriers to effective access to judicial remedies of (foreign) victims of business-related human rights violations taking place abroad: a) costs of bringing claims to a court, b) problems of representation and c) inadequate options for aggregating claims or enabling representative proceedings (class actions).⁴⁸ The existence of these barriers in the Swiss judicial system will be discussed below.

1.4.1. Costs of Bringing Claims to a Court

[38] The costs of bringing a claim to a court in Switzerland may constitute a barrier for effective access to remedy.⁴⁹ This is particularly the case for claims based on civil law: The court may demand that the plaintiff make an advance payment of up to the amount of the expected court costs (Art. 98 CPC). Similarly, the defendant may also be able to request that the plaintiff be required to provide security for defendants' costs [including attorney's fees] (Art. 99 CPC). Such a security can, for instance, be requested if the plaintiff has no residence or registered office in Switzerland (Art. 99 para. 1 lit. a CPC). This will most probably affect victims from abroad who seek to gain access to judicial remedy in Switzerland for business-related human rights violations committed abroad. Thus, the financial entry barrier to proceedings seems quite high. To illustrate the problem, one might think of a tort case in which a potential victim claims damages of 100'000 Swiss Francs against a company domiciled in Switzerland. According to the official court cost calculator of the Canton of Zurich, the regular court costs would be 8'750 Swiss Francs and the party cost [the Swiss term for expenses plus amounts allocable for attorneys' fees] would be 10'900 Swiss Francs.⁵⁰ Consequently, a potential victim from abroad would have to deposit nearly 20'000 Swiss Francs before a court would even start to hear the case, since the payment of the advance and security for party costs is a procedural pre-requisite (Art. 59 para. 2 lit. f CPC). Not included in these costs are the costs of acquiring the evidence that a party requires or for the legal representation of the potential victim from abroad. Furthermore, if the plaintiff loses the case, he would have to bear all court and party costs (106 CPC). The party costs in proceedings against corporations in particular can be very high.⁵¹ Finally, in addition, the Federal Act on Assistance to Victims of Crime only provides assistance to victims based in Switzerland (Art. 17 para. 1 lit. a).⁵² A recently proposed

⁴⁸ For the practical barriers to the right of access to remedy see ZERK, pp. 79 *et seq.* and SKINNER *et al.*, pp. 47 *et seq.* The commentary to UNGP 26 further mentions the state prosecutors' lack of adequate resources, expertise and support to meet the State's own obligations to investigate individual and business involvement in human rights related crimes as a practical barrier to the right to effective access to remedy. With regard to the judicial system in Switzerland, these limiting factors do not seem to play a relevant role. UNGP commentary, p. 8.

⁴⁹ According to Art. 301 para. 1 CrimPC, any person is entitled to report an offence to a criminal justice authority in writing or orally. Moreover, a person who has suffered either loss or injury has procedural rights in the proceedings. Reporting a crime does not create any financial obligations at all.

⁵⁰ The results are based on the official court cost calculator available at: http://www.gerichte-zh.ch/fileadmin/user_upload/Dokumente/Themen/Allgemeine_Dokumente/Prozesskosten/P_Gebuehrenrechner_V.pdf (accessed on 12.03.16).

⁵¹ Regarding the question whether the risk of costs in civil proceedings can be seen as a barrier to the access to courts see MEIER & SCHINDLER, pp. 29 *et seq.*

⁵² SR 312.5.

amendment to the CPC would reduce this burden by limiting it to 50% of the expected court costs (draft Art. 98 CPC).⁵³

[39] Art. 29 para. 3 of the Swiss Constitution alleviates some of these impediments by granting every person with insufficient means the right to free legal advice and assistance as well as the right to free legal representation. In order to obtain such legal aid, it is necessary that the case have a prospect of success and that legal representation seems necessary.⁵⁴ The applicant must show that he or she cannot make the required payments for procedural and party costs without using funds needed to cover his or her basic needs (Art. 117 *et seq* CPC).⁵⁵ Nevertheless, if the party that obtained legal aid is unsuccessful in the proceedings, such party is not relieved from paying the party costs of the opposing party (Art. 118 para. 3 in combination with Art. 122 para. 1 lit. d CPC).

1.4.2. Problems of Legal Representation

[40] While it is often argued that the difficulties involved in legal representation are closely linked to its cost,⁵⁶ there is little evidence that this correlation causes substantial problems in Switzerland given that as mentioned above various instruments exist for providing legal aid and representation and for covering the costs of legal representation.

1.4.3. Inadequate Options to Aggregate Claims and for Representative Proceedings (Class Actions)

[41] Art. 89 CPC allows so-called group actions by associations or organisations of regional or national importance to assert a claim in their own name for the infringement of personality rights of their members if their bylaws authorize them to safeguard the interests of certain groups of individuals.⁵⁷ Similar regulations of representative action can be found in Art. 7 GEA as well as other special laws.⁵⁸ The focus of such representative actions is limited in its aims: according to Art. 89 para. 2 CPC, organisations may petition the court to prohibit an imminent violation, to put an end to an ongoing violation or to establish the unlawful character of a violation if the latter continues to have a disturbing effect. However, the currently available representative actions in Switzerland may only result in a court declaration that a specific action is unlawful or that a violation exists. Victims could then use these decisions as declaratory judgments, but would still need to enter individual claims.

[42] Nevertheless, these group actions should not be mistaken for class actions. With class actions, factual issues are clarified uniformly and decisions are binding for all parties that are members of the class as certified by the court; they are especially attractive for claimants since they have the

⁵³ Draft by the Federal Council of 02.03.2018, available at <https://www.bj.admin.ch/dam/data/bj/staat/gesetzgebung/aenderung-zpo/vorentw-d.pdf> (accessed on 30.05.2018).

⁵⁴ For further details see, STEINMANN, N 63 *et seq.*

⁵⁵ Similar regulations apply in cases where a private party files a private law claim base on a criminal offence in criminal proceedings (Art. 136 CrimPC).

⁵⁶ See e.g. SKINNER *et al.*, pp. 6 *et seq.*

⁵⁷ See e.g. Wyss, N 37 *et seq.*; DOMEJ, pp. 421 *et seq.*

⁵⁸ See e.g. Art. 56 Law on Trade Mark Protection (SR 232.11) as well as Art. 10 para. 2 lit. a and b UCA (SR 241) for Professional and Economic Associations or consumer protection organizations of national and regional importance.

effect of a shared burden of costs. Furthermore, they have certain *ex ante* effects on companies in order to avoid future infringements.⁵⁹ Within the Swiss legal system, no procedural instrument similar to class actions (as they are generally known in common law jurisdictions) exists.⁶⁰ Currently under Swiss law, the only chance of several aggrieved parties having the opportunity to jointly file a lawsuit for a positive performance is either to request a voluntary joinder of their cases according to Art. 71 CPC or to combine claims against the same party according to Art. 90 CPC. However, both procedural avenues have certain shortcomings: a voluntary joinder of parties is excluded if the individual cases are subject to different types of procedures (Art. 71 para. 2 CPC). In addition, they are generally quite costly since each of the joint parties may proceed independently of the others. Regarding the objective combination of actions, it remains unclear whether potential victims could assign their individual legal claims to an interest group (e.g. to a NGO) that would be able to assert these claims on their behalf.⁶¹

[43] In 2013, the Federal Council published a report on representative proceedings and discussed advantages and disadvantages of strengthening representative proceedings in the Swiss legal system.⁶² One of the report's main findings is that the existing possibilities are insufficient to tackle mass claims and that there is a need to optimise and strengthen the existing mechanisms.⁶³ Potential countermeasures discussed in the report are new rules regarding costs in collective cases, the expansion of the scope of representative actions by organisations and associations towards integrating the option of individual damage claims, and the introduction of new instruments such as test cases or opt-in class actions.⁶⁴ A recently proposed amendment to the CPC would introduce several of the proposed measures. It would make it possible for organisations to claim for damages in a representative action and introduce the possibility of class conciliation proceedings and agreements (Gruppenvergleich) which a court can declare binding for everyone who is concerned by the violation.⁶⁵

2. Non-judicial Remedies

2.1. Introduction

[44] According to the UN Guiding Principles, states' obligations to provide effective remedies is not limited to judicial remedies but includes appropriate non-judicial grievance mechanisms as part of

⁵⁹ Regarding the potential taming effect of class actions in relation to future infringements by corporate actors, see PERUCCHI, p. 492. The argumentation of the basic function of class actions by the U.S. Supreme Court: "The aggregation of individual claims in the context of a class wide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government" is instructive, see *Deposite Guar. Nat'l Bank v Roper*, 445 U.S. 326, p. 339 (1980).

⁶⁰ See e.g. CORAPI, pp. 193 *et seq.*

⁶¹ See critically DOMEJ, pp. 429 *et seq.*; affirmative Federal Council, Kollektiver Rechtsschutz, p. 16.

⁶² See Federal Council, Kollektiver Rechtsschutz.

⁶³ See Federal Council, Kollektiver Rechtsschutz, pp. 2 *et seq.*

⁶⁴ See Federal Council, Kollektiver Rechtsschutz, pp. 56 *et seq.*; Wyss, N 62 *et seq.*

⁶⁵ Federal Council, Erläuternder Bericht vom 02.03.2018 zur Änderung der Zivilprozessordnung (Verbesserung der Praxistauglichkeit und der Rechtsdurchsetzung), p. 17 and Vorentwurf, Art. 89a and 352a *et seq.*, both available at https://www.bj.admin.ch/bj/de/home/aktuell/news/2018/ref_2018-03-02.html (accessed on 28.05.2018).

a comprehensive state-based system for the remedy of business-related human rights abuse.⁶⁶ In addition, states should consider ways to facilitate access to effective non state-based grievance mechanisms.⁶⁷ In the following section, an overview of state-based, non-judicial remedy mechanisms in Switzerland and their potential role in addressing business-related human rights violations will be given.

2.2. National Contact Point in Switzerland

[45] As a member state of the OECD, Switzerland is bound by the OECD Guidelines for Multinational Enterprises. The Guidelines require states to establish a specific body, the National Contact Point (NCP). Apart from promotional activities to further the effectiveness of the Guidelines, the NCP serves as a forum for the settlement of disputes (referred to as “instances” in the Guidelines). In this role, NCP should contribute in an impartial, predictable and fair manner to the resolution of issues that arise from the alleged non-observance of the Guidelines in specific instances by companies.⁶⁸ When fulfilling their tasks, NCP must comply with the four key criteria of visibility, accessibility, transparency and accountability to further the objective of functional equivalence.⁶⁹

[46] Adhering governments have considerable discretion when it comes to the organization of their NCP.⁷⁰ According to the Guidelines, they should provide their NCP with sufficient human and financial resources that they can effectively fulfil their responsibilities.⁷¹ In Switzerland, the NCP is part of the International Investment and Multinational Enterprises Unit of the Foreign Economic Affairs Directorate, located in the State Secretariat for Economic Affairs (SECO) within the Federal Department of Economic Affairs, Education and Research (EAER).⁷² Whenever a specific instance is raised with the Swiss NCP, an internal *ad hoc* working group is formed in order to support the NCP in addressing the issue. The composition of the *ad hoc* working group depends on the issue at stake. It may include representatives from other relevant government agencies who can contribute their expertise in a specific matter.⁷³ The Secretariat of the Swiss NCP has one full time

⁶⁶ UNGP 27; UNGP commentary, p. 30.

⁶⁷ UNGP 28, UNGP commentary, p. 31.

⁶⁸ OECD, Guidelines 2011, p. 68, I.1.

⁶⁹ OECD, Guidelines 2011, p. 71, I.

⁷⁰ OECD, Guidelines 2011, p. 72, A. 2; OECD, Annual Report 2016, p. 39 f.; OECD Annual Report 2015, pp. 39 *et seq.* Six different forms of organisation exist: (1) Monoagency: The NCP is composed of one or more representatives of a single Ministry. (2) The Monoagency ‘plus’: The NCP secretariat is located in one Ministry but other Ministries or stakeholders are involved in the work of the NCP on an advisory basis. The U.S. NCP has the monoagency plus structure. (3) Interagency: The NCP is composed of representatives of two or more Ministries. NCPs with an interagency structure include e.g. Canada, Germany, Switzerland and the UK; (4) Tripartite: The NCP is composed of representatives of one or more Ministries, business associations, and trade unions. An example is the French NCP; (5) Quadripartite: The NCP is composed of representatives of one or more Ministries, business associations, trade unions, and NGOs. Examples are Finland and the Czech Republic; (6) Independent Agency: The NCP is generally composed of independent experts connected to a Ministry and usually benefiting from Secretariat staff within the Ministry. Denmark, Norway and the Netherlands follow this model.

⁷¹ OECD, Guidelines 2011, p. 68, I. 4.

⁷² See SECO, Procedural Rules NCP 2014, p. 2.

⁷³ See SECO, Procedural Rules NCP 2014, p. 2: “e.g. SECO/Labour Directorate for issues relating to international labour, FDFA/Human Security Section for issues relating to human rights, FDF/SIF for tax-related issues, FDFA/Directorate of Political Affairs, Sectoral Foreign Policies Division for corruption, environment and tax issues, FDFA/Swiss Agency for Development and Co-operation for development-related issues”.

and two part-time staff members. A fourth person may contribute to the handling of specific instances in times of high workload. The NCP receives an annual budget specifically allocated to it.⁷⁴

[47] The Swiss NCP is supported by an advisory body consisting of 14 representatives from different stakeholder groups, i.e. academia, NGOs, workers, employers and business associations.⁷⁵ It was created to advise and assist the NCP on its strategic orientation as well as on the application of the Guidelines and its procedural guidelines. The advisory body is not directly involved in handling specific instances and does in principle not function as an oversight body. Some activities of the Advisory Board may, however, have characteristics of the functions of an oversight body.⁷⁶

[48] The manner by which NCP assess specific instances is as different and varied as their structures and composition. When dealing with specific instances NCP have significantly different conceptions of their roles and powers.⁷⁷ The Swiss NCP assumes the role of a mediator, promoting a dialogue between the parties in order to find a solution to the dispute. In cases where mediation fails, the NCP may – but does not have to – issue a statement on whether the company concerned violated the Guidelines.⁷⁸ While this approach has been welcomed by different stakeholders and successfully applied by other NCP, the Swiss NCP has not yet been in a position to issue such a statement.⁷⁹

[49] According to the Guidelines, the assessment of specific instances by NCP is divided into three phases:

- Initial assessment: determines if the issues raised merit further examination.
- Offer of good offices by the NCP: to facilitate access to consensual and non-adversarial means to resolve the issues.
- Conclusion: statements or recommendations.⁸⁰

[50] In addition, if the NCP make recommendations to the parties involved, the NCP may, if appropriate, follow-up with the parties on their response to these recommendations.⁸¹

[51] The Swiss NCP acts in accordance with the procedural rules adopted by the SECO. These rules were significantly altered and drafted in a more transparent manner in 2014.⁸² After receipt of

⁷⁴ See OECD, NCP Peer Reviews: Switzerland, p. 16; OECD, Annual Report Swiss NCP 2016, pp. 7 et seq.

⁷⁵ See Art. 7 of the Ordinance on the Organisation of the National Contact Point for the OECD Guidelines for Multinational Enterprises and its Advisory Board (SR 946.15).

⁷⁶ See SECO, Annual Report NCP 2015, p. 5; OECD, Annual Report Swiss NCP 2016, p. 8: The advisory board was for instance closely involved in the update of the NCP's written procedural guidance and requested specific amendments.

⁷⁷ See KAUFMANN *et al.*, Baseline Study, p. 62; OCHOA SANCHEZ, p. 106 f.

⁷⁸ See SECO, Procedural Rules NCP 2014, p. 2; KAUFMANN *et al.*, Baseline Study, p. 62.

⁷⁹ An overview of all specific instances can be found at the NCP website: <http://tiny.uzh.ch/Gq> (accessed on 15.08.2017).

⁸⁰ OECD Guidelines 2011, pp. 82 et seq, paras. 25-37.

⁸¹ OECD Guidelines 2011, p. 85, para. 36.

⁸² Changes concerned the following: the report on the initial assessment is no longer confidential, but instead must be published on the NCP website; the final statement must include a summary of the reasons why no agreement was reached; the possibility to envisage specific follow-up activities or to provide financial assistance in exceptional cases (e.g. for translation or travelling costs) is explicitly mentioned in the guidelines;

a violation report, the NCP sends a written confirmation of its receipt of the submission and notifies the company concerned within ten working days. The company is then given the opportunity to comment on the submission.⁸³ In its initial assessment, the NCP determines whether the request is admissible and whether the NCP will provide its services. For this purpose, the Swiss NCP ascertains the following: the identity and interests of the complainant, whether it has jurisdiction over the submission, whether the matter falls under the Guidelines' scope of application and was raised in good faith, and whether a violation of the Guidelines is sufficiently substantiated.⁸⁴ Both individuals and interest groups, including non-governmental organisations, may report an alleged violation of the OECD Guidelines by a company to the Swiss NCP. However, in order for the Swiss NCP to exercise its jurisdiction, the company must be domiciled or have its headquarters in Switzerland or the alleged violation of the Guidelines must have occurred in Switzerland.⁸⁵ Furthermore, the NCP has to ensure that an admission of the case would not have any adverse consequences to the parties of possible parallel procedures. Finally, the NCP prepares and publishes a written report on its website, indicating whether it will accept the case, and explaining the bases of its decision. In its decision, the NCP also expressly states that this decision implies neither a conclusive assessment of the issues raised nor a breach of the OECD Guidelines.⁸⁶

[52] If the Swiss NCP concludes that the inquiry does not justify a closer examination, it publishes an explanation and a summary of the main reasons for its negative decision on its website. However, if the NCP accepts the submission, it assists the parties in resolving the questions raised. With the consent of the parties, the NCP may initiate a dispute resolution procedure which it can manage itself or, if the procedure is mediation, it can engage a (external) mediator. The purpose of the procedure is to offer a neutral discussion platform to clarify the various interests of the parties, find common methods of resolution, and reach an agreement between them. The discussions are voluntary, confidential and normally take place at the premises of the NCP in Switzerland. If one party does, or both of them do, not respect the confidentiality requirement, the Swiss NCP reserves the right to stop the proceedings. Financial assistance to the parties involved will only be provided by the NCP in well-founded exceptional cases and in its own discretion.⁸⁷

[53] The result of the dispute resolution procedure is published in a final statement on the website of the Swiss NCP and included in the Annual Report on the OECD Guidelines for Multinational Enterprises published by the OECD. The parties involved in a specific instance may decide which information on the discussions and the agreement should be included in the final statement.⁸⁸ The NCP also publishes the names of the parties involved, unless there is good reason not to do so.

[54] In the event that there is no agreement, or if a party is not willing to participate in the proceedings, the final statement will include a summary of the reasons why no agreement was reached. This final statement will also be published. Moreover, it can include recommendations for the implementation of the Guidelines. A finding as to whether or not the concerned company has

the guidelines foresee the distribution of a feedback-questionnaire to the involved parties in order to assess its work and to receive suggestions for improvement.

⁸³ See SECO, Procedural Rules NCP 2014, p. 3.

⁸⁴ See SECO, Procedural Rules NCP 2014, p. 3.

⁸⁵ <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en> (accessed on 04.03.16).

⁸⁶ See SECO, Procedural Rules NCP 2014, p. 4.

⁸⁷ See SECO, Procedural Rules NCP 2014, pp. 4 *et seq.*

⁸⁸ See SECO, Procedural Rules NCP 2014, pp. 4 *et seq.*; OECD, Guidelines 2011, p. 73, 3 lit. b.

violated the Guidelines can but need not be included. Furthermore, if the parties agree, the Swiss NCP can envisage specific follow-up activities.⁸⁹

[55] On conclusion of the proceedings, the Swiss NCP distributes a feedback-questionnaire to the parties involved in order to assess its work and to receive suggestions for improvement.⁹⁰

[56] Other important developments include the first *peer review* of the Swiss NCP concluded in March 2017, a recently published survey of enterprises in order to assess their awareness of the OECD-Guidelines and the NCP, different *promotional activities* of the Swiss NCP as well as the current *debates on the applicability* of the OECD-Guidelines to entities such as NGOs or international sports organisations.⁹¹

[57] In assessing the policies and practices of the Swiss NCP in the light of the effectiveness criteria of the UNGP (UNGP 31) and the OECD-Guidelines⁹² the following becomes evident: the Swiss NCP has a comprehensive internet page providing information about the Guidelines and the functioning of the NCP. The website is regularly updated and can be consulted in the three official languages of Switzerland (French, German and Italian) as well as in English. This also applies for the procedural guidelines.⁹³ Furthermore, the Swiss NCP may provide financial assistance for translation or travelling costs and is open for general or specific questions and issues.⁹⁴ However, this option has not yet been applied. The Swiss NCP publishes all statements, be it the report on the initial assessment or the final statement and consequently uploads its annual reports on its website. All of this can be rated positively with regard to the core criteria of visibility, accessibility and transparency.⁹⁵ The clear and transparent procedural guidelines add substantially to the predictability of the procedures before the Swiss NCP. The distribution of a flyer to multinational companies and other stakeholders (e.g. Swiss embassies abroad) summarising the OECD Guidelines as well as the functioning of the Swiss NCP and other promotional activities helps to make the Swiss NCP visible for external parties.⁹⁶ The recommendations of the recent peer review for which the Swiss NCP volunteered which focus on further clarifying the roles of the different actors – *ad hoc* working groups and advisory board – together with the feedback-questionnaire could contribute to further improving the NCP's practices and policies.⁹⁷

⁸⁹ See SECO, Procedural Rules NCP 2014, pp. 4 et seq.

⁹⁰ See SECO, Procedural Rules NCP 2014, p. 5.

⁹¹ See OECD, NCP Peer Reviews: Switzerland, pp. 17 et seq; H. Winistorfer et al., Bedeutung und Stellenwert der OECD Leitsätze für multinationale Unternehmen in der Schweiz, available at: https://www.seco.admin.ch/dam/seco/en/dokumente/Aussenwirtschaft/Wirtschaftsbeziehungen/NKP/Studie_Bedeutung_OECD_Leits%C3%A4tze_CH.pdf.download.pdf (accessed on 28.05.2018); SECO, Annual Report 2015/2016, pp. 1 et seq; see OECD, Annual Report Swiss NCP 2016, pp. 15 et seq.

⁹² See OECD, Guidelines 2011, p. 79.

⁹³ OECD, Annual Report Swiss NCP 2016, p. 8.

⁹⁴ See SECO, Procedural Rules NCP 2014, pp. 4 et seq.

⁹⁵ See SECO, Annual Report 2013/2014, p. 2; OECD, Core Template for Voluntary Peer Reviews of NCP, p. 17.

⁹⁶ See OECD, NCP Peer Reviews: Switzerland, pp. 17 et seq; OECD, Core Template for Voluntary Peer Reviews of NCP, p. 17.

⁹⁷ See OECD, NCP Peer Reviews: Switzerland; UNGP 31, lit. g. With the agreement of SECO, the Swiss Agency for Development and Cooperation (SDC) supports the OECD Action Plan to Strengthen National Contact Points through peer reviews and capacity-building activities operationally and financially.

2.3. National Human Rights Institution

[58] The Commentary to the UNGP mentions that National Human Rights Institutions (NHRI) might play a particularly important role for the implementation of the third pillar: NHRI can introduce state-based, non-judicial grievance mechanisms and consider individual complaints in concrete cases of human rights violations, when mandated by law to do so. However, the Commentary also states that NHRI should both comply with the Paris Principles and meet the criteria set out in UNGP 31, in order to guarantee their effectiveness.⁹⁸

[59] Switzerland does not have a national human rights institution, as requested by the Paris Principles.⁹⁹ In 2009 the Swiss Centre of Expertise in Human Rights, a university-network, was launched by the Federal Government as a pilot project for a potential future NHRI. Based on its positive evaluation, in June 2016, the Federal Council decided to establish a NHRI for Switzerland, built on the existing set-up. A consultation draft was submitted in summer 2017. In the draft legislation proposed, no individual complaint mechanism is foreseen for the NHRI.¹⁰⁰ Meanwhile, the mandate of the Swiss Centre of Expertise for Human Rights has been extended until the establishment of a successor institution or for a maximum of five years, *i.e.* until 2020 respectively.¹⁰¹ In sum, Switzerland does not currently provide any form of NHRI with a complaint or consultation mechanism for victims of business-related human rights abuses. Consequently, there is no Swiss NHRI that would fall within the scope of this study.

2.4. Ombudspersons

[60] While the Commentary to the UNGP does not define the notion of ombudsperson,¹⁰² this study follows a broad understanding of an ombudsperson as an “independent and objective investigator of complaints filed by individuals” who reviews the complaint, “determines whether the complaint is justified and makes recommendations [...] to resolve the problem”.¹⁰³ The topic of this study is therefore ombudspersons who fulfil the function of a public or official body¹⁰⁴ and are able to receive complaints concerning matters of individual and/or collective concern.

[61] In Switzerland, there are several relevant public authorities with ombudspersons’ functions. This section briefly introduces their main features with a particular focus on their potential role in disputes regarding business-related human rights abuses in an international context. The scope of this study is limited to ombudspersons at the federal level.

⁹⁸ UNGP commentary, pp. 6 and 30.

⁹⁹ UNGA, Paris Principles 1993.

¹⁰⁰ Draft bill on funding for national human rights institution issued for consultation, published on 28 June 2017, available in German and French at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-67310.html> (accessed on 24.09.2017).

¹⁰¹ Press release by the Federal Council, 29 June 2016, available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-62431.html> (accessed on 15.08.2017).

¹⁰² UNGP commentary, p. 28; for a classical definition of an ombudsperson see Ombudsman Committee, International Bar Association Resolution, Vancouver 1974, as cited in REIF, p. 3.

¹⁰³ FIDH, Guide, p. 432.

¹⁰⁴ For the distinction between public and private ombudsperson see HAAS J., pp. 88 *et seq.*

2.4.1. Ombudsperson Offices Receiving Individual Complaints

[62] Several ombudsperson offices have been established in the context of concessions for public services. This includes first the *Ombudscom*, a conciliation board for telecommunication services established as a private foundation, which was assigned with this task based on Art. 12c of the Telecommunications Act (TCA).¹⁰⁵ It is responsible for disputes between individual customers and providers of telecommunications or value-added services; it can however not issue binding decisions for the parties and does not prevent civil actions in court.¹⁰⁶ Participation in the procedure is mandatory for all providers of telecommunication or value-added services.¹⁰⁷ A similar body with a similar mandate exists for postal services, the *OmbudPostcom*, an institution of the Federal Postal Services Commission.¹⁰⁸

[63] Every customer of a company providing telecommunication, value-added or postal services can submit an application for arbitration either to the *Ombudscom* or to the *OmbudPostcom*. While the rules of procedure of the *OmbudPostcom* explicitly limit its jurisdiction to companies registered in Switzerland (but not to activities in Switzerland),¹⁰⁹ there is no similar restriction for the *Ombudscom*.¹¹⁰ The nature of disputes to be brought to the two ombudsperson offices are not specified. The question thus arises whether customers could ask the two bodies for conciliation in disputes regarding human rights infringements of telecommunication or postal companies. This could concern in particular the right to freedom of expression or privacy rights.¹¹¹

[64] The *Independent Complaints Authority for Radio and Television* (Unabhängige Beschwerdeinstanz für Radio und Fernsehen, ICA) is the federal authority in charge of assessing complaints about radio and television programmes broadcasted in Switzerland. It examines whether programmes of private (or public) broadcasters have violated national or international law or whether there has been an unlawful refusal of the right to appear on a programme.¹¹² According to the Federal Act on Radio and Television (RTVA), “programmes must respect fundamental rights”.¹¹³ The ICA can issue binding decisions, which can be appealed to the Federal Supreme Court;¹¹⁴ thus it does not represent an ombudsperson according to the definition adopted by this study. Nevertheless, it is of relevance because before bringing a complaint to the ICA, it is necessary to address the ombudsperson mechanism in place for each language region within 20

¹⁰⁵ SR 784.10.

¹⁰⁶ Art. 12c para. 3 TCA; Art. 46 para. 1 Ordinance on Telecommunications Services (OTS; SR 784.101.1).

¹⁰⁷ See Art. 47 para. 1 OTS.

¹⁰⁸ See Art. 65-72 Postal Ordinance (SR 783.01). Also the Federal Electricity Commission (EiCom) can be mentioned, which is responsible for the independent national energy regulation. It is not however of particular relevance for the question of access to remedy for individuals, but rather for service providers. Furthermore, several private ombudsperson have been established, for example the Ombudsperson of the Swiss Travel Industry, the Ombudsperson of Private Insurance and of Suva and the Swiss Banking Ombudsperson.

¹⁰⁹ Rules on Procedure of *Ombud-Postcom* (entry into force on 15 October 2013), para. 2, available at: http://www.ombud-postcom.ch/fileadmin/user_upload/dateien/ombud-postcom_verfahrensreglement_de.pdf (accessed on 17.03.16).

¹¹⁰ Rules on Procedure and Fees of *Ombudscom* (entry into force 1 July 2013), Art. 2, available at: <https://de.ombudscom.ch/verfahrens-und-gebuhrenreglement/> (accessed on 17.03.16).

¹¹¹ See for example the TELECOMMUNICATIONS INDUSTRY DIALOGUE, p. 1: “a group of telecommunications operators and vendors who jointly address freedom of expression and privacy rights in the telecommunications sector in the context of the UN Guiding Principles on Business and Human Rights”.

¹¹² Art. 38 para. 2 of the Federal Act on Radio and Television (SR 784.40).

¹¹³ Art. 4 para. 1 RTVA.

¹¹⁴ Art. 99 RTVA.

days after the broadcasting of the programme in question.¹¹⁵ The ombudsperson service is, in principle, free of charge and has no power to issue decisions or directives, but instead mediates between the parties.¹¹⁶ Complaints may only be lodged by persons with Swiss citizenship or with a permanent or temporary residence permit¹¹⁷ against programmes which fall under Swiss jurisdiction according to the European Convention on Transfrontier Television.¹¹⁸ The ICA thus does not provide access to remedy for potential victims of human rights infringements by television and radio companies in an extraterritorial context.

[65] Regarding salary and working conditions, the measures accompanying the Bilateral Agreement on the Free Movement of Persons (FMP) between Switzerland and the European Union oblige the Federal Government as well as the cantons to appoint so-called tripartite commissions. These commissions find their legal basis in Art. 360b of the Code of Obligations (CO).¹¹⁹ They consist of an equal number of employers' and employees' representatives in addition to representatives of the state and they are responsible for the supervision of the labour market.¹²⁰ As such, if the tripartite commission is notified or observes violations of the applicable standards, in particular abusive wage practices,¹²¹ it tries to find a solution with the respective employer. If this is not possible within two months, the commission can petition the competent authority to issue a binding measure. Everybody can notify a tripartite commission of irregularities.¹²² Yet, only disputes to which Swiss labour law is applicable may be brought before the tripartite commission. This excludes most employees of Swiss companies abroad, as the law of the host state will apply to the respective labour contracts.¹²³

[66] Lastly, the International Code of Conduct Association (ICoCA), responsible for the promotion, government and oversight of the implementation of the International Code of Conduct for Private Security Service Providers (ICoC) must be mentioned. Switzerland is one of six countries, which are members to the ICoCA and implemented its obligations by enacting the Federal Act on Private Security Services provided Abroad (PSSA)¹²⁴ as well as the Ordinance on Private Security Services provided Abroad (OPSA).¹²⁵ This legislation requires any company, which intends to provide private security services abroad from Switzerland or any other activity mentioned in Art. 2 para. 1 PSSA to declare specific information to the competent authorities before taking up its activities (Art. 10 PSSA). While the law does not provide for specific judicial remedy mechanisms for victims of human rights violations committed by private security service providers abroad, a non-judicial

¹¹⁵ Art. 91 and 92 RTVA.

¹¹⁶ Art. 93 RTVA.

¹¹⁷ Art. 94 para. 3 RTVA.

¹¹⁸ See Art. 5 para. 3 and 4 of the European Convention on Transfrontier Television (SR 0.784.405); Art. 2 lit. e RTVA.

¹¹⁹ See also Art. 7 para. 1 lit. b of the Federal Act on the accompanying measures for employees seconded to Switzerland from other countries and on the control of minimum salaries in regular working contracts (SR 823.20).

¹²⁰ See TIEFENTHAL, pp. 109 *et seq.*; Art. 10 *et seq.* of the Ordinance on the employees sent to Switzerland (SR 823.201).

¹²¹ See Art. 360a para. 1 CO.

¹²² VISCHER & ALBRECHT, Art. 360b CO, N 5.

¹²³ For the question of which law applies, see N [21] *et seq.*

¹²⁴ SR 935.41.

¹²⁵ SR 935.411.

complaint mechanism has been developed under the auspices of the ICoCA and was adopted in September 2016.¹²⁶

2.4.2. Ombudspersons Receiving Complaints of Collective Nature

[67] Apart from these classical ombudsperson offices, which can receive individual complaints, it appears necessary to briefly present two ombudspersons responsible for matters concerning a large number of people.

[68] In the context of data protection, the *Federal Data Protection and Information Commissioner* (Eidgenössischer Datenschutz- und Öffentlichkeitsbeauftragter, FDPIC) plays an important role. She or he is independent and not subject to directives by the government. The FDPIC is not only responsible for monitoring the compliance of federal public authorities with the Federal Data Protection Act (FADP),¹²⁷ but also for the compliance of private actors. A central aspect of this role is the prevention and remedy of unjustified personality infringements by the private sector.¹²⁸ Consequently, the FDPIC has the competence to investigate cases in detail on his own initiative or at the request of a third party. He or she may, for instance, recommend that a method of data processing be changed or stopped. Although the FDPIC's recommendations are not binding, he or she can refer the matter to the Federal Administrative Court for a decision, if the company does not comply with the recommendations. The FDPIC also has the right to appeal the decision.¹²⁹

[69] While the FDPIC offers advice to the public,¹³⁰ the Federal Data Protection Act does not provide him or her with the right to make recommendations on complaints concerning a specific individual situation.¹³¹ As a result, the FDPIC can only offer access to remedy when private actors' data processing affects privacy rights of a large number of persons. For matters with an international dimension, namely cross-border disclosure of personal data, Art. 6 FADP states that "[p]ersonal data may not be disclosed abroad if the privacy of the data subjects would be seriously endangered thereby, in particular due to the absence of legislation that guarantees adequate protection".¹³² In its explanations to this provision, the Federal Council explicitly mentions information to foreign states about foreigners living in Switzerland, when the respective government does not respect human rights.¹³³ The FDPIC was confronted with such cross-border disclosure of data when several banks transmitted data about their employees to U.S. authorities. In reaction, he issued recommendations, in particular of a procedural nature, for better respecting the privacy rights of the employees concerned.¹³⁴

¹²⁶ The so-called Art. 13 procedure; see <https://icoca.ch/en/complaints> (accessed on 09.04.2017).

¹²⁷ For data processing of cantonal and communal authorities, the communal and cantonal data protection officers are responsible.

¹²⁸ See Art. 12 and 13 of the Federal Act on Data Protection (SR 235.1); Art. 28 *et seq.* CC.

¹²⁹ Art. 29 FADP; see e.g. the decision of the Federal Tribunal on *Google Street View v the Federal Data Protection and Information Commissioner* (BGE 138 II 346).

¹³⁰ See <http://www.edoeb.admin.ch/org/00926/index.html?lang=en> (accessed on 17.03.16).

¹³¹ For an overview of the rights of individual under the FADP see EPINEY *et al.*, pp. 55 *et seq.*

¹³² See also *ibid.*, pp. 33 *et seq.*

¹³³ See Federal Council, Message FADP, p. 451.

¹³⁴ See recommendations of the FDPIC to several banks, issued on 15 October 2012, available at: <http://www.edoeb.admin.ch/datenschutz/00628/00663/index.html?lang=de> (accessed on 17.03.16); for further decisions regarding the data transmission to foreign authorities see BGE 141 III 119 as well as the decision of the Supreme Court of Zurich, LB130059-O/U (28.02.2014).

[70] The federal Price Supervisor (Preisüberwacher) has an important function in the area of access to goods and services provided by the private sector.¹³⁵ He or she is responsible for preventing or eliminating abusive increase or maintenance of prices of goods and services, including credits, caused by the strong market position of the provider.¹³⁶ The mandate does not include measures concerning salaries or other matters of employment relations.¹³⁷ According to Art. 7 of the Price Supervision Act (PSA), individuals can notify the Price Supervisor if they suspect that a price is abusive. When an abuse is detected, he or she tries to find an amicable settlement; if this is not possible he can order a price reduction or refuse the authorisation of an increase.¹³⁸ The Price Supervisor's competence goes thus beyond making recommendations. Moreover, his or her decision can then be appealed to the Swiss Federal Administrative Court and afterwards to the Swiss Federal Supreme Court, but only by directly affected parties or consumer organizations of national or regional significance.¹³⁹

[71] According to the explanations of the Federal Council, the mandate of the Price Supervisor covers companies registered in Switzerland and foreign companies with activities within the country. It does not however include corporate activities outside the territory of Switzerland, even if the company is registered here.¹⁴⁰ Although its practice includes international companies as well, such as DHL,¹⁴¹ it is limited to the Swiss territory. The Price Supervisor does not therefore dispose of any influence on the price policies of Swiss companies abroad, for example pharmaceutical companies playing an important role in the debate on access to medicine.¹⁴²

2.5. Arbitration and Conciliation Bodies

[72] It must be noted that the Civil Procedure Code (CPC) foresees as a rule that “[...]itigation shall be preceded by an attempt at conciliation before a conciliation authority”.¹⁴³ The responsible bodies are established by the cantons, which dispose of organisational autonomy.¹⁴⁴ Presenting the different cantonal arbitration bodies would go beyond the scope of this study; the following section focuses on the federal level, where only one relevant institution in the area of labour rights could be identified.

[73] The Board of Conciliation for the Settlement of Collective Work-Related Disputes (Eidgenössische Einigungsstelle zur Beilegung kollektiver Arbeitsstreitigkeiten) is an *ad hoc* body established by the Federal Department of Economic Affairs, Education and Research in cases of employment related disputes between employer and employee organizations, which concern more

¹³⁵ It should be noted that the Price Supervisor is also competent to supervise public prices, however this falls outside of the scope of this study.

¹³⁶ See the Federal Council, Message PSA, p. 766.

¹³⁷ See Art. 1 PSA (SR 942.20).

¹³⁸ Art. 9 and 10 PSA.

¹³⁹ Art. 20 and 21 PSA.

¹⁴⁰ See Federal Council, Message PSA, p. 782.

¹⁴¹ See the amicable settlement with regard to customs charges between *DHL Express (Schweiz) AG and Price Supervisor*, 01.08.2014, available at: [https://www.preisueberwacher.admin.ch/dam/pue/de/dokumente/er/einvernehmliche_regelungmitderdhlexpressschweizag.pdf](https://www.preisueberwacher.admin.ch/dam/pue/de/dokumente/er/einvernehmliche_regelungmitderdhlexpressschweizag.pdf.download.pdf/einvernehmliche_regelungmitderdhlexpressschweizag.pdf) (accessed on 17.03.16).

¹⁴² See, in this regard, Report of the Special Rapporteur, Physical and Mental Health, pp. 6 *et seq.*

¹⁴³ Art. 197 CPC. Exceptions to this rule are listed in Art. 198 CPC.

¹⁴⁴ HONEGGER, para. 11.

than one Canton.¹⁴⁵ The Conciliation Board becomes active only upon request of one party when all attempts at reconciliation through direct negotiations between the parties have failed and if there is no other conciliation mechanism available according to the applicable collective agreement.¹⁴⁶ Neither the legal basis for the Board nor the corresponding message of the Federal Council mentions collective labour disputes within an international context.¹⁴⁷ Considering the intent and purpose of the law, it seems feasible to conclude that the Board's jurisdiction is limited to disputes where Swiss law is applicable.

[74] Since 2014, disputes regarding redundancy plans, *i.e.* "an agreement in which an employer and employees set out measures to avoid redundancies or to reduce their numbers and mitigate their effects",¹⁴⁸ must be settled in an arbitration mechanism if negotiations fail. The chosen tribunal will then issue a binding decision.¹⁴⁹ This compulsory arbitration mechanism may take place with a private or public arbitration body, according to the parties' agreement. It is, however, linked to the mandatory redundancy scheme. The scheme applies to Swiss employers who normally employ at least 250 employees and intend to make at least 30 employees redundant within 30 days for reasons that have no connection with their persons.¹⁵⁰

2.6. Consultation Bodies

[75] The bodies discussed in this section do not offer a complaint mechanism, but do offer consultation services for victims.¹⁵¹

[76] The Federal Commission against Racism (Eidgenössische Kommission gegen Rassismus, FCR), an extra-parliamentary commission established by the Federal Council in order to implement the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹⁵² offers *inter alia* consultation services for victims of racial discrimination. It decides after a first internal analysis together with the concerned person, whether the case needs to be passed on to a private consultation body or to a cantonal or municipal ombudsperson.¹⁵³

¹⁴⁵ Art. 1 para. 1 of the Federal Act on the Board of Conciliation for the Settlement of Collective Work-Related Disputes (SR 821.42).

¹⁴⁶ Art. 1 para. 3 of the Federal Act on the Board of Conciliation for the Settlement of Collective Work-Related Disputes.

¹⁴⁷ Federal Council, Message Collective Work-Related Disputes.

¹⁴⁸ Art. 335h para. 1 CO.

¹⁴⁹ See Art. 335j CO.

¹⁵⁰ Art. 335i CO.

¹⁵¹ The following bodies, which could be of relevance in the field of business and human rights, offer no form of complaint or consultation for individuals: the Supervisory Commission Professional Pension; the Swiss Financial Market Supervisory Authority (FINMA); the Federal Commission for General Services and Fundamental Issues (Eidgenössische Kommission für allgemeine Leistungen und Grundsatzfragen); the Federal Commission on Vaccination; the Federal Commission on Tobacco Prevention; the Federal Commission on Food Safety; the Expert Commission on Genetic Test with Humans; the Federal Consumer Affairs Commission; the Federal Expert Commission on Biosecurity; the Federal Commission for Air Hygiene.

¹⁵² See the order of appointment of the Federal Commission against Racism, 25. November 2015, available at: http://www.ekr.admin.ch/pdf/Einsetzungsverfugung_EKR_2015.pdf (accessed on 17.03.16).

¹⁵³ See <http://www.ekr.admin.ch/dienstleistungen/d259.html> (accessed on 17.3.16). Such public ombudspersons exist in the cantons Baselland (Basle-Country), Basel-Stadt (Basle-City), Waadt (Vaud), Zug and Zurich as well as in the cities of Bern, Rapperswil-Jona, St. Gallen (St. Gall), Winterthur and Zurich.

[77] Similarly, the Federal Bureau for Equality of People with Disabilities (Eidgenössisches Büro für die Gleichstellung von Menschen mit Behinderungen, FBED) does not offer consultation services for victims of discrimination by private companies, for example in employment relations. Rather it focuses on advising actors who want to promote equality of people with disabilities. Victims of discrimination are referred to the private-led association “Inclusion Handicap”.¹⁵⁴ The body was established based on Art. 19 of the Federal Act on the Elimination of Discrimination against People with Disabilities,¹⁵⁵ must however also be seen as part of the national implementation of the International Convention on the Rights of Persons with Disabilities, which requires states to designate “focal points within government”.¹⁵⁶

[78] Moreover, we should also mention the Federal Act on Gender Equality (GEA),¹⁵⁷ which is dedicated mainly to achieving gender equality at work. It applies to private employment under the Swiss Code of Obligations as well as to public employment.¹⁵⁸ As an example, the regulation of public procurement can be mentioned, according to which only providers guaranteeing equal pay for men and women can be chosen.¹⁵⁹ The GEA established the Federal Office for Gender Equality (Eidgenössisches Büro für die Gleichstellung von Frau und Mann), which is responsible for the promotion of equality of men and women in all areas of life. It does not however look at individual cases, but rather at structural deficiencies within Switzerland.¹⁶⁰

[79] Lastly, the Federal Tripartite Commission for Matters of the ILO is responsible for the promotion of the application of international labour standards. It was established based on the ILO Tripartite Consultation (International Labour Standards) Convention No. 144. The commission has a consultative function and does not consider individual cases.¹⁶¹ A parliamentary motion demanding the extension of the commission’s mandate to bilateral and multilateral agreements with a focus on the social responsibility of businesses, has not been pursued.¹⁶²

2.7. Non-judicial Remedy Mechanisms in Export Finance Institutions and Development Finance Institutions with a Link to Switzerland

2.7.1. General Remarks

[80] Public development finance can take many forms, from direct loans, credit lines to corporations, equity investments, lending through financial intermediaries and provision of insurance. Swiss companies can, through various means, be involved in development-related finance, be it as project developers, syndicate banks, contractors etc. who may or may not benefit from export credit insurance or project-related funding by national, bi- or multilateral development

¹⁵⁴ See <http://www.edi.admin.ch/ebgb/00594/00595/index.html?lang=de> (accessed on 17.3.16).

¹⁵⁵ SR 151.3.

¹⁵⁶ Art. 33 para. 1 of the International Convention on the Rights of Persons with Disabilities (SR 0.109).

¹⁵⁷ GEA (SR 151.1).

¹⁵⁸ Art. 2 GEA.

¹⁵⁹ See Art. 8 para. 1 lit. c of the Federal Act on Government Procurement (SR 172.056.1).

¹⁶⁰ Art. 16 GEA.

¹⁶¹ See the Federal Council, Message ILO, p. 370.

¹⁶² Motion 12.3795.

finance or export credit institutions.¹⁶³ Since many of the projects or corporations funded are located in countries or contexts in which the rule of law and institutional capacity regarding human rights are weak, there is a significant potential for corporate human rights abuses. According to the UNGP states should therefore take additional steps to protect against such abuses by business enterprises that receive substantial support and services from state agencies (e.g. export credit agencies, official investment insurance or guarantee agencies, development agencies, and development finance institutions).¹⁶⁴ In this context, the inclusion of a requirement for human rights due diligence is considered to be an appropriate means (among others).¹⁶⁵ Furthermore, states should encourage multilateral institutions that deal with business-related issues to promote businesses' respect for human rights when acting as members of such institutions.¹⁶⁶

[81] It is important to note that enterprises owned or controlled by the state are also subject to the responsibility to respect human rights in pillar II of the UNGP.¹⁶⁷ Part of this responsibility to respect is the expectation of having legitimate processes in place to enable the remediation of any adverse human rights impacts which business enterprises cause or contribute to.¹⁶⁸ If an enterprise's products or services are directly linked to the adverse impact (only) through a client relationship but the enterprise does not contribute to the impact, it is not expected to provide a remedy but still should seek to prevent and mitigate the adverse impact by using its leverage.¹⁶⁹ It may also take a role in providing (operational-level) remediation.¹⁷⁰ Non-judicial grievance mechanisms for potentially affected people or communities are considered an effective way of enabling remediation if they meet the effectiveness criteria in UNGP 31.¹⁷¹ They may be established alone or in cooperation with other actors.¹⁷² Besides the remediation function, these grievance mechanisms may serve another key function, namely to "support the identification of adverse human rights impacts as part of an enterprise's ongoing human rights due diligence"¹⁷³. They may therefore also be a valuable means for bilateral development finance or export credit institutions whose products and services might be qualified as being directly linked only to adverse impacts (depending on the circumstances, policies and practices in place) in meeting their responsibility to respect human rights.

[82] Some National Action Plans (NAP) on business and human rights have taken up the nexus between development-related finance and public financial institutions in some way.¹⁷⁴ The Swiss NAP does not contain any specific recommendations with regard to access to remedy in export

¹⁶³ See in general (and in particular with regard to the differing range of mandates among export credit agencies and multilateral development banks) MAIZEL & BORISOFF, p. 213-240.

¹⁶⁴ See UNGP 4; UNGP, commentary, p. 7.

¹⁶⁵ *Ibid.*

¹⁶⁶ UNGP 10; UNGP, commentary, p. 12; see also UNGP 8; UNGP, commentary, p. 10 *et seq.* with regard to general policy coherence.

¹⁶⁷ See UNGP, commentary, p. 7, and UNGP 14.

¹⁶⁸ UNGP 15 (c) and UNGP 22.

¹⁶⁹ See UNGP 13; UNGP, commentary, p. 21 *et seq.*

¹⁷⁰ UNGP, commentary, p. 24 *et seq.*

¹⁷¹ UNGP, commentary, p. 24.

¹⁷² UNGP, commentary, p. 31.

¹⁷³ UNGP, commentary, p. 32.

¹⁷⁴ E.g. commitment by Finland or Spain to promote human rights within international development organizations (Finland, NAP, p. 14, see also p. 21 *et seq.*; Spain, NAP, p. 15; or Sweden to encourage multilateral institutions to promote corporate respect for human rights, Sweden, NAP, p. 29).

credit agencies, development finance institutions and public-private development partnerships. However, it has included some policy instruments to enhance and ensure human rights due diligence by relevant institutions and/or their clients¹⁷⁵ and programmes to enhance the rule of law in host states in general.¹⁷⁶

[83] The following subchapters provide a general overview on different means of access to remedy available in the area of bilateral development finance and export credit funding.¹⁷⁷

2.7.2. International Financial Institutions (IFI)

[84] Switzerland is a member and shareholder of several international financial institutions having various types of policies in place that seek to prevent adverse environmental and social impacts. Most of them also have a dedicated independent accountability mechanism that intends to provide access to remedy for individuals or communities who are negatively impacted by activities financed by those institutions:¹⁷⁸

- (a) World Bank: *Inspection Panel*,¹⁷⁹
- (b) International Finance Corporation, Multilateral Investment Guarantee Agency: *Compliance Advisor Ombudsman*,¹⁸⁰
- (c) Asian Development Bank: *Compliance Review Panel and Special Project Facilitator*,¹⁸¹
- (d) Inter-American Development Bank: *Independent Consultation and Investigation Mechanism*,¹⁸²
- (e) African Development Bank: *Independent Review Mechanism*,¹⁸³
- (f) European Bank for Reconstruction and Development: *Project Complaint Mechanism*,¹⁸⁴

¹⁷⁵ Switzerland, NAP, p. 24, 28. The Swiss Export Risk Insurance, however, is obliged to take into account the statements and reports by the Swiss National Contact Point in their decision-making process (Switzerland, NAP, p. 24; OECD Common Approaches, para. 16).

¹⁷⁶ Switzerland, NAP, p. 40. Please note that the exploration of these programmes (as helpful as these might be for enhancing access to remedy) is beyond the scope of this study since they touch on much wider issues than business-related human rights infringements such as the lack of the rule of law, good governance, corruption etc.

¹⁷⁷ The following remarks only cover non-judicial remedy mechanisms that have a state-nexus. However, victims of human rights violations committed by or contributed to by Swiss companies might have other avenues to raise their concerns and seek justice such as state-based judicial or administrative mechanisms in the home or host state, state-based non-judicial mechanisms such as National Contact Points, or non-state-based non-judicial grievance mechanisms such as operational-level grievance mechanisms operated by the companies themselves or third parties set up in accordance with UNGP 29 and 31.

¹⁷⁸ There also exist other independent accountability mechanisms (such as the Complaint Mechanism of the European Investment Bank, European Ombudsman) but since Switzerland is not a member of the IFI, they are not listed here.

¹⁷⁹ <http://ewebapps.worldbank.org/apps/ip/Pages/Home.aspx> (accessed on 04.04.2016).

¹⁸⁰ <http://www.cao-ombudsman.org/> (accessed on 04.04.2016).

¹⁸¹ <http://www.adb.org/site/accountability-mechanism/main> (accessed on 04.04.2016).

¹⁸² <http://www.iadb.org/en/mici/> (accessed on 04.04.2016).

¹⁸³ <http://www.afdb.org/en/about-us/organisational-structure/independent-review-mechanism-irm> (accessed on 04.04.2016).

¹⁸⁴ <http://www.ebrd.com/work-with-us/project-finance/project-complaint-mechanism.html> (accessed on 04.04.2016).

[85] These independent accountability mechanisms vary greatly with regard to mandates, functions, structures and procedures. Some are only allowed to review whether the alleged adverse activity was performed in compliance with the institution's policies; others are also permitted to engage in concrete problem solving on the ground.¹⁸⁵ International Financial Institutions' (IFI) independent accountability mechanisms have been criticized as being flawed means of access to remedy for quite some time.¹⁸⁶ A recent study that assessed the policies and practice of the most important IFI mechanisms against the effectiveness criteria for non-judicial mechanisms of the UN Guiding Principles (UNGPs 31) found that the current system is inadequate to provide access to remedy for the victims and needs some reform.¹⁸⁷ Major issues identified were connected to accessibility (e.g. lack of awareness, restrictions applicable),¹⁸⁸ predictability (e.g. delays, lack of communication),¹⁸⁹ equitability,¹⁹⁰ transparency,¹⁹¹ and rights-compatibility (no human rights standards).¹⁹²

2.7.3. Export Credit Agencies (ECA)

[86] The Swiss Export Risk Insurance (SERV) is Switzerland's official export credit agency.¹⁹³ SERV insures political and *del credere* risks involved in exporting goods and services, it does not act as direct lender. It is an institution under Swiss public law and follows a certain set of internal human rights review and due diligence procedures as well as rules requiring information disclosure by clients¹⁹⁴ in line with the respective OECD Common Approaches that take into account the UNGPs.¹⁹⁵ With regard to access to remedy, the OECD Common Approaches make particular recommendations only indirectly regarding non-judicial grievance mechanisms for ECA.¹⁹⁶

¹⁸⁵ For a general overview and further information see RICHARD, p. 129 *et seq.*; FIDH, Guide, p. 439 *et seq.* (see in particular the comparative table on p. 502-505); BISSELL & NANWANI, p. 154 *et seq.* (in particular Table 1 on p. 170-172); VAN PUTTEN.

¹⁸⁶ *Ibid.*; see also e.g. the analysis of the shortcomings of the World Bank Inspection Panel by LINDER *et al.*, p. 26 *et seq.* and a general human rights critique of the World Bank and Asian Development Bank's inspection policies by FUJITA, p. 196 *et seq.*

¹⁸⁷ See DANIEL *et al.* (eds.), Glass Half Full?, Report and Annexes 5, 6, 8, 11, 12 and 15.

¹⁸⁸ DANIEL *et al.* (eds.), Glass Half Full?, p. 56 *et seq.*

¹⁸⁹ DANIEL *et al.* (eds.), Glass Half Full?, p. 58 *et seq.*

¹⁹⁰ DANIEL *et al.* (eds.), Glass Half Full?, p. 59 *et seq.*

¹⁹¹ DANIEL *et al.* (eds.), Glass Half Full?, p. 61 *et seq.*

¹⁹² DANIEL *et al.* (eds.), Glass Half Full?, p. 63.

¹⁹³ See <http://www.serv-ch.com/en/organisation/about-serv/> (accessed on 04.04.2016).

¹⁹⁴ See Art. 8 lit. a Swiss Export Risk Insurance Ordinance from 1 January 2016 (SERV-V, SR 946.101); see also SERV Guidelines for Reviewing Environmental, Social and Human Rights Issues (2015), online available at http://www.serv-ch.com/fileadmin/Files/PDF/online-schalter/nachhaltigkeit/Leitlinien_Umwelt_e.pdf (accessed on 04.04.2016).

¹⁹⁵ OECD, Common Approaches on Environment and Officially Supported Export Credits and Environmental and Social Due Diligence, preamble and para. 48. As the document title indicates, the OECD Common Approaches focus on establishing and improving environmental and social (including human rights related) due diligence requirements for clients. Therefore, they put the focus on preventive measures such as Environmental and Social Impact Assessments (ESIA) and risk management systems rather than remediation issues. See also the recommendation to apply additional measures with regard to human rights due diligence by business enterprises that are granted substantial support or delivered services by export credit agencies etc. as set out in the Recommendation CM/Rec (2016)3 of the Committee of Ministers to member States on human rights and business, adopted on 2 March 2016, para. 22.

¹⁹⁶ OECD, Common Approaches, para. 43 ("Adherents shall: Ensure, through appropriate measures and mechanisms, compliance with their policies and procedures pursuant to this Recommendation.[...]"")

However, depending on the size of the project, such mechanisms might have to be established by the project sponsors according to the standards applied (especially in bigger projects).¹⁹⁷ The OECD Common Approaches, after all, require export credit agencies to “consider any statements or reports made publicly available by their National Contact Points (NCP) at the conclusion of a specific instance procedure under the OECD Guidelines for Multinational Enterprises” when reviewing projects.¹⁹⁸ They also require adherents to “share approaches to and experience of [...] applying relevant due diligence tools and international standards” as well as to consider further policy coherence issues with regard to the OECD Guidelines for Multinational Enterprises and the UNGP.¹⁹⁹

[87] As some other national export credit agencies, the SERV does not provide for a formalized complaints procedure to handle human rights concerns arising from its business activities. However, for larger projects SERV publishes information *ex-ante* and *ex-post* on their homepage including information on how to get in contact with the SERV head of sustainability concerning these operations. In addition, NGOs may raise questions concerning the regularly published transactions at any time and face-to-face meetings with NGOs are organized on a yearly basis. Most ECA organize such round-tables. Having a more elaborate mechanism in place – taking into account the effectiveness criteria of UNGP 31 – is not yet common among national export credit agencies.²⁰⁰

2.7.4. Swiss Institution for Development Finance

[88] The entirely government-owned Swiss Investment Fund for Emerging Markets (SIFEM) focuses its activities on the support of small and medium-sized enterprises. The SIFEM emphasises the need for businesses to respect environmental and social standards, including human rights.²⁰¹ Such preventive mechanisms do not however fulfill the same functions as complaint mechanisms, which offer redress once human rights violations have already occurred. The SIFEM like its peers of similar size does not have a grievance mechanism.²⁰²

¹⁹⁷ E.g. when a project under review is benchmarked against the IFC Performance Standards that require clients to set up grievance mechanisms for affected people (OECD, Common Approaches, para. 21; IFC PS 1).

¹⁹⁸ OECD, Common Approaches, para. 16.

¹⁹⁹ OECD, Common Approaches, para. 48.

²⁰⁰ According to a recent OECD survey, only 10 out of 33 ECA have complaints procedures in place to ensure compliance with their policies and procedures: OECD, Working Party on Export Credits and Credit Guarantees, p. 37.

²⁰¹ See SIFEM, Responsible Investment Policy Document, online available at http://www.sifem.ch/fileadmin/user_upload/sifem/pdf/en/obviam-responsible_policy.pdf (accessed on 17.03.16).

²⁰² Other international instruments, in which the Swiss Government participates, do not currently show an intention to develop a complaint mechanism either; see for example the Extractive Industries Transparency Initiative or the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

III. COMPARATIVE REPORT ON ACCESS TO JUDICIAL REMEDIES

1. Preliminary Remarks on Access to Judicial Remedies

[89] In accordance with the ToR as well as the offer of 20 October 2015, the analysis of the foreign law relating to access to judicial remedies focuses on the following questions:

Criminal law

1. Does the legal system allow for the prosecution of criminal acts that have been committed abroad?
 - 1.1. Under which conditions does the legal system allow for the prosecution of criminal acts committed abroad that have a link to the respective country? (*esp. nationality of perpetrator, nationality of victim, specific places abroad (e.g. domestic ship or airplane) etc.*)
 - 1.2. To what extent does the legal system provide for the possibility of universal punishability? (“*universal punishment/jurisdiction*” meaning that the country can/must assume jurisdiction even though there is no direct link to the country; this may for example be the case when specific domestic/international (legal) interests are concerned or for specific crimes)
2. Does the legal system allow prosecution and conviction of companies?
 - 2.1. Under which conditions does the legal system allow prosecution and conviction of companies?
 - 2.2. What sanctions are possible in the respective legal system when convicting a company?
 - 2.3. Can natural persons be prosecuted and/or convicted as representatives of the company, i.e. not for acts they committed personally, but for acts committed by the company as such?
3. In the context of this study, under what conditions, if at all, can the victim of a crime participate in criminal proceedings? What are the victim’s rights in criminal proceedings?
4. Are there possibilities of enabling or facilitating prosecutions specifically in the context of business and human rights? If so, which ones? (*if there are no such possibilities, no further explanation is needed*)

Private International Law and International Procedural Law

1. Under which ground of jurisdiction, if any, may the victim or victims of acts or omissions carried out by a business company sue such a company in the country of its nationality (provided the country in which the acts were carried out and/or the damages occurred is different from that of the nationality of the company)?
2. Under which ground of jurisdiction, if any, may the victim or victims of acts or omissions carried out by the local subsidiary of a foreign business company sue the parent company in the country of its nationality?

3. Under which ground of jurisdiction, if any, may the victim or victims of acts or omissions carried out by a local business company operating under foreign control (e.g. in association with a foreign company) sue for damages in the foreign country concerned? (any form of business association and any form of control may be presented as an exemple).
4. In determining the right of victims to obtain compensation for damages occurring abroad or resulting from acts carried out abroad the judge:
 - 4.1. Applies her or his own law, i.e. *lex fori* (as such or as the law of the defendant's nationality);
 - 4.2. Applies the local law, i.e. the *lex loci commissi delicti*;
 - 4.3. Considers international human rights standards.
5. In determining the amount of compensation for damages (*quantum debeatur*) the judge:
 - 5.1. Applies her or his own law (if yes, on which grounds?);
 - 5.2. Applies the local law (if yes, for which reasons?).

Tort law and Corporate Law

1. Liability of directors of a company:
 - 1.1. What are the conditions for liability of the director of a company for acts committed within his functions? Who can sue the director for damages?
 - 1.2. Are there liability provisions in corporate and/or in tort law applicable to the potential liability of a director for acts committed/damages caused within the exercise of his functions? If available, indicate any material on damages that occurred abroad.
2. To what extent can a company be held liable for tortious acts of its subsidiaries or an affiliated company abroad in spite of the existence of a separate legal entity (piercing the corporate veil)?

Procedural Law

1. Statutes of limitations

Description of the rules on limitation periods for bringing a civil claim for damages to person, property and/or environment.

 - 1.1. What are the limitation periods (if any)? Is there any relevant case law in the context of business and human rights?
 - 1.2. Have the rules been subject to commentary in the legal literature in the context of business and human rights? In particular, what are the advantages and disadvantages of the rules as regards the access to justice for victims of human rights violations?
2. Financial barriers and legal aid for bringing an action in court

Description of the rules related to costs for bringing an action in court for damages to person, property and/or environment and the distribution of legal costs between the parties.

- 2.1 Does the plaintiff need to pay a fee in order to bring an action in court?
 - 2.2 Is there any legal aid, financial or other, that may be granted to plaintiffs?
 - 2.3 Does a plaintiff whose claims do not succeed need to compensate the other party for its legal costs ("loser pays" rule)? Are contingency fee arrangements permissible?
 - 2.4 Is there any case law in the context of business and human rights on the distribution of legal costs?
 - 2.5 Have the rules described above been subject to commentary in the legal literature in the context of business and human rights? In particular, what are the advantages and disadvantages of the rules as regards the access to justice for victims of human rights violations?
3. Standard and burden of proof

Brief description of the rules on standard and burden of proof in civil procedure for claims of damages to person, property and/or environment.

 - 3.1 What are the rules on burden of proof; for example, is it the party claiming a certain fact that has the burden of proof? May the burden of proof shift to the other party? Is there any case law in the context of business and human rights providing guidance on the application in practice of those rules?
 - 3.2 What are the rules on standard of proof? Is there any case law in the context of business and human rights providing guidance on the application in practice of those rules?
 - 3.3 Have the rules been subject to commentary in the legal literature in the context of business and human rights? In particular, what are the advantages and disadvantages of the rules as regards the access to justice for victims of human rights violations?

Collective Redress

1. Do collective actions exist?
 - 1.1 Are they available for Human Rights abuses? Under what theories (causes of action)?
 - 1.2 Are there any specific limitations on such types of actions?
2. What form do these actions take?
 - 2.1 Are they brought by a representative organization/entity or directly by claimants? If yes, what are the requirements for the representative?
 - 2.2 What remedies are available (injunctive relief, damages, how calculated)?
3. Requirements concerning collectivity
 - 3.1 How similar must the claims be? Same legal basis? Same type/range of damages? Same type of plaintiff?
 - 3.2 How is collectivity constituted?
 - 3.2.1 Opt-in, opt-out, mandatory?

3.2.2 How are (potential) members notified?

3.2.3 Must all members of the collectivity be named (publicly)?

[90] The national reports will indicate the legislative framework, academic writing as well as information on current legislative proposals. Judicial decisions are taken into account where relevant, either by the character of the legal system or/and by the existence of cases in the field of business and human rights.

2. Criminal Law

2.1. Prosecution of Acts Committed Abroad

2.1.1. General Comparative Remarks

[91] There seems to be a difference in principle between the jurisdictions in Denmark, France, Germany, and the Netherlands, on the one hand, and the common law jurisdictions of the United Kingdom and the United States, on the other hand, as to the possibility of prosecuting acts that have been committed abroad. While the former jurisdictions provide for general rules establishing the conditions under which such acts can be prosecuted by their national courts, the two common law jurisdictions do not have comparable general provisions. They regulate, for specific criminal offences, if and under which conditions national courts can prosecute such acts in the event that they have been committed abroad. Canada, as a mixed jurisdiction, does have general rules in its Criminal Code, notably a general principle (section 6 para. 2) excluding jurisdiction over offences committed outside Canada and a number of exceptions for specific offences (section 7), and it also provides for exceptions in specific statutes.²⁰³ Even though it has a general rule, the Netherlands also follow a more mixed approach, as the general rule indicates the specific offences and circumstances under which prosecution of acts committed abroad is possible.

[92] More generally, it is possible to distinguish four different grounds on which acts committed abroad are prosecuted: First, jurisdiction can be based on a link between the offender and the prosecuting state, notably if the offender is a national or a resident of the state (active personality). Second, the same link can be found between the victim against whom the offence was committed and the prosecuting state (passive personality). Third, jurisdiction may be based on the location at which the act was committed, as for example on board a ship or aircraft flying the prosecuting state's flag. And finally fourth, it may be possible to exercise jurisdiction regarding acts touching specific national or international interests due to which national provisions allow prosecution of such acts irrespective of the existence (or absence) of another link to the jurisdiction. For this fourth group, we will use the term "universal jurisdiction" within the context of these comparative remarks.²⁰⁴

²⁰³ Canadian Criminal Code (R.S.C., 1985, c. C-46).

²⁰⁴ The meaning of the term might vary within the different national contexts. For a more restrictive use of the term, see ENGLE, pp. 77 *et seq.*, for whom only jurisdiction based on violations of international *jus cogens* qualifies as universal jurisdiction.

[93] In addition, many jurisdictions require an act to constitute a criminal offence under the law of both the prosecuting state and the state in which the act was committed. For this condition, we will use the term “double criminality”.

2.1.2. Active Personality

[94] Denmark, Canada, France, Germany, and the Netherlands all provide for the possibility of prosecuting acts committed abroad based on the nationality of the offender (active personality principle). In addition, under a variation of the active personality principle, the Netherlands allow prosecuting foreign nationals on the basis of their residence in the Netherlands for certain offences committed abroad. In Canada, the active personality principle applies only for certain offences such as sexual offences against children and trafficking of human beings, as well as terrorism, for citizens and permanent residents of Canada. In Canada, the mere presence of the offender is sufficient to prosecute for acts such as nuclear terrorism, financing of terrorism, hostage-taking, and torture. Similar rules apply in the Netherlands for some terrorism related offences, offences against infrastructures, some nuclear energy related offences and hostage-taking. In this formulation, the active personality principle is close to universal jurisdiction.

[95] Denmark, France, Germany and the Netherlands differentiate between more and less serious criminal offences by making the so-called double criminality a condition only for prosecution for less serious offences. In Germany, Denmark and the Netherlands double criminality is generally required except for specific offences listed in the codes (though in the Netherlands, prosecution for acts committed abroad is only possible for serious offences). The French Criminal Code simply draws the line between felonies (*crime*, no double criminality required) and misdemeanours (*délits*, double criminality required). As an exception to this rule, prosecution of terrorist acts committed abroad by French nationals or residents is also possible in France irrespective of whether the act constitutes a criminal offence in the respective local state. There is another exception in France of particular interest within the present context: the accomplice to an offence committed abroad can be prosecuted in France, if he or she acted in France, if double criminality applies to the main offence and if this main offence has been established by a final decision of the foreign court. This makes it possible to prosecute French parent companies as accomplices, in the event that one (or more) their subsidiaries were convicted for a criminal offence abroad.

[96] Denmark, France, Germany and the Netherlands also allow prosecution of foreign offenders present in their jurisdictions when they cannot be extradited, at least for some offences. The specific conditions, why extradition is impossible, and the other conditions which must be fulfilled in order for this rule to apply, vary. Canada has a specific variation of the active personality principle that allows prosecution of criminal acts committed by public service employees (section 7 (4) Criminal Code). A similar rule applies in Dutch criminal law (section 4 (10) Dutch Criminal Code).

[97] As previously mentioned, there are no general rules concerning the possibility of prosecuting criminal acts committed abroad in the laws of the United Kingdom and the United States. Both countries have regulations stipulating that prosecution of such a criminal act is possible if the offender is a national or a resident of the respective state. In the United Kingdom, for example, prosecution is possible in specific cases of bribery, money laundering, terrorism or sexual acts against children; examples in the United States are sexual acts with minors abroad, travelling abroad with the intention of committing such acts as well as organizing such trips for profit for others.

2.1.3. Passive Personality

[98] France, Germany and, in a more restrictive way, Denmark, the Netherlands and Canada provide for the so-called passive personality principle, allowing for the prosecution of offences committed abroad against a national of the prosecuting country. In German law, courts generally have jurisdiction for offences committed against a German national or resident under the condition that there is double criminality (except for a list of specific criminal offences). Under French law, felonies against French nationals can be prosecuted irrespective of the question whether there is double criminality. If the offence merely constitutes a misdemeanour, double criminality is necessary. In addition, the offence must be punishable by imprisonment and prosecution must be requested by the police, the victim or through official denunciation. Denmark applies the passive personality principle only in rare cases. In order to allow for prosecution of acts against a Danish national or resident, there must be double criminality, the offence must be punishable by at least six years' imprisonment and it must be part of the list of specific offences to which the passive personality principle applies. The Netherlands and Canada apply the passive personality principle only for specific offences without requiring double criminality (in Canada e.g. for terrorist activities, offences involving explosive or lethal devices, hostage-taking, or torture). Under Dutch law, prosecution is also possible for some offences committed abroad against foreign nationals residing in the Netherlands if the victim has not reached the age of 18 years.

[99] To the best of our knowledge, neither the United Kingdom nor the United States permit prosecuting offenders of acts committed abroad based on the nationality or residence of the victim.

2.1.4. Location

[100] Offences committed on board a ship or aircraft flying the flag of one of the states examined here may be prosecuted by the flag-state. This is based on the so-called flag-state principle of international public law, notably set out in the United Nations Convention on the Law of the Sea. The United Kingdom expanded this principle by stating that acts not committed directly on board, but by any master or seaman of a ship flying the flag of the United Kingdom also fall under their jurisdiction. A similar provision in Dutch law applies for some offences. In addition, both the United Kingdom and France may exercise jurisdiction in connection with acts that took place on board a foreign aircraft, if the next landing of this aircraft is within the territory of the respective country. Both countries, however, add further conditions to application of this exception.

2.1.5. Universal Jurisdiction

[101] Denmark, France, Germany and the Netherlands provide for jurisdiction where national interests are affected by a criminal offence. This may, for example, concern cases of violation of the state's constitution (Denmark), high treason (Germany), forgery of the state's seal (France), or a wide number of different interests, from the integrity of the national currency to the freedom of action of the government (the Netherlands). In addition, France, Germany, the Netherlands and the United Kingdom allow the exercise of jurisdiction if the offence violates specific international interests or offences of a transnational character such as unlawful drug dealing (Germany), assistance to torture (France), or offences tried by the International Criminal Court (United Kingdom). Finally, the United Kingdom also provides a regulation on exercising jurisdiction in cases of terrorism, if the act has been committed in or by nationals of member states of a special convention on the suppression of terrorism. Canada does not provide for universal jurisdiction in

the strict sense, but it extends the active personality principle for some offences by allowing for prosecution if the author of the crime is present in Canada (see above, N [94]) or has no citizenship.

2.2. Prosecution and Conviction of Corporations

2.2.1. Comparative Remarks

[102] In principle, all jurisdictions under review allow prosecution of corporations with the exception of Germany. Under German law, only individuals can be prosecuted. However, under specific conditions, a regulatory fine may be imposed on a company if a natural person is convicted for an offence affecting a company (e.g. creating benefits for the company).

[103] Canada, Denmark, France, the Netherlands, the United Kingdom and the United States allow prosecution of corporations. In Denmark, however, this is only the case if the law or regulation specifically so states, as is notably true in some provisions of the Companies Act. Although in theory every criminal offence could apply to legal persons in the United Kingdom, in practice this will only rarely be possible, as a business's intention will be hard to prove. There are also a range of laws providing criminal offences designed specifically to apply to legal persons which are more likely to be applied in practice. In the context of business and human rights, especially the Corporate Manslaughter and Corporate Homicide Act 2007 is of interest. The French legal framework radically changed in 2006: Until 2006, it was only possible to prosecute legal persons if the law specifically said so. Since the reform, every criminal offence also applies to legal persons. Parent companies may even be liable for environmental damage caused by their insolvent subsidiaries, although this only applies to damages in France. For acts committed abroad, the rules on extraterritorial liability apply.

2.2.2. Conditions

[104] The conditions for a legal person's criminal liability can only be set out here in the form of a general summary, as there will always be specific conditions for the individual offences. Generally speaking, the laws of France, Denmark and the United States stipulate that a specific individual must commit the actual act. In France, it must be an organ or representative of the legal person. According to the Canadian Criminal Code as amended in 2003, either a representative or a senior officer must have acted, and there are different additional requirements depending on who acted (see below). Danish law merely requires that at least one natural person has acted and fulfilled the offence's conditions on *mens rea* and *actus reus*, but it is not necessary that it be known which individual acted. The offence can also be committed anonymously. In the United States it will depend on the law of the respective state: In general, businesses are liable for acts of any officer, employee or agent, but many states restrict liability to acts of senior management. In its Corporate Manslaughter and Corporate Homicide Act 2007, the United Kingdom follows an approach similar to those of France and parts of the United States by stipulating that senior management must have acted. The formulation, however, is more specific, as the person must have been killed as a result of the way in which the activities are managed or organized.

[105] Furthermore, Denmark, the United Kingdom and the United States require the offence to have taken place within the scope of the employment. In addition, in the United States as well as in France the offence must, at least in part, be in the interest of the company. These additional

conditions are also found in the Canadian Criminal Code for different situations, as (since 2003) the Code distinguishes between corporate liability for offences of negligence (section 22.1) and corporate liability for other offences (section 22.2). In the first case, either representatives acting within the scope of their authority were part of the offence or senior officers “responsible for the aspect of the organization’s activities that is relevant to the offence” do not meet the reasonable standard of care to “prevent a representative of the organization from being a party to the offence.” In the second case, a senior officer, with the intent at least in part to benefit the organization, was directly a party to the offence, or, with the mental state of being a party to the offence and acting within the scope of the authority, directed the work of representatives of the organization to commit the offence, or “knowing that a representative of the organization is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.” In both cases, apart from the elements found in the other jurisdictions, liability can attach as a result of the failure of senior management to prevent an offence.

[106] In the Netherlands, the conditions are formulated in a more general way, at least as far as the *actus reus* is concerned. According to a ruling of the Supreme Court in 2003, a corporation is only liable in criminal law if an illegal act or omission can “reasonably” be attributed to it, and this is the case, if the act or omission took place within the “scope” of the corporation, typically under one of the following four “groups of circumstances”: a natural person working for the corporation committed the act or omission, the act or omission was part of the “normal business” of the corporation, the corporation benefitted from the conduct, and, finally, the corporation accepted the conduct (including failing to take reasonable care to prevent the act or omission).²⁰⁵ While the first three circumstances are reminiscent of the conditions applicable in the other jurisdictions, the idea of reasonable care goes further and is found only in Canada. The mental element of the offence can be established either by attributing a natural persons’ intent or by deriving the corporate *mens rea* from policies, decisions and other circumstances.²⁰⁶

[107] An important regulation within the context of this study can be found in France, where a parent company is only liable for offences committed by its foreign subsidiary if it had full and effective control over it. At the same time, it is important to note that in the United States, the company will also be held criminally liable if it expressly forbids the behaviour which caused the offence; the company cannot exculpate itself.

[108] As mentioned above, German law does not provide for the possibility of prosecution and conviction of legal persons. However, the judge can impose a fine on a company as legal consequence of the conviction of the natural person. In order to be allowed to do so, the natural person must be a representative or officer of the company and must be found guilty of a criminal or regulatory offence. In addition, the company must be enriched, this must have been intended or the company’s duties must have been violated.

2.2.3. Sanctions

[109] The most important sanction against legal persons in all examined countries is a monetary penalty. Whether or not the maximum amount is limited varies not only among the different countries, but also within a jurisdiction according to the different criminal offences. Denmark is the

²⁰⁵ See. KEULEN & GRITTER, pp. 182 *et seq.* (referring to the Dutch Supreme Court, 21.10.203, NJ 2006, 328 (*Drijfmeest*)).

²⁰⁶ KEULEN & GRITTER, p. 184.

only jurisdiction that does not impose a minimum or maximum fine for companies, but leaves the amount to the court's discretion. In the United Kingdom, this is only true for some offences. In addition, the existence, and amount, of a limitation depends on the respective offence. For manslaughter within the scope of the Corporate Manslaughter and Corporate Homicide Act 2007, for example, the amount is up to the court's discretion. In part, the same can be true in the United States, as it is possible to limit, or not limit, the fine for an individual offence. If there is no specific regulation, the general rules apply. According to these rules, the highest possible fine for a company for a felony as well as for a misdemeanour resulting in death is \$500'000, for a class A misdemeanour, \$200'000 and for class B and C misdemeanours as well as for infractions, \$10'000. It is interesting to note that in the case of specific loss or specific gain having been caused by the offence, it is also possible to link the fine to this amount with twice such amount being the maximum. Under Dutch law, as well, there are different categories of criminal offences that provide for different maximum fines, ranging from 380 EUR to 740'000 EUR²⁰⁷. Interestingly, it is possible to punish corporations by imposing a fine of the next highest category if the first amount does not allow for appropriate punishment (Art. 23(7) of the Dutch Penal Code). The French legislator chose to link the fine for a company to that which can be imposed on a natural person. The maximum fine must not exceed an amount equal to five times the fine for an individual and where the respective provision does not allow for a fine but only for imprisonment, the maximum fine imposable on a company is 1'000'000 EUR. In Canada, there are no limits to the amount of a fine except for summary conviction offences, where the maximum amount is 100'000 CD\$. In addition, the court must take into account a variety of circumstances when sentencing an organization, such as the advantage realised by the organization, the degree of planning, an attempt to conceal assets in order to simulate its ability to pay, the impact of the sentence on the economic viability of the company, the cost of the investigation and prosecution, possible regulatory penalties imposed on the organisation and possible convictions of the organisation or its representatives for similar offences or conduct, penalties imposed by the organisation on the person responsible within the organization, restitutions made to the victim and measures taken to reduce the commission of similar offences in the future.²⁰⁸

[110] The regulatory fine that can be imposed on legal persons as a legal consequence of the conviction of an individual under German law must be higher than the financial benefit that resulted from the offence. In the event that the convicted representative committed the criminal offence with intent, the highest possible fine is 10'000'000 EUR, where s/he acted negligently, the limit is 5'000'000 EUR. The regulatory fine can also be imposed on the legal person, if the representative did not commit a criminal offence, but merely a regulatory offence. In this case, the maximum fine is the same for the individual as it is for the legal person.

[111] France, the Netherlands, the United Kingdom and the United States provide for the possibility of ordering a legal person to pay compensation to the victim in the context of criminal proceedings: in Dutch law, the payment must be made to the state. In Canada, the court can require the guilty party to make restitution for damage to property, bodily or psychological harm to persons or close relatives, although these orders, according to the Supreme Court, "should not substitute for the civil process."²⁰⁹ In Denmark and Germany, there are no specific provisions in that respect – it seems that the general rules on tort liability apply. In France, this is possible if the criminal offence

²⁰⁷ KEULEN & GRITTER, p. 185.

²⁰⁸ Sec. 718.21 Canadian Criminal Code (R.S.C., 1985, c. C-46).

²⁰⁹ ROACH, p. 493 (referring to *R. v Zelensky* [1978] 2 S.C.R. 940).

constitutes either a felony or a misdemeanour with a prison sentence of one year or for which a fine is the primary penalty. Interestingly, the law also stipulates that if the business is ordered to pay compensation, the monetary fine to be imposed on the business will be limited to the higher of 75'000 EUR and the highest fine imposable on an individual. The United Kingdom's general rule provides that the judge may decide to impose an obligation on the convict to pay compensation or funeral expenses. In addition to this general rule, according to the Modern Slavery Act 2015, a so-called slavery and trafficking reparation order may be imposed on individuals or businesses committing offences under the said act ordering them to pay compensation to the victim. Finally, under the law of the United States, it depends on the respective offence whether or not it allows for compensation to the victim. In some cases, it may even be compulsory that the court order the offender to pay compensation.

[112] The laws of France, the Netherlands, the United Kingdom and the United States also recognise other possible sanctions for offences committed by corporations. Most importantly, France, the Netherlands and the United States allow for a company to be barred from various commercial activities, such as a prohibition on the exercise of, or the disqualification from, public tenders. In severe cases, even dissolution of the legal person may be ordered, which is also possible within the scope of the Serious Crime Act 2007 in the United Kingdom. Also possible in both France and United States is the confiscation of goods belonging to the company. Furthermore, the United Kingdom, France and the Netherlands provide for the possibility of ordering public notice of the conviction. Finally, a court in the United Kingdom can also impose a remedial order specifying the steps to be taken. In the United States, a court can put the legal person on probation. In France, several sanctions with regard to the protection of animals exist, for example the prohibition of possession of animals and the confiscation of an animal against which the offence took place. Again, Denmark and Germany do not allow for any sanctions other than a monetary fine as set out above.

2.2.4. Conviction of Natural Persons for Acts by the Company

[113] In general, it is not possible under the laws of the examined countries to prosecute and convict a natural person for acts committed by the company itself. France even states so explicitly in its Code of Criminal Procedure. However, in some States of the United States, corporate agents can be held criminally liable for reckless omissions to perform the required act regarding an omission of the corporation. Similarly, Denmark allows for liability for negligent complicity to acts or omissions by employees, if a manager does not fulfill his/her duties of supervision. According to section 51 of the Dutch Criminal Code, it is possible to prosecute and punish either the legal persons or the persons who have ordered and who have actually directed the unlawful acts, or on both. Dutch law therefore goes further than the other jurisdictions under review.

2.3. Participation of the Victim

2.3.1. Comparative Remarks

[114] While the last 25 years have brought reforms in favour of victims in many jurisdictions and, therefore, a certain harmonization,²¹⁰ the role of victims in criminal proceedings still varies considerably. Within the European Union, the Directive 2012/29/EU of the European Parliament and of the Council provides for a range of rights for the victims, also during criminal proceedings.²¹¹

[115] All jurisdictions provide for a right of the victim to be informed of certain aspects of the proceedings as well as of victims' rights and concerning the criminal justice system more generally. The right to information might concern specific aspects of the trial such as the termination and the outcome as far as it concerns the victim (Germany). In most jurisdictions, it concerns practically all aspects of the case such as the commencement and progress of the case, including the discontinuance of the investigation, the date and time of the court sessions, the final judgment, and, (in the Netherlands for serious offences, in the U.S. and Canada generally), the release of the suspect or convicted offender. In the United Kingdom, the victim has a right to be informed during police investigation. Under the Canadian Victims Bill of Rights (2015), the victim must request the relevant information and can register with the Correctional Service to get information on the offender (after conviction).

[116] In some jurisdictions, such as Germany, France, and the UK, the victim has some remedies when the prosecution decides not to prosecute (right to review in the UK). In addition, the victim has a right to a lawyer and often a translator, under some circumstances, in many jurisdictions (see below, N [120]).

[117] Many jurisdictions provide for a relatively active role of the victim during the proceedings. In Germany, the victim can join criminal proceedings as a so-called private accessory prosecutor (*Nebenkläger*), though only for some specific criminal offences (e.g. sexual offences) or in special circumstances, and s/he can also bring a civil claim (*Adhäsionsklage*). The latter is also possible in the Netherlands²¹² and in Denmark (see below, para. [119]). In France the victim joins proceedings as a so-called civil party, which automatically gives the victim a number of other rights. In the United States, France, Germany, and the Netherlands, the victim is allowed to be present during the trial, in the United States to the extent that this would not alter the victim's own testimony. More importantly, these four countries give the victim the possibility to actively take part in the proceedings, in the United States only by conferring with the state's attorney, but in France, Germany and the Netherlands, also by asking their own questions during examination and by applying for evidence. In France, Denmark and the Netherlands, the victim (or, in Denmark, his or her counsel) also has the right to access the court's official files on the respective case. Finally, in Canada, the Netherlands, the United States, as well as in the United Kingdom, the victim has (or his or her closest relatives have) a right to make a statement, which may be used when deciding on the actual punishment (victim impact statement). Although the victim will presumably also be heard in the other countries as an important witness to the case, there is no similar provision as to

²¹⁰ GROENHUIJSEN, p. 63.

²¹¹ European Parliament and European Council, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14.11.2012.

²¹² Sec. 51 et seq Dutch Code of Criminal Procedure.

the possibility to make an “impact “statement” in the sentencing phase in most jurisdictions, possibly because the verdict and the sentencing stage are less clearly separated.

[118] The specific rights of victims are limited, under Canadian law, to victims residing in Canada or to Canadian citizens.

2.3.2. Claim Compensation during Criminal Proceedings

[119] In all examined jurisdictions except for the United Kingdom it is possible for the victim to bring his/her claim for damages during the criminal proceedings and the criminal judge then decides on compensation. In the United Kingdom, the Criminal Injuries Compensation Authority decides on state-funded compensation. In France, the victim will be a so-called civil party at the same time and will have the right to participate in the proceedings already set out. This is not the case in Germany, where joining the proceedings as a private accessory prosecutor and bringing a civil claim for compensation are two different things, especially since the former is only possible to a limited extent and for the latter, legal aid is possible. Also in the Netherlands, making a claim for compensation implies that the victim will join the criminal proceedings. In Netherlands, Canada, Denmark or the United States, the other rights of the victim (or his/her counsel) do not depend on making a claim for compensation. Under Danish law, the judge may refuse to treat complicated civil claims, if no personal injury has occurred and if the criminal trial must not be delayed. Furthermore, the judge may only treat the claim, if the decision goes in the same direction as the decision regarding the criminal offence in question. It may be interesting to note that in France, compensation can not only be claimed for “direct”, i.e. the victim’s damages, but also for “indirect” victims, namely the victim’s relatives.

2.3.3. Right to a Lawyer

[120] In Germany, France, Denmark, and the Netherlands, the victim has the right to be accompanied and in some cases also represented by a lawyer during the criminal proceedings. In Denmark and Germany, legal aid is possible for specific offences, meaning that the state will bear the costs for the legal representative. In Germany, this legal aid is linked to the role as private accessory prosecutor and thus only possible in these cases. Under these three jurisdictions, the victim may be accompanied by a lawyer especially during investigations, and the lawyer has the right to access the court’s official files on the respective case. In Denmark, the lawyer may also ask additional questions to the victim during the hearing.

2.3.4. Other Rights

[121] In addition to the aforementioned rights, a victim may have other rights against the offender during criminal proceedings in certain countries. Within the context of this study, the following additional rights are of interest: The law of the United States and the Canadian Victims Bill of Rights explicitly state that a victim has the right to be reasonably protected from the accused. The common law jurisdictions under review also provide for explicit protection of privacy, although this is limited to victims of sexual assault in the United Kingdom and formulated very broadly in the U.S., where every victim is to be treated with fairness and respect and with respect for his/her dignity and privacy. The other jurisdictions do not explicitly mention corresponding protections, but they are likely included in provisions on witness protections.

[122] An interesting new aspect was introduced, as § 406g StPO, in German law in 2017. The victim can request a psychological court support worker who can be present during the trial.

2.3.5. Special Regulations in the Context of Business and Human Rights

[123] For the time being, none of the examined jurisdictions provides specific regulations facilitating the prosecution of criminal offences in the context of business and Human Rights that go beyond what has been indicated above.

[124] However, there is newly approved legislation in France that creates a duty of vigilance for parent companies or contracting companies relating to the activities of its subsidiaries, subcontractors and suppliers. The bill imposes exclusively civil liability (for greater detail see below, N [157] *et seq.*). The parliament's proposal to introduce criminal sanctions was held to be unconstitutional by the French Conseil constitutionnel (Constitutional Court) and did not enter into force (see below, N [538]).

3. Private International Law and International Civil Procedure

[125] The discipline of conflict of laws has developed according to very different principles and traditions in the USA and Canada as compared to Europe. The following comparative review will therefore present the different approaches in principle before elaborating on specific rules and methods potentially applicable to tort claims against multinational companies for human rights violations abroad.

3.1. Jurisdiction

3.1.1. Approaches to Jurisdiction

[126] The European states under review, to a large extent, apply the same unified heads of jurisdiction, in civil and commercial matters, namely (in the field of tort law) those of the Brussels system, now provided for in EU Regulation 1215/2012 (Brussels I (recast) Regulation).²¹³ The Brussels I (recast) Regulation provides for a general principle (jurisdiction in the state of domicile, see below, N [129] *et seq.*) and additional heads of jurisdiction such as the place of performance for contract disputes or the location of an agency or branch for disputes arising out of the operation of an agency or branch. Some heads of jurisdictions are exclusive within the European Area of Freedom, Justice and Security. This means that, on the one hand, they bar the case from being heard by another European jurisdiction and, on the other hand, they hinder recognition of a foreign judgment pronounced in violation of such rules.²¹⁴ If the Brussels I (recast) Regulation does not apply, *i.e.* if the defendant is not domiciled within the EU, if there is no head of exclusive jurisdiction in the aforementioned sense in the EU and if no choice of forum in favour of a European judge has

²¹³ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union L 351/1 (hereinafter Brussels I (recast) Regulation).

²¹⁴ See SICL's Study and, for a *summary* of the notion of exclusive jurisdiction in the EU system: PRETELLI, pp.74 *et seq.* esp. 75.

been made, there is room for national provisions on jurisdiction (see below, N [135] *et seq.*). In the event of parallel proceedings²¹⁵, rules on *lis pendens* require European courts empowered with jurisdiction to stay proceedings and, if the court first seized accepts jurisdiction, to decline jurisdiction in favour of that court (Art. 29 Brussels I (recast) Regulation). A similar rule is designed to prevent contradictory judgments in cases of related actions (Art. 30 Brussels I (recast) Regulation).

[127] U.S. law analyses jurisdiction by verifying its existence in a given case both *ratione materiae* (subject-matter jurisdiction) and *ratione personae* (personal jurisdiction). Subject matter jurisdiction depends on the type of claim being brought. State courts are courts of general jurisdiction and, as such, have jurisdiction over most types of claims, including torts, contracts, and corporations law. Federal courts, however, can only hear cases authorized by the United States Constitution or federal statutes.²¹⁶ State courts and federal courts may have concurrent jurisdiction. Courts of the state of domicile of a corporation will always have personal jurisdiction over the corporation; courts may also have personal jurisdiction over a “foreign” corporation where such corporation has significant contacts with the forum state. U.S. courts have drawn a distinction between two types of personal jurisdiction: “general” or all-purpose jurisdiction (ordinarily at the place of incorporation but not necessarily exclusively), and “specific” or conduct-linked jurisdiction.²¹⁷ A court may have general jurisdiction over a corporation not domiciled in the forum “to hear any and all claims against [it]” only when the corporation’s affiliations with the State in which suit is brought are so constant and pervasive “as to render [it] essentially at home in the forum State.”²¹⁸ Specific jurisdiction, which requires less extensive contacts but restricts the types of cases which the court may hear, “depends on an affiliation between the forum and the underlying controversy, principally, underlying activity or an occurrence that takes place in the forum State and is therefore subject to the State’s regulation.²¹⁹ (for the Constitutional dimension see below, N [135]).

[128] In Canada, the international jurisdiction of the state courts is regulated according to the various private international law rules in the different provinces and territories. While most Canadian provinces follow principles that have their origins in the English common law, the rules relating to jurisdiction of the courts in Quebec are based on the Quebec Civil Code. The federal courts of Canada have jurisdiction in more limited areas, mainly for claims against the Government of Canada and civil claims in federally regulated areas. Most cases in the area of Business and Human Rights seem to be decided in state courts according to rules of state private international law. In Quebec, there is a general principle (see N [129] *et seq.*) combined with specific heads of jurisdiction, although there are several possibilities allowing for discretion of the judge either to admit its jurisdiction in spite of the lack of a head of jurisdiction (*pour de nécessité*, see below, N [138]) or to decline jurisdiction (*forum non conveniens*, Art. 3135 Quebec Civil Code, see below, N [136]).

²¹⁵ *I.e.* where the case is already pending before another court invested with jurisdiction (Art. 7 Brussels I (recast) Regulation).

²¹⁶ Essentially, for a federal court to have jurisdiction, either a question of federal law must be presented (“original jurisdiction”) or the parties must be from different states (“diversity jurisdiction”): 28 U.S. Code § 1332..

²¹⁷ *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (where the corporation has “certain minimum contacts with [the State] such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’”).

²¹⁸ *Goodyear Dunlop Tires Operations, S. A. v. Brown*, 564 U.S. 915 (2011) at 919.

²¹⁹ *Ibid.*

Under the common law, jurisdiction requires personal service (see N [129] *et seq.*), consent or a real and substantial connection (compare below, N [135] *et seq.*).²²⁰

3.1.2. Jurisdiction in the State of Domicile – Nationality and Incorporation

[129] All traditions of private international law provide for a forum at the so-called “place of the defendant” (*forum rei*). However, how one determines this forum may vary. Some traditions identify this *forum rei* as the place of the company’s incorporation or domicile/seat, others as the place of the administration (main place of business). Under U.S. law, the courts of the place of incorporation of a corporation)²²¹ are always competent. Similarly, in Canadian common law as well as under the Quebec Civil Code,²²² a corporation can generally be sued at the place of incorporation. In those common law legal systems, however, exercise of jurisdiction is not ordinarily mandatory and a judge may decline jurisdiction on grounds of *forum non conveniens*, i.e. based on the argument that a case is better heard somewhere else, see also below, N [138]).

[130] The Brussels I (recast) Regulation adhering to the principle *actor sequitur forum rei*, according to which individuals must be sued in their member state of domicile,²²³ does not make a radical choice between the place of incorporation and the place of administration. The notion of domicile, as regards a company is very broad. It is either the company’s statutory seat, the seat of its central administration; or where its principal place of business is located.²²⁴ In addition, “For the purposes of Ireland, Cyprus and the United Kingdom, ‘statutory seat’ means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place”²²⁵. Most importantly, as indicated above, in principle²²⁶ it is not possible to decline jurisdiction at the place of domicile unless a case is pending elsewhere in Europe, by virtue of facultative *fora*.

[131] Within the concept of “place of administration” one may include the place where decisions are normally taken, or in so far as failure to supervise a subsidiary or even a contracting party (typically a supplier) under the relevant (parent) company’s control, where the failure occurred. In some jurisdictions, courts have developed such duties to supervise specifically in order to hold companies liable for their subsidiaries (see below, N [157] *et seq.*).

3.1.3. The Importance of the Place of Activities or Decisions Taken

[132] In many cases, the place of incorporation is not necessarily the place of the headquarters or the central place of administration of a corporation. The Brussels I (recast) Regulation explicitly states that the seat of the central administration provides grounds for jurisdiction (see above, N [130]). Also, Canadian common law rules allow for jurisdiction in the state where the central

²²⁰ See CASTEL, pp. 83 *et seq.*

²²¹ The main place of business may also provide an additional forum, see below, 3.1.3.

²²² Art. 3134 and 3148 (1) Quebec Civil Code.

²²³ Art. 4(1) Brussels I (recast) Regulation.

²²⁴ Art. 63 Brussels I (recast) Regulation.

²²⁵ *Ibid.*

²²⁶ Exceptions apply in the case of choice of forum or for the cases where the Regulation provides for an exclusive head of jurisdiction.

administration of a corporation is located, as this is a typical case of presence within the jurisdiction. In the U.S., the main place of business may provide an additional forum for acts concerning that business (see below, N [136] *et seq.*).

[133] In addition, in tort cases, the *locus delicti* offers one or more additional *fora*. The place where a tortious act was committed or where the harm occurred offer additional *fora* against a company domiciled in the European Union.²²⁷ The *locus delicti* is a ground for jurisdiction under Canadian common law²²⁸ and the Quebec Civil Code as well as in many states of the U.S. To establish the place of tort, Canadian courts follow a flexible approach rather than limiting themselves to the place of harm or the place where acts were committed. Under the law of Quebec it is the place where the act ("fault") was committed or an injury occurred that, amongst others, can be qualified as the place of the tort²²⁹.

[134] The *fora* indicated above might be relevant for the present context to the extent that a decision was taken at the place of administration, or to the extent that failure to supervise a subsidiary or even a contracting party under the parent company's control (typically a supplier) are at stake.²³⁰ As mentioned earlier (N [131]), courts have developed such duties in order to hold companies liable for their subsidiaries in some jurisdictions (see below, N [157] *et seq.*).

3.1.4. Importance of Factual Connections

[135] Under common law legal systems, courts tend to place greater emphasis on a case-by-case analysis based on the facts of a specific case when dealing with questions of jurisdiction. Two notable examples of this approach are (1) the determination of the extent of the connection between a corporation and a foreign forum necessary to justify the forum's personal jurisdiction over the corporation under U.S. law and, more generally, (2) the notion of *forum non conveniens*.

[136] Under the due process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution, a defendant may not be required to appear in a court located outside of such defendant's domicile (*actor sequitur forum rei*) unless the defendant's (and, in some cases, the subject of the litigation's) contacts with the "foreign" forum are significant enough that the traditional notions of "fair play and substantial justice" are respected.²³¹ These are often referred to as "minimum contacts" in U.S. case law.²³² That said, there appears to be a trend in U.S. Supreme Court case law towards narrowing jurisdiction over foreign²³³ corporations.²³⁴ For example, in *Daimler AG v. Bauman*, the Supreme Court held that "asserting general personal jurisdiction over

²²⁷ Art. 7 (2) Brussels I (recast) Regulation; The formulation is a consequence of the ECJ consolidated interpretation of the rule now formulated in Art. 7 (2) Brussels I (recast) Regulation with regards to its ancestor (Art. 5 (3) of the 1968 Brussels Convention), see the first of the line of cases mentioned in the text: judgment of ECJ, 7 March 1995, *Shevill and Others*, ECLI:EU:C:1995:61, Reports of Cases 1995 I-00415.

²²⁸ WALKER, p. 232; see also MIJARES PEÑA, p. 8.

²²⁹ WALKER, p. 233.

²³⁰ Critical as to the possibility to establish jurisdiction at the seat of the administration for injuries or losses that occur abroad in this context: WAGNER, Haftung, p. 735.

²³¹ *International Shoe v. State of Washington*, 326 U.S. 310 (1945).

²³² *International Shoe v. State of Washington*, 326 U.S. 310 (1945).

²³³ I.e. corporations not domiciled in the forum state.

²³⁴ See *Goodyear Dunlop Tires Operations, S. A. v. Brown*, op.cit; *Daimler AG v. Bauman*, 571 U.S. 20 (2014), 134 S. Ct. 746 (2014); *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773 (2017).

a corporation that is not headquartered or incorporated within the court's jurisdiction violates the constitutional requirement of due process even if the corporation does significant business there directly or through a subsidiary".²³⁵ As a result of this decision, it appears that suing a parent company for the acts of its subsidiary will require holding the parent corporation directly liable for the acts of its subsidiaries and that general personal jurisdiction may only be asserted against a corporation in the territory of its "home": in other words, where the corporation's main activities take place.²³⁶

[137] The common law doctrine of *forum non conveniens* allows a court that has jurisdiction to decline to exercise it based on a determination that another court would be better suited to decide the case.²³⁷ In making that determination, courts will consider, among other elements, the availability of witnesses, the law applicable to the transaction, the residence of the parties or the place where the parties carry on business and the possibility for the plaintiff to obtain justice in the foreign jurisdiction. In addition, the special competence or expertise of a particular court must be taken into account in order to decide whether an alternative forum is more appropriate.²³⁸ Once again, the weight to be given to these factors is normally discretionary and it is for the court to decide on case-by-case basis.²³⁹

3.1.5. Jurisdiction over the Subsidiary as a Result of a Joinder of Actions

[138] As mentioned below (see N [157] *et seq.*) according to their substantive law, most countries do not hold parent companies liable for acts or omissions of their subsidiaries, since the latter are normally deemed to be separate legal entities. However, it is important to point out that separate entities may always be sued jointly in the domicile of one of them (*forum rei*), as was the case in *Owusu*.²⁴⁰ This means that, even in the absence of a head of jurisdiction allowing a person to sue the subsidiary in the country of the parent company (or vice-versa, in the absence of a head of jurisdiction allowing a suit to be brought against the parent company in the country of the subsidiary), by virtue of Art. 8 (1) Brussels I (recast) Regulation: "A person domiciled in a Member State may also be sued,: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". This is only possible when the claim is brought against the parent company as well.

²³⁵ *Daimler AG v Bauman*, 134 S. Ct. 746 (2014), at 761-2.

²³⁶ The narrowing trend appears to apply to special jurisdiction as well, requiring that the corporation's contacts with the foreign forum be related to the transaction that forms the basis of the suit. See description of the *Bristol-Myers Squibb* case in Annex 1, under 5.2.6.

²³⁷ See E. L. Barrett Jr., The Doctrine of Forum Non Conveniens, 35 California Law Review 380 (1947); for Canada, see MIJARES PEÑA, p. 8, referring to Van Breda 2012 SCC 17.

²³⁸ *Spiliada Maritime Corp. v Cansulex Ltd*, [1987] A.C. 460.

²³⁹ *Connelly v RTZ Corp. Plc*, [1998] A.C. 854. See, also, MIJARES PEÑA, p. 8, referring to Van Breda 2012 SCC 17.

²⁴⁰ ECJ, 1 March 2005, *Ansdraw Owusu*, ECLI:EU:C:2005:120. In *Owusu*, the claimant was a British national acting to redress a tort that had occurred outside the European Judicial Area. The claimant sued many companies based outside the European judicial Area but was successful in bringing his action "at home", in his own *forum*, because he sued those companies jointly with a British company, the company that put him in contact with all the other companies involved.

3.1.6. Forum Necessitatis

[139] *Forum necessitatis* is deemed to be an exceptional ground for jurisdiction, aimed at guaranteeing the victim access to justice in cases where it seems that no other judge is willing to take jurisdiction over his or her case. In the present context, it might provide a basis for jurisdiction over the subsidiary, or over a parent company not established in the *forum* state, if, and only if, the other possible fora do not provide reasonable access to justice to the persons concerned.

[140] Private international law rules establishing that a judge may ground jurisdiction on the basis of necessity are relatively new. Art. 11 of the Belgian *Code de droit international privé*²⁴¹ and Art. 3136 of the Code civil du Québec are examples. Also at the European level an increasing number of regulations (4/2009 on maintenance obligations, 650/2012 on successions etc.) recognise “necessity” as a ground for European judges’ jurisdiction. However, in civil and commercial matters, the Brussels I Regulation (recast) does not allow recourse to a *forum necessitatis*.²⁴²

[141] In Quebec, Art. 3136 of the Quebec Civil Code (inspired by Swiss law²⁴³) allows jurisdiction if it is impossible or not reasonably possible to seize the court abroad. In spite of the fact that the claimants relied on this provision, the Quebec Supreme Court declined jurisdiction on this basis in a case where the Armed Forces of the Democratic Republic of Congo had killed 70 to 80 civilians fighting an insurrection that had taken place near mining operations of the defendant that allegedly provided logistic support to the Armed Forces.²⁴⁴

3.1.7. Jurisdiction Based on Specific Legislation

[142] In the U.S., two pieces of federal legislation specifically address international claims that would be applicable in the human rights context: the Alien Tort Claims Act²⁴⁵ (ATCA, also referred to as the Alien Tort Statute, or ATS) and the Torture Victim Protection Act (TVPA).²⁴⁶ The ATCA does not actually create a cause of action but, instead, is specifically a jurisdictional statute which provides as follows. “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” As the

²⁴¹ Loi du 16 juillet 2004 portant le code de droit international privé, Moniteur belge, 27.7.2004.

²⁴² Similar provisions can be found in Romania (Art. 153 Legea nr. 105 din 22 septembrie 1992 cu privire la reglementarea raporturilor de drept internațional privat), Austria (§ 28 Gesetz vom 1.8.1895, RGBI 110, betreffend die Einführung des Gesetzes über die Ausübung der Gerichtsbarkeit und die Zuständigkeit der ordentlichen Gerichte in bürgerlichen Rechtssachen (Jurisdiktionsnorm – EGJN), and Portugal (Art. 65. 1 d Código de Proceso Civil).

²⁴³ GUILLEMARD, 8/7.

²⁴⁴ *Anvil Mining Ltd*, 2011 QCCS 1966, cited by MIJARES PEÑAS, p. 7.

²⁴⁵ 28 U.S. Code § 1330.

²⁴⁶ Torture Victim Protection Act of 1991, 28 U.S.C. § 1330 n.2. The TVPA provides: “An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”

TVPA, does not grant jurisdiction²⁴⁷ and may not be used to sue a corporation²⁴⁸, it will not be discussed in greater detail.

[143] Since the 1990s, approximately 200 cases have been brought against transnational businesses under the ATCA “for their roles, typically vicarious, in violating customary international human rights norms in countries hosting businesses’ activities.”²⁴⁹ The subject matter jurisdiction of the ATS requires that “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms”.²⁵⁰

[144] In the April 2013 case of *Kiobel v. Royal Dutch Petroleum*,²⁵¹ however, the U.S. Supreme Court held that the presumption against extra-territorial application of federal law applies to claims under the ATCA brought for violations of customary international law that occur abroad, and that nothing in that case rebutted the presumption.²⁵² In that case, unanimous as to the result, the Court held that in order to overcome the presumption, plaintiffs must demonstrate that a claim “touch[es] and concern[s]”²⁵³ the territory of the United States with sufficient force; however, a business’ presence in the United States alone is not sufficient to overcome the presumption.²⁵⁴ To date, there is no Supreme Court case law defining the notion of “touch and concern.” In its most recent decision *Jesner v. Arab Bank*, the Court did not deem it necessary to elaborate on this criterion but held that “foreign companies create unique problems. And courts are not well suited to make the required policy judgments that are implicated by corporate liability”. As a result, it held that foreign corporations may not be defendants in suits brought under the ATCA.²⁵⁵

3.2. Applicable Law

3.2.1. Law Applicable to the Right to Obtain Compensation

[145] The member states of the European Union determine the law applicable to claims for compensation on the basis of the Rome I and Rome II Regulations.²⁵⁶ The general rule on tort claims is that the *lex loci delicti*, i.e. the law of the place where the tort occurs, applies. The same

²⁴⁷ It is worth noting here that there is also a federal criminal statute which grants jurisdiction over alleged offenders who are either U.S. citizens or are present in the U.S., regardless of the nationality of the victim or the alleged offender. 18 U.S. Code § 2340A.

²⁴⁸ See *Mohamad v Palestinian Authority*, 566 U.S. 449 (2012) (holding that “only a natural person is an ‘individual’ who can be held liable under the Torture Victim Protection Act”).

²⁴⁹ SKINNER, p. 160.

²⁵⁰ *Sosa v Alvarez-Machain*, 542 U.S. 692, 124 S. Ct. 2739, 159 (2004).

²⁵¹ *Kiobel v Royal Dutch Petroleum*, 569 U.S. 108 (2013).

²⁵² *Ibid.* at 124.

²⁵³ “even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” *Kiobel v Royal Dutch Petroleum*, 569 U.S. at 124-5.

²⁵⁴ *Ibid.*

²⁵⁵ *Jesner v Arab Bank*, 584 U.S. ___(2018) at [25-26]., available at: https://www.supremecourt.gov/opinions/17pdf/16-499_1a7d.pdf.

²⁵⁶ Regulation (EC) No 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Official Journal of the European Union L 199/40 (hereinafter Rome II Regulation or Regulation (EC) No 864/2007).

principle applies in Canada, and this can be the place of the activity or of the injury.²⁵⁷ Also in the U.S., one may assume that the *lex loci delicti* applies,²⁵⁸ and, if the wrongful act is in one state and the injury occurs in another, the law of the latter will be applied²⁵⁹ with some exceptions²⁶⁰. Some U.S. jurisdictions, however, follow the “most significant relationship” rule²⁶¹; others the “governmental interests analysis” approach,²⁶² others still the “comparative impairment” approach.²⁶³ These might provide for exceptions to the principle of *lex loci* under certain circumstances. Also Canadian private international law seems to allow for exceptions.²⁶⁴

[146] The Rome II Regulation provides for several exceptions, one depending on party autonomy²⁶⁵, another in favour of the law of a common habitual residence of the victim and the defendant at the time when the damage occurs²⁶⁶, yet another for the law of the place with the closest link to the tort (so called *clause d'exception*). The text explicitly allows for the application of the law governing the “pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question”. These exceptions do not apply in the specific case of environmental damages, which allows a choice between the law of the place where the causes of the event causing damage began to be produced and the law of the country in which the event giving rise to the damage occurred.²⁶⁷

[147] Even if foreign law is applicable according to those rules, there are other norms in the jurisdictions under review that might lead to the application of another law. In the U.S., for a foreign law to be applied, one of the parties must raise the question of the law applicable to the claim, and, usually, prove the substance of the foreign law; otherwise the *lex fori* will be applied *ex officio*.²⁶⁸ In Europe, fundamental rights are considered to be part of public policy (*ordre public*), enabling the court to dismiss a foreign law normally applicable as *lex loci*. Accordingly, the Charter of Fundamental Rights of the European Union is applicable when applying European Union norms in general.²⁶⁹ The European Convention on Human rights is also a relevant source of fundamental rights contributing to interpretation of the notion of European States’ *ordre public*. As a consequence, a European judge may apply forum law in judging human rights violations, and

²⁵⁷ CASTEL, p. 209 and 214; WALKER, HCF 145 and HCF-147; Art. 3126 Quebec Civil Code.

²⁵⁸ See below N [801] *et seq.*, quoting *Norris v Taylor*, 460 So. 2d 151 (Ala. 1984); *Myers v Hayes International Corp.*, 701 F. Supp. 618 (M.D. Tenn. 1988).

²⁵⁹ *Ibid.* with reference to *Ling v Jan's Liquors*, 237 Kan. 629 (Kan. 1985).

²⁶⁰ *Ibid.* with reference to SYMEONIDES, p. 331

²⁶¹ *Ibid.* quoting *Enron Wind Energy Sys., LLC v Marathon Elec. Mfg. Corp. (In Enron Corp.)*, 367 B.R. 384 (Bankr. S.D.N.Y. 2007)

²⁶² *Ibid.* quoting *District of Columbia v Coleman*, 667 A.2d 811 (D.C. 1995), but see, also, *Richards v United States*, 369 U.S. 1 (U.S. 1962).

²⁶³ *Ibid.* quoting *Bernhard v Harrah's Club*, 16 Cal. 3d 313 (Cal. 1976).

²⁶⁴ CASTEL, pp. 211 *et seq.*

²⁶⁵ Art. 14 Rome II Regulation. The choice is possible, as far as such an agreement does not prejudice the rights of third parties. However, the application of peremptory norms of the law of the country where the damage occurred, as well as of peremptory norms of Community law need to be applied.

²⁶⁶ Art. 4 (2) Rome II Regulation.

²⁶⁷ Art. 7 Rome II Regulation, following a principle originally established in procedural law by the decision *Shevill*, ECJ, 7 March 1995, *Shevill and Others*, ECLI:EU:C:1995:61.

²⁶⁸ See HAY *et al.*, p. 607.

²⁶⁹ BUREAU & MUIR WATT, N 620-60.

disregard a foreign *lex loci delicti commissi* whenever he thinks that the latter may lead to results incompatible with the requirements of basic human rights.

3.2.2. Law Applicable to the Quantum of Damages

[148] In the European Union, the same law applies to the right to obtain compensation (see above, N [145] *et seq.*) and the quantum of damages. According to Art. 15 para. c) Rome II Regulation, the scope of the law applicable to the damage includes “the existence, the nature and *the assessment of damage or remedy claimed*”. In the U.S., the quantification of damages is often seen as a procedural issue and therefore governed by the *lex fori*.²⁷⁰

4. Corporate Law and Torts

4.1. Comparative Overview

[149] Financial compensation is probably the most common judicial remedy in Western legal systems. It provides direct relief for the victim and therefore seems the most worthy of protections. With the exception of a few possibilities for the victim within criminal law and proceedings (see above, sec. 2.3, N [114] *et seq.*), claims for financial compensation generally require a basis in substantive law that would provide for such a remedy, once the jurisdictional (see above, sec. 3.1, N [126] *et seq.*) and procedural (see below, sec. 5, N [163] *et seq.*) hurdles are overcome. In the legal systems under review (and provided that the law of these jurisdictions applies, see above, sec. 3.2, N [145] *et seq.*), the legal basis for financial remedies against the company and/or its directors are found in either tort and/or corporate law.

[150] A victim of human rights violations caused by an enterprise abroad has potential remedies in the home state of this enterprise either against the directors of a company and/or against the company itself. As the legal framework often distinguishes between the two situations, they will be addressed separately below, despite the fact that some arguments might apply to both.

4.2. Directors' Liability²⁷¹

[151] As a preliminary remark, we note that the structure of companies and, accordingly, the directors' role and responsibilities vary considerably among the different jurisdictions under review.

²⁷⁰ BORCHERS, Punitive Damages, p. 544-45.

²⁷¹ There is some international and comparative legal literature dealing specifically with directors' liability. It provides a compilation and, sometimes, analysis of different national approaches to directors' liability in general, often from a commercial perspective (for descriptive reports, see SMERDON; LOOS A.; see also ANDERSON; for a more analytical study, see GERNER-BEULER *et al.*). For more general literature on comparative company law concerning directors' liability and directors' duties (e.g. *Le pouvoir dans les sociétés. Journées chiliennes. Tome LXII/2012*, Paris 2012, esp. pp. 446 *et seq.*; ANDENAS & WOOLDRIDGE, pp. 265 *et seq.*; SIEMS & CABRELLI, pp. 27 *et seq.*). Indirectly related to directors' liability is the considerable amount of literature on corporate governance (see HOPT, pp. 1061 *et seq.*, p. 1187, according to whom “Since the late 1990s, when the field of comparative corporate governance emerged, it has virtually exploded.” Finally, several studies in the field of business and human rights mention directors' liability to some extent. The following discussion will attempt to combine elements of this literature with the national reports and focus on access to justice considerations.

One important element is the existence of (only) one board of directors (one-tier structure, such as in Switzerland) or of two instances (two-tier structure, typically in Germany): a management board and a supervisory board. There are also, however, hybrid structures that divide management and supervision within the one-tier structure (typically in Scandinavian countries).²⁷² In addition, the definitions of director, especially the liability provisions relating to *de facto* directors, might vary. These differences need to be borne in mind when comparing the different liability regimes, as the differences do have an impact on the directors' duties as well as on their enforcement, *i.e.* typically on directors' liability.²⁷³

[152] An essential function of company law is the control and accountability of management (*i.e.* the board) towards the company or/and the owners of the company, *i.e.* typically the shareholders and investors.²⁷⁴ Directors must act in the interest of the company, and they owe duties first to the company.²⁷⁵ Liability provisions in corporate law therefore deal typically with directors' liability towards the company. Several legal systems also provide for liability directly to the shareholders, at least in specific circumstances (e.g. English law, if a specific factual relationship exists). Liability to other parties is explicitly provided for under corporate law only in one jurisdiction under review, *i.e.* Denmark. Under section 361(1) of the Danish Companies Act, directors are liable to pay damages for damage they cause, intentionally or negligently, to third parties, and therefore also potentially to victims of human rights violations abroad. A damage claim requires only proof of causation, negligence (fault) and damage.²⁷⁶ Nevertheless, in spite of this provision, it seems that claims of third parties against directors are rare in Denmark.

[153] In most other legal systems, general tort provisions might allow third parties (and, accordingly, also victims of human rights violations abroad) to claim damages against company directors. In fact, even the Danish provision is understood as a reference to general tort principles. However, there are significant differences among the legal systems as to when and how such claims are possible.

[154] As a basic rule, generally applicable in most legal systems under review (with the exception of Denmark), a tort committed by a director is considered a tort of the company. In French law, third parties can only sue the director if he or she has committed a "wrong separable from his or her functions". Under Dutch law, the individual director is only liable if he or she engaged in conduct that is qualified as "a serious and personal reproach". Examples cover mainly acts where the director knowingly engaged in dealings to the disadvantage of a creditor. Under English law, a director will be personally liable for his or her own torts committed in relation to the company's affairs (such as fraud), he/she can be held jointly liable in the unlikely event that he or she assumes personal responsibility for the acts or omissions of the company which render the company liable, or he/she can be jointly liable where he or she procures or directs the wrongful act or omission in question. In German law, as well, liability would generally require personal involvement, *i.e.* the fact that a director committed the tortious act (typically an injury) by him- or herself. There is considerable uncertainty concerning whether a director can be held responsible for lack of oversight

²⁷² See GERNER-BEURLE *et al.*, pp. 5 *et seq.*; for more on detail on the European models, see: HOPT & LEYENS, pp. 135 *et seq.*

²⁷³ See GERNER-BEURLE *et al.*, pp. vii and 3.

²⁷⁴ KRAKMAN *et al.*, pp. 35 *et seq.*

²⁷⁵ See GERNER-BEURLE *et al.*, p. 63.

²⁷⁶ See BOE & POUlsen, pp. 341, 344.

over the employee. In the various Canadian provinces, there is the possibility of personal liability if actions or omissions are personal and outside their authority as agents for a corporation, i.e. the director must make the tortious act his or her own by deliberately, and wilfully participating in it.²⁷⁷ This seems to be the case, according to case law, if tortious conduct causes physical injury, property damage or a nuisance, even when the director acts in the best interest of the company.²⁷⁸

[155] In most cases of human rights abuses committed abroad, there is typically no personal involvement as indicated in the various legal systems. For this reason, to our knowledge, there are no cases in the jurisdictions under review holding directors liable for human rights violations abroad. There are, however, other constellations where directors' liability might be more likely. One of them is the case of bankruptcy of the corporation. In this situation, the legal systems under review provide for particular duties and liabilities, especially towards creditors of the companies.²⁷⁹ Another situation is liability towards employees. In this context, legislation in several Canadian provinces imposes individual liability on directors for salary arrears²⁸⁰. In addition, a director can be personally liable towards an employee for physical injuries in cases where he or she had or ought to have "personal factual awareness of serious and avoidable or reducible danger" for the employees in relation to corporation related activities.²⁸¹ Finally, a director could be held liable for workplace discrimination.²⁸² It is, however, unclear, whether this would also apply to employees working abroad.

[156] In conclusion, while there seems to be a general tendency towards an increase in directors' individual liability,²⁸³ the cases in which directors are individually liable to victims of human rights violations abroad are conceptually limited in most jurisdictions to situations where the director was him- or herself actively and personally involved in the human rights violation, or where he or she can be individually and seriously blamed. A mere violation of a duty to supervise will generally not be enough to trigger liability, though the situation is unclear in Germany in this regard. Only in Denmark is the wording of the corporate legislation relatively favourable towards a liability claim along these lines. There is, however, no case law on the subject, so there are considerable uncertainties concerning how courts would actually assess such a claim. Finally, there are as yet no reported cases on the possibility of directors being held liable for omissions in the context of the human rights due diligence obligations that have recently been introduced in a number of jurisdictions. As most of these are linked to reporting obligations and are therefore designed to protect investors and shareholders rather than victims, they do not seem to be designed to offer a remedy to the victims of human rights violations abroad. We cannot, however, rule out the possibility that a court would characterise a due diligence obligation as also protecting potential victims in a specific case.

²⁷⁷ DE GUISE *et al.*, pp. 119 *et seq.*, 126; KOEHNEN & COWLING, pp. 61, 69. SARRA, pp. 81, 85.

²⁷⁸ SARRA, p. 86, quoting from *ADGA Systems International Ltd v Valcom Ltd* (1999) 43 OR (3d) 101; see, on the case and its extension of personal liability: NICHOLLS, p. 1.

²⁷⁹ For example Art. 2:138 NV and 2:248 BV of the Dutch Civil Code (Liability for gross mismanagement as an important cause of bankruptcy).

²⁸⁰ DE GUISE *et al.*, pp. 119 *et seq.*, 125 ; SARRA, pp. 100 *et seq.*

²⁸¹ SARRA, p. 97.

²⁸² SARRA, p. 99.

²⁸³ See generally: GLASBEEK, pp. 1 *et seq.*, 23 *et seq.*; see also ANDERSON, Preface, p. v; for Canada: KAISER, p. 15.

4.3. Corporate Liability, Especially for Activities of a Subsidiary

[157] Liability of the corporation for human rights violations abroad can typically be based on contract or tort. In most legal systems under review (with the exception of France), a victim can choose the legal basis of the claim if the preconditions for both exist. Contractual liability generally requires the existence of a contract between the victim and the author of the human rights violation as well as a breach of a contractual duty, and it therefore applies to victims who are employees of the company. The other conditions for liability in contract as well as, more importantly, the requirements for tort liability vary according to the jurisdiction. In English law and in most states of the U.S., various torts might apply, one of the most frequently used being the tort of negligence. It requires the existence of a duty on the side of the author, owed to the victim, and the breach of the duty by the author, causing the damage/injury at stake. In French law, liability claims in tort, according to the general clause (Art. 1240 (formerly 1382) Civil Code) require fault (*i.e.* typically negligence), causation and damage. Dutch, German, and Danish law require an additional element that is referred to as “wrongfulness” in academic and comparative writing. In German law, this is reflected in statutory provisions that require damage to the physical integrity or property, or the violation of some other rights or provisions as a condition for liability; in Dutch and Danish law the concept is often interpreted similarly. A thorough description and comparison of the different national tort law traditions would require much more detail.²⁸⁴ Given the scope of this report, the following discussion will focus on two issues particularly relevant for corporate liability for activities abroad. In fact, some legislation specifically provides for liability for damages caused abroad. In addition, as companies often carry out their activities abroad through subsidiaries, the report will analyse how corporations are held liable in that respect.

[158] The most frequently discussed statute in relation to corporate liability for human rights violations in the U.S. is probably the Alien Tort Claims Act, which only addresses jurisdictional issues²⁸⁵ (see paras. [142]*et seq.*). In addition, the U.S. Torture Victims Protection Act of 1991 provides for liability for acts of torture or extrajudicial killing. Case law, however, has established that the Torture Victims Protection Act permits only claims against natural persons.²⁸⁶ It therefore does not apply against corporations in at least some Circuits in the U.S.²⁸⁷ Finally, the Anti-Terrorism Act would offer the possibility for a U.S. national “injured in his or her person, property, or business by reason of an act of international terrorism”²⁸⁸ to sue in the U.S. for three times the damage actually sustained. Nonetheless, the Act has not given rise to successful litigation and it seems difficult for a victim to prove the involvement of a corporation in acts of terrorism. Interestingly, there appears to be a statute in Belgium enabling Belgian residents to sue for such torts.²⁸⁹

[159] In all jurisdictions under review, several mechanisms were developed to allow holding a parent company liable for acts of the subsidiary despite the separate legal personalities of the two. Three different avenues have been developed to hold the parent company accountable for acts of

²⁸⁴ See for instance BUSSANI & SEBOK.

²⁸⁵ DE LISLE, p. 395 *seq.*, p. 403, referring to *Sosa v Alvarez-Machain*, 542 U.S. 692 (2004).

²⁸⁶ DE LISLE, p. 404.

²⁸⁷ See e.g. *Bowoto v Chevron Corporation, et al.*, F.3d, 2010 WL 3516437 (C.A. 9 (Cal.)); but see, also, *Aldana v Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-52 (11th Cir. 2005).

²⁸⁸ 18 U.S.C. § 2333 (a).

²⁸⁹ ENGLE, pp. 70 *et seq.*

its subsidiaries. Similar arguments are sometimes developed in order to hold a company accountable for acts committed by a company it controls.

[160] First of all, courts in all jurisdictions under review may, under certain circumstances, “pierce the corporate veil”, i.e. they may regard acts of the subsidiaries as acts of the parent company. This theory, however, is applied very rarely in the present context. In Germany for example, it generally requires the blending of property. According to some German authors, piercing the corporate veil is also possible in the event of full and active control by the parent company, mainly in cases where the parent company extracts assets from the subsidiary before the latter goes into bankruptcy. Also in Denmark, the theory is applied only in relation to bankruptcy of the subsidiary and after the mixing of assets; in France, as well as in the Netherlands,²⁹⁰ a similar possibility exists in the context of bankruptcy. In the Netherlands, the (controversial) doctrine of “vereenzelvigen” (identification) might allow – though only in exceptional cases – attributing acts and liabilities to a parent company in the event of a conjunction of several of the following circumstances: dominance, intensive involvement in the management, creation of expectations, blending of assets, especially if recognizing the separate existence of the two corporations would lead to consequences contrary to good faith.²⁹¹ In the UK, piercing the corporate veil may only take place when a company is established for fraudulent purposes, or where it is set up to avoid an existing obligation. While these instances make it seem rather unlikely that the theory of piercing the corporate veil applies to liability for human rights violations, Canadian courts have had a more favourable approach. According to a decision of the Ontario Court of Appeal, the separate legal personality can be disregarded if a subsidiary corporation acts “as the authorized agent of its controllers”.²⁹² The Ontario Superior Court applied this reasoning in 2013 in a preliminary assessment of a claim for human rights violation by a subsidiary.²⁹³

[161] A second approach consists in holding the parent company liable for the breach of a duty to supervise its subsidiary. This possibility was most famously developed in 2012, in the UK case of *Chandler v Cape*²⁹⁴ concerning liability towards employees for asbestos related damages. According to this case, the following conditions allow holding a parent company liable towards employees of the subsidiary: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge of some relevant aspect of health and safety in the particular industry; (3) the subsidiary’s system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees’ protection. Some commentators argue, on the basis of previous cases, that in certain circumstances, a holding company may have a direct duty of care toward its subsidiary’s tort victims, including both employees and third parties, without making any distinction among the claimants. The English cases are also discussed in Denmark, where the literature suggests that the same reasoning could be applied, although there are no supporting cases (yet). Also in Canada and the U.S., some courts reason along similar lines, though there are some inconsistencies, especially in U.S. case law, concerning possibilities and conditions of such liability. In the

²⁹⁰ In the Netherlands, the liability of the director in the event of bankruptcy can be applied to a parent corporation with direct influence over the management(as a *de facto* manager), see VANDEKERCKHOVE, p. 35.

²⁹¹ VANDERKERCKHOVE, pp. 37 *et seq.*

²⁹² *Parkland Plumbing & Heating Ltd v Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256.

²⁹³ *Choc v Hudbay Minerals Inc.*, 2013 ONSC 1414.

²⁹⁴ *David Brian Chandler v Cape plc*, 2012 England and Wales Court of Appeal Civil Division 525.

Netherlands, the parent company can be held liable in tort in violation of a duty of due care towards creditors if it knew or should have known that its act of omission would harm the creditors of the subsidiary and if there was considerable involvement with the management of the subsidiary.²⁹⁵ Finally, the French legislator has introduced an explicit duty for large-size parent companies to oversee the activities of the subsidiaries (under direct or indirect control) and even of their subcontractors and companies within the supply chain in order to identify and prevent the possibility of human rights violations, physical injury and environmental damage.²⁹⁶ The Act provides a basis for claims of victims against the parent company, as it explicitly refers to the general clause of liability. While the European Union has introduced a regulation requiring big companies to report on the existence and results of their due diligence processes in Human rights and environmental matters (Directive 2014/95/EU), it is not certain that the duty to report will be linked to a duty to supervise leading to subsequent liability as is the case according to the French Act.

[162] Finally, a third approach to holding parent companies liable for human rights violations (mainly found in the US) consists of considering them to be participants in the respective act. As for the other theories, court practices vary considerably in this respect; it is therefore difficult to establish the precise conditions for such liability.

5. Procedural Law

5.1. Introduction²⁹⁷

[163] Civil claims in the context of human rights violations are likely to be brought as tort claims principally for personal injury or for damages to property or environment. The following analysis will therefore, as a point of departure, focus on rules governing tort claims, although more general civil law rules will be discussed when they are of relevance for the scope of this study. This part of the study focuses on issues that appear to have been subject to more extensive discussion in the context of access to justice following human rights violation, namely the statutes of limitations (5.2.), financial barriers and legal aid (5.3.); and several issues relating to proof (5.4.).²⁹⁸

5.2. Statute of Limitations

[164] Rules on time limitations can be an important barrier to human rights claims for civil justice. Although generally applicable, they have been deemed to pose specific barriers to human rights claims, given the difficulties in investigating and gathering evidence for such claims.²⁹⁹ This is particularly true in transnational situations; victims of human rights violations in foreign countries

²⁹⁵ VANDEKERCKHOVE, pp. 33 et seq.

²⁹⁶ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Journal Officiel, 28.03.2017 after Decision 2017-750 of the Conseil constitutionnel.

²⁹⁷ Although there are few comprehensive comparative studies containing detailed information and analyses of specific national civil law procedure regimes, there are several commentaries in the legal literature on how national civil law procedure rules and related policies and practices generally may constitute barriers to justice (see for example ZERK, pp. 64 et seq.).

²⁹⁸ *Ibid*, see also for example LAZARUS *et al.* and SKINNER *et al.*

²⁹⁹ SKINNER *et al.*, p. 39.

must first discover that they may bring their case in the home country of the business corporation, then find out how this may be done, and subsequently raise sufficient funding etc.

[165] Limitation periods for a tort-based claim often depend on the nature of the claim. In the UK and France, for example, there are specific limitation periods for claims that include damages for personal injury. For this kind of claim, the limitation period is shorter than the general tort law rule in the UK (3 years instead of 6 years) whereas it is longer in France (10 years instead of 5 years). A majority of jurisdictions (Denmark, Germany, the UK, Quebec³⁰⁰ and the U.S. (federal law)) have, in accordance with the general or fall-back rules, a limitation period of either three or four years for tort law claims that include damages for personal injury. If the damage caused to a person was intentional, a longer limitation period may apply. This is the case at least in Germany where the limitation is 30 years. In Quebec, a 10 year period applies to acts causing bodily injury that constitute criminal offences.³⁰¹

[166] Where there is a need of proof of damages, *i.e.* if the tort is not actionable *per se*, the limitation period starts running from the date when the damage is sustained, at least in Denmark and the UK. In Germany, it begins running at the end of the year in which the claim arises, whereas the general French rule (and the case-law of the Supreme Court of Canada)³⁰² designates the date when the person became aware of the claim. A requirement that the claimant become, or should have become, aware of the claim in order to trigger the running of the limitation period also applies in Denmark and Germany. There may be a maximum limit for the suspension of a claim; for example in Denmark, claims for damages for personal injury are subject to a maximum limitation period of 30 years.

[167] If the court finds that a foreign law applies to the substantive issues, the national choice of law rules may also provide that the foreign law governs the limitation period. However, in the UK, there is an exception to this principle, based on public policy, if its application would result in undue hardship for a person who is (or who might be) made a party to the proceedings. In this regard, it should be mentioned that limitation periods for tort based claims can be very short, and thereby significantly limit the possibility of access to justice.³⁰³

5.3. Financial Barriers and Legal Aid for Bringing an Action in Court

[168] Litigation is often complex and costly. Indeed, court fees to bring a case, costs of expert witnesses, transport and other services, and, in particular, costs of legal counsel may in many cases effectively hinder access of victims of human rights violations to civil justice.³⁰⁴ More generally, according to a major comparative study on litigation funding and costs including 37 jurisdictions, the high level of legal fees and the procedural architecture in some systems produce significant challenges for delivery of access to justice at proportionate costs through the courts.³⁰⁵

³⁰⁰ Art. 2925 Quebec Civil Code; BAUDOUIN & LINDEN, N 205.

³⁰¹ Art. 2926.1 Quebec Civil Code.

³⁰² BAUDOUIN & LINDEN, N 299.

³⁰³ TAYLOR *et al.*, p. 16.

³⁰⁴ UNGP commentary, p.28 to Principle 26, which states that the costs for bringing a claim can be an important practical barrier to access judicial remedy. See for example the volumes edited by REIMANN; HODGES *et al.*, and PICKER & SEIDMAN, p. 26.

³⁰⁵ HODGES *et al.*, p. 108.

Controlling costs and delays in court have long been recognized as difficult issues that remain unresolved in many jurisdictions.³⁰⁶

[169] The rules on cost and fee allocation in civil procedure, *i.e.* which of the parties bears which kind of litigation expenses, is obviously of great importance for the issue of access to justice. Traditionally, countries have been categorized in one of the following two groups; (1) the systems that shift the winner's litigation costs to the loser ("the English rule/loser pays rule") or (2) the systems in which each side bears its own costs ("the American rule"). The vast majority of countries claim to adhere to the "loser pays" principle.³⁰⁷ This however is a very simplistic division, given that in practice no system makes the winner completely whole and even in the U.S. some costs are shifted to the loser. Thus, most jurisdictions operate somewhere in between these two extremes.³⁰⁸ Of the countries examined in this study, all countries except the U.S. are characterized by a "loser pays" system, although in France and Canada³⁰⁹, the judge appears to have a comparatively large discretion concerning fee allocation. A "loser pays" rule may have the effect that the financial risk for a victim to commence proceedings is considerable.³¹⁰

[170] The financial risk faced by claimants can be reduced by allowing for contingency fee arrangements. Under such arrangements, the legal counsel bears the burden of litigation expenses; only if the claim is successful will counsel be reimbursed for their fees and disbursements out of the settlement or court award in favour of the claimant. The advantage is thus that the threshold for a plaintiff to start proceedings is much lower. It may, however, be difficult to find a lawyer willing to accept a contingency arrangement since an unsuccessful case may engender considerable costs for him or her. Moreover, depending on the system of allocation of fees, the unsuccessful plaintiff, may still be liable for the other party's legal fees.

[171] Although permitted in some countries to varying extents, many jurisdictions prohibit contingency fees, either by law, or as a result of professional rules and practice standards for lawyers.³¹¹ In the U.S. and (to a lesser extent) in Canada,³¹² contingency fee arrangements are fairly common in personal injury cases, where the attorney is entitled to a percentage of the obtained award (often between 30-50%). Under German law, it is only permitted in the limited case where a plaintiff, due to his or her financial situation, would otherwise be prevented from bringing the action. No-win-no-fee agreements (also known as conditional fee agreements) also make the lawyer's remuneration contingent on the outcome of the case but they differ from the typical contingency fee in that the size of the fee is not (at least not strictly) tied to the sum won.³¹³ Such arrangements are permissible in many jurisdictions, for example in Denmark and the UK. In France and the Netherlands³¹⁴, arrangements based exclusively on success are prohibited. In France, however, a fee arrangement may take into account the outcome of the case if it also applies other criteria such as the time spent and the difficulty of the case.

³⁰⁶ *Ibid.*

³⁰⁷ REIMANN, p. 9.

³⁰⁸ *Ibid.*

³⁰⁹ Art. 477 Quebec Civil Code; ABRAMS & MCGUINNESS, pp. 1398 *et seq*, § 17.4 – 17.6.

³¹⁰ TAYLOR *et al.*, p. 21.

³¹¹ TAYLOR *et al.*, p. 21.

³¹² ABRAMS & MCGUINNESS, pp. 1415 *et seq*, § 17.36 *et seq*; see also the Website of the Barreau du Quebec: <http://www.barreau.qc.ca/en/public/relation/mandat-honoraires/> (accessed on 15.08.2017).

³¹³ REIMANN, p. 45.

³¹⁴ Art. 25-29 *Gedragsregels* 1992, see. Loos M.B.M., pp. 219 *et seq*, 223.

[172] In all jurisdictions under review, with the exception of France, a plaintiff is obliged to pay a fee in order to bring an action in court. According to a general principle under French law, no such fee is charged by the courts; however, many potential ancillary costs such as translation of acts, compensation to experts, etc. are allocated to the parties. In the case of money claims, the court fee is generally determined as a function of the amount being claimed. In the UK, the fee may vary from £35 to £10,000 (for claims over £200,000) and in Denmark between DKK 500 and DKK 75,000. The court fee is often waived if the plaintiff is granted legal aid in order for her or him to bring the action (for example in Denmark and Germany), whereas in the UK a reduction of the fee is potentially available to economically weak persons.

[173] A legal aid scheme may be an efficient tool to enable a victim of human rights violations to enforce his or her rights by bringing an action in court. Although the extent of the aid and its type may vary considerably, many jurisdictions have put in place such schemes. More comprehensive publicly funded legal aid schemes are available in Canada (though with differences among the provinces)³¹⁵, Denmark, France, Germany, and the Netherlands³¹⁶, whereas such aid is comparatively limited in the UK and in particular in the U.S. The legal aid is often granted in the form of waiving court fees and paying for lawyers' fees.

[174] The granting of legal aid is subject to considerable restrictions and is thus available to only a small percentage of litigants. A common feature of these schemes is that only indigent parties are eligible, i.e. parties who fall below an income or wealth threshold. It is also usually subject to a merits test, i.e. the receiving party must have a realistic chance of success. This is true for at least the legal aid schemes in Denmark, Germany, Quebec³¹⁷, and the UK. Legal aid is also often limited to plaintiffs residing in the jurisdiction concerned, e.g. in the Netherlands.

[175] As regards the countries in the European Union, it should be mentioned that there is a right to legal aid laid down in the Charter of Fundamental Rights of the European Union. The Charter's Art. 47 para. 3 lays down an obligation upon the Member States to ensure that legal aid is available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to judges. To our knowledge, however, this provision does not seem to have had any major influence on the existing domestic rules on legal aid.

[176] A UK case which examined, albeit indirectly, the question of financial support for legal costs and which is often cited in the context of business and human rights is *Lubbe v Cape plc*.³¹⁸ In this case, the claimants' difficulties in funding their case in South Africa in relation to personal injuries suffered there partly as a result of acts of the UK-based Cape plc, was one of the factors relied on by English judges in rejecting an application by Cape plc under *forum non conveniens* claiming that South Africa, and not England, was the more appropriate forum for the case. Hence, although South Africa was deemed to be the natural forum, the claimants succeeded in showing that a stay of proceedings on the ground of *forum non conveniens* would be substantially unjust as a result of the lack of adequate financial support available in South Africa compared to that in England.

³¹⁵ See DUPUIS, with links to the different provinces.

³¹⁶ Wet op de rechtsbijstand 1993, available at <http://wetten.overheid.nl/BWBR0006368/2017-09-01> (accessed on 26.09.2017).

³¹⁷ See Sec. 4.11. Act respecting legal aid and the provision of certain other legal services, 2010, c. 12, s. 1.

³¹⁸ *Lubbe v Cape plc* [2000] 1 Weekly Law Reports 1545.

5.4. Standard and Burden of Proof

[177] The rules on standard and burden of proof are a fundamental element of civil procedure generally and central for the outcome of a case. Closely related to the question of burden of proof are rules of discovery, disclosure of information, and admissibility of evidence. In transnational claims, there are often considerable difficulties to obtain sufficient evidence, *inter alia* because of issues of admissibility and reliability of evidence.³¹⁹

[178] The burden of proof can be described as the obligation placed upon a party to prove or disprove a disputed fact. As a general rule in the jurisdictions under review, for civil law cases, including tort cases, the party that alleges a certain fact generally has the burden of proof with respect to that fact. In practice, this often means that a plaintiff must prove all of the elements of his or her claim. Rules allowing the use of discovery or a shifting of the burden of proof to the defendant can facilitate the proof for the plaintiff. The first element is clearly a feature of procedural law (and is therefore assessed according to the rules of the court (*lex fori*)). Nonetheless, many jurisdictions (such as the Netherlands³²⁰ and European private international law rules relating to contractual and extracontractual liability³²¹) regard rules relating to the burden of proof and legal presumptions as substantive (*i.e.* to be determined according to the law applicable to the case); in others, however, the issue is more controversial.

[179] Discovery is the process by which parties to civil litigation gain access to the information needed to prove or defend a claim. Usually, the discovery order is made against the other party although it may also, in certain circumstances, be made against third parties. In particular in the United States, civil procedure allows for broad discovery, whereas it is more limited in Canada³²² and even more in the UK. In continental European countries there is generally no discovery or disclosure rule *obliging* the other party to divulge information in its possession. Where similar rules exist, such as in Denmark or in the Netherlands³²³, they typically do so only in an attenuated form.³²⁴

[180] A shift of the burden of proof with respect to negligence may be possible in the U.S. in accordance with the principle of *res ipsa loquitur*. If a plaintiff in a tort case can prove that the harm alleged would not ordinarily have occurred without negligence, that the object that caused the harm was under the defendant's control, and that there are no other plausible explanations, proof of that harm will create a rebuttable presumption of negligence by the defendant, thereby shifting the burden of proof with respect to the negligence to the defendant. A shift of the burden of proof is also conceivable for example where the facts in question lie within the sphere of the opponent. This applies, for example, in France for the liability of the employer for accidents at the workplace. In the Netherlands, a more general rule provides the possibility of shifting the burden of proof if the

³¹⁹ SKINNER *et al.*, p. 8.

³²⁰ VAN HOOJDONK & EIJSVOOGEL, p. 33

³²¹ Art. 22 Brussels II.

³²² See ABRAMS & McGUINNESS, pp. 1007 *et seq*, especially § 13.3 with regards to the requirement of proportionality; see also REYNOLDS, Art. 397 N 7 and Art. 398 N 10 *et seq*; for an assessment of Canadian as opposed to U.S. discovery procedures, see PICKETT, § 1.46, according to whom an essential difference concerns the access, under U.S. discovery procedure, to non-party witnesses and documents.

³²³ Art. 843a *Wetboek van Burgerlijke Rechtsvordering*; see VAN HOOJDONK & EIJSVOOGEL, p. 31; see also ENNEKING, Multinationals and Transparency, p. 139.

³²⁴ SKINNER *et al.*, p. 45.

principles of reasonableness and fairness so require.³²⁵ In addition, it is possible to impose an aggravated burden on the defendant to motivate his defense and the court can appreciate the available evidence, e.g. through presumptions of fact.³²⁶ We are not however aware of any case law in the context of business and human rights in the examined countries in which the burden of proof has been shifted in accordance with those principles.

[181] Where the lawmaker wants to protect a weaker party, there may be rules attributing the burden of proof for certain facts to the other party. This is often the case, for example, in disputes between employer and employee regarding grounds for dismissal. In France, there are certain kinds of proceedings in which none of the parties has the burden of proof (although the defendant benefits in case of doubt), for example in labour law disputes concerning discrimination and mobbing.

[182] The standard of proof refers to the amount of evidence required to prove a claim or assertion. It is not generally the same in civil and criminal cases. Hence, although the evidence may be insufficient to convict under penal law, damages may be awarded by a court for the same acts in a civil law case. The standard of proof may also be different depending on the civil law area in question and on the particular claim. In Denmark, for example, a comparably high degree of probability is generally required in tort law. In the U.S., the general standard of proof in civil matters is expressed as a preponderance of the evidence. This is similar to the UK and Canada³²⁷ where proof on the balance of probabilities (reasonable probability) is required in order to discharge the burden of persuasion, i.e. the proponent must show that it is more likely than not that his or her version of the facts is correct. In Germany, the court must be convinced that a certain fact is true; an absolute certainty is not required, but the level of certainty must rule out reasonable doubts. Hence, the standard of proof appears to be higher in Germany than in the U.S. and the UK and therefore Germany is a less favourable venue (albeit in that specific aspect) for a person claiming damages for human rights violations.

6. Collective Redress

[183] All of the jurisdictions examined provide for some form of collective action³²⁸, in some situations, but the forms of action, the requirements and the types of matters that may be treated vary considerably from one country to another. Class actions seem most developed in the U.S. and in Canada, where almost all provinces have passed class action legislation. In addition, although they may be possible in theory, our research revealed no collective Human Rights actions actually filed in any jurisdiction other than the U.S. and Canada.

[184] Class actions form an integral part of the U.S. litigation landscape; they are well known, relatively common and represent powerful tools both in and of themselves, and as a means of leverage to obtain an out-of-court settlement. In a US-style class action, a group of plaintiffs – be

³²⁵ Art. 150 *Wetboek van Burgerlijke Rechtsvordering*, Bk 1; see VAN HOOJDONK & EIJSVOOGEL, p. 21; in addition, according to case law, in actions for breach of a contractual or statutory provision drawn up to prevent occurrence of a specific harm, there is a presumption of causation.

³²⁶ ENNEKING, *Multinationals and Transparency*, p. 138, with further references.

³²⁷ ABRAMS & MCGUINNESS, p. 1279, § 16.139.

³²⁸ Although some legal orders allow for a form of litigation in which defendants form the group rather than plaintiffs, these would ordinarily be inappropriate for Human Rights litigation; as such, we have restricted our discussions to collective actions in which the group concerned is a group of plaintiffs.

they individuals, corporations, associations, etc. – are joined together as a party or parties, represented by a court-approved representative, in a single litigation. Once the class is certified, all members of the class will be bound by the outcome of and/or determinations made in the litigation. The rules in Canada seem to be fairly similar to those in the U.S., though there are considerable differences among the provinces.³²⁹

[185] Denmark, France, and the UK also have what are essentially class actions but only in Denmark is this form of procedure available for more than very specific areas of the law that would be unlikely to apply in a Human Rights context. Class actions in the UK are limited to competition law although there are other forms of collective actions; in France, they are limited to consumer and competition law, although bills which would allow such actions concerning environmental and health issues, and discrimination are pending. We will therefore focus the discussion of class actions in this opinion on Danish and U.S. class actions.

[186] In the Netherlands, the Act on the Collective Settlement of Mass Damages of 2005 provides for a procedure that facilitates settlement agreements following damages caused by a single incident or similar incidents to a considerable number of people. However, as opposed to the class action procedures in the U.S. and in Denmark, the judicial procedure under the Collective Settlement of Mass Damages Act consists in judicial declaration of the binding nature of a settlement agreement reached by a person responsible for mass disaster accidents and an association or foundation acting for the group of aggrieved persons.³³⁰

[187] In Canada, Denmark and the U.S., collective actions are available for most if not all types of civil claims. In addition, the U.S. has two specific statutory bases that would clearly apply in the Human Rights context: the Alien Tort Claims Act ("ATCA") and the Torture Victim Protection Act ("TVPA"). In contrast to the U.S., the UK allows "human rights violation" claims only against public authorities. This does not, however, rule out the possibility of a tort claim – such as negligence – against a business.

[188] Recent U.S. Supreme Court case law appears to have placed additional jurisdictional restrictions on the ATCA (see N [144])³³¹, although both the ATCA and the TVPA remain in effect. Moreover, there appears to be a trend in U.S. law to make class action litigation less easily available.³³²

[189] Each jurisdiction has its particularities, however, the types of redress can be roughly divided into four categories: 1) class actions, where a group of plaintiffs sue together, all as parties to a single litigation; 2) representative actions, where an individual or an organization sues on behalf of a group of plaintiffs, all of whom are bound by the decision of the court but who are not actually parties to the litigation; 3) group litigation, where some or all issues of similar cases are tried together but the cases remain separate; and 4) joinder, where several cases by several parties are joined because the facts and/or the outcomes of one of the actions are dependent on the other.

³²⁹ See more in Detail: MARTINEAU & LANG, pp. 56 *et seq.*

³³⁰ FLEMING & KUSTER, pp. 286 *et seq.*, 289.

³³¹ See *Kiobel* and subsequent cases attempting to apply that case, discussed above.

³³² See Scalia opinions in class action appeals e.g. *Comcast Corp. v Behrend*, 133 S.Ct. 1426 (2013); *CompuCredit Corp. v Greenwood*, 132 S.Ct. 665 (2012).

6.1. Class Actions

[190] Collective actions exist for a broad range of civil claims in the U.S., Canada and in Denmark. The U.S. rules are fairly precise. Under U.S. Federal law, four requirements must be fulfilled for a class action: 1) there must be questions of law and fact that are common to all of the plaintiffs (commonality), 2) the number of plaintiffs must be so large that individual suits would be impracticable (numerosity), 3) the representative's case must be typical of other members' cases (typicality), and 4) the representative must be able to "fairly and adequately protect the interests of the class" (adequacy of representation).³³³ Sometimes, plaintiffs must also prove that common issues not only exist but will predominate, and that a class action is better suited than individual litigation in the case(s) at hand. In the different Canadian provinces, quite similar requirements apply for the certification or authorization of the class.

[191] In Denmark, the plaintiffs' claims must arise from the same factual circumstances and have the same legal basis, and collective action must be deemed to be the best method of examining the claims.³³⁴ There appears to be a trend towards an increasing number of these actions, although the total number remains low.³³⁵ A writ for a collective action may be lodged by any person who could be appointed as a group representative and must contain a description of the group, information on how the group members can be identified and notified as well as a proposal for a group representative.³³⁶ The court decides what claims are covered and defines the scope of the action. The representative must be appointed by the court.³³⁷

[192] The action is led by a representative who can be a member of the group, an association, a private institution or another organization where the action falls within the framework of the organization's goals or a public authority authorized for the purpose by law (e.g. a consumer ombudsperson).³³⁸ Unlike in U.S. class actions³³⁹, in Danish collective actions, the representative, on behalf of the members of the group, is the only claimant in the case; members of the representative class are not technically parties to the case.³⁴⁰ In this sense, the Danish collective action would not qualify as a true "US-style" class action. Nonetheless, the Danish group members have a similar status in some ways; for example, they are bound by the court's decisions and rules.³⁴¹

[193] The general model for class actions in the U.S. and in Canada is an opt-out structure. The same model applies to the Collective Settlement of Mass Damages Act. If a class is certified, any party that falls within the class is bound by the court decision unless that party specifically opts out of the class. Nonetheless, in cases where an opposing party may be confronted by contradictory individual judgments, the interests of third parties might be decided or compromised in the absence

³³³ Rule 23 Federal Rules of Civil Procedure.

³³⁴ Chapter 23a of the Administration of Justice Act (LBK nr 1257 af 13/10/2016 (Gældende) Udskriftsdato: 20. september 2017).

³³⁵ FELDMAN & ANDERSON, p. 29.

³³⁶ § 254 d Administration of Justice Act.

³³⁷ § 254 e Administration of Justice Act.

³³⁸ § 254 d Administration of Justice Act.

³³⁹ § 254 c Administration of Justice Act.

³⁴⁰ And as is the case in representative actions.

³⁴⁰ § 254 d Administration of Justice Act.

³⁴⁰ § 254 f 2 Administration of Justice Act.

³⁴¹ *Ibid.*

of a class action, or where injunctive or declaratory relief is appropriate for all members of the class, a certified class is mandatory and opting out is not possible.

[194] In Denmark, however, the general rule is the opt-in model. An opt-out model is permitted where the relevant claims are clearly not expected to be brought individually (*i.e.* individual claims do not exceed DKK 2'000 or roughly € 200) and where opt-in is not appropriate for handling the claims (such as where there are so many potential claimants that the practical administration of opt-in notice will require a disproportionate amount of resources). In addition, in such a case, the representative must be a public authority, (*e.g.* ombudsperson). Our research, however, has revealed no such actions.

[195] In the U.S., in Canada, and in Denmark, all remedies generally available for civil law claims, such as damages – including pain and suffering, injunctive relief, restitution, etc. – are available for these actions. In both countries, it is the court that ultimately decides how, where and when members of the class will be notified.

6.2. Representative Actions

[196] Representative actions exist in the UK (although they are relatively uncommon), in Germany, in France, and in the Netherlands.

[197] In the UK, only a claimant can qualify as a representative and only the representative is a party to the suit. In Germany, however, only certain approved associations may take action as a representative of a specific public interest (*e.g.* environmental protection under the German Federal Nature Conservation Act, discrimination against disabled persons). Unlike in the UK, however, the claimant/representative in Germany, although the only party to the suit (other than the defendants), has generally suffered no damage itself. Action may only be taken against administrative regulations. Moreover, environmental claims are restricted to organizations that have the right to participate in decision-making (*e.g.* urban planning), and claims on behalf of the disabled, to those concerning accessibility. Litigation concerning acts or conditions abroad is excluded.

[198] Under French law, an accredited national consumer association can claim compensation before a civil court for individual damage suffered by consumers placed in similar or identical situations. However, because these suits are limited to the consumer protection area, they will not be discussed further. It is, nonetheless, worth noting that there are two bills currently pending in France which would allow for this type of a procedure in cases concerning (1) discrimination, and (2) environmental and health issues.

[199] In the UK, all claimants in representative actions must share a single common interest and no individual assessment of claims – including damages – must be necessary. It is neither enough that the suggested class of claimants sue in respect of the same cause of action, nor that the claims raise very similar factual issues, perhaps even arising from the same incident. This is probably one of the reasons why this form of procedure is rarely used when pecuniary interests are involved; this procedure is usually limited to suits seeking injunctive relief only. The representative claimant, then, must have the same interest as the claimants represented, and is the only claimant who is a party to the suit.

[200] In the Netherlands, a foundation or an association can start legal proceedings to protect the common interests of third parties if its articles of association include the protection of third parties' interests as a purpose of the association or foundation (Art. 3:305a Dutch Civil Code). This claim

is seen as a subsidiary claim, *i.e.* the parties can still commence proceedings themselves. In particular, it is not possible for the foundation or association to claim monetary damages,³⁴² though a recent proposal submitted to the Dutch parliament aims at introducing this possibility.³⁴³

[201] In this type of procedure, court permission is not required to file a claim but, once the suit is filed, the court can, *sua sponte* or upon petition of a party, refuse to allow the claimant to act as a representative. Where the representative proceeding is allowed by the court, the represented plaintiffs need not be informed of the representative party's intention to bring the action nor need they be informed of its progress. Indeed, the representative claimant or defendant, who is the only claimant who is a party to the case, is *dominus litis* (Latin for "the one who calls the procedural shots") and so the representative can therefore compromise the claim or defense.

[202] A party may however petition the court for permission to opt-out. All persons represented in the claim must be identified as part of the proceedings but we know of no rule that such persons must be named publicly. That said, civil cases generally involve hearings in open court, which the public may attend. The representative bears all costs in case of loss and may not be able to recover all costs even in the event of a win.

6.3. Group Litigation

[203] UK law provides for group litigation orders (GLOs) pursuant to which there may be consolidated management of claims giving rise to common or related issues of fact or law. Court permission is required for this type of procedure. A Group Register may be established on which specific issues of certain cases may be listed with the permission of the court. Registration in the Group Register is the only way that claimants will benefit from the results of the group litigation. Cases having a least one of the issues that have qualified for listing on the Group Register may be eligible to be managed as a group. It should be noted that the standard for similarity of claims here is less stringent than for representative actions. Unlike the case of representative actions, however, the court must give permission for the representative to file the group litigation (which may be given whether or not the representative is authorized by the other claimants to represent them). The cases remain separate and, once the common issues are resolved, each claimant must establish his, her or its right to relief, separately.

[204] This is an opt-in procedure only; the lawyer for a case may petition the court for a GLO; if the order is issued, it must specify which claims will qualify to be managed as a group. Court orders issued subsequently will be binding on all cases that are part of the group, and the cases are jointly managed, but the cases remain separate nonetheless. The GLO usually provides for advertising to allow potential claimants to opt-in to the collective action but no general rules exist on this subject or on who pays.

³⁴² See more in detail: FLEMING & KUSTER, p. 288.

³⁴³ See the comment of the bill of the Justice Ministry (in Dutch), available at: <https://www.rijksoverheid.nl/ministeries/ministerie-van-veiligheid-en-justitie/nieuws/2016/11/16/wetsvoorstel-collectieve-schadevergoedingsactie-naar-tweede-kamer> (accessed on 21.08.2017), or the summary in English by Dr. Ianika Tzankova, available at: <http://www.collectivedress.org/newsitem/6041> (accessed on 21.08.2017).

6.4. Joinder

[205] Cases may be joined in Germany, Canada, Denmark, the UK and the US³⁴⁴.

[206] Joint actions exist in Germany such that, for example, evidence is heard only once for all the joined cases, but the cases remain individual, requiring individual determinations, and neither legal actions by a party nor decisions on one case bind other parties. This type of action may be optional or mandatory, depending on the circumstances.³⁴⁵ Cases which have legal ties amongst them may also be consolidated, but only after they have been filed.³⁴⁶

IV. COMPARATIVE REPORT ON ACCESS TO NON-JUDICIAL REMEDIES

1. National Contact Points

1.1. General Remarks

[207] The OECD Guidelines for Multinational Enterprises (Guidelines) require adhering governments to set up National Contact Points (NCP). A NCP is a special body, to which any interested party can bring human rights complaints against multinational enterprises that are operating in or from the currently 48 countries adhering to the Guidelines.³⁴⁷ From 2000 until 2016 more than 400 specific instances (complaints) have been submitted to the NCP system.³⁴⁸ Since the inclusion of the Human Rights Chapter in the Guidelines, there has been an increase of complaints addressing human rights issues. Among the 99 (out of 157) submissions accepted prior to 30 April 2017, more than half, i.e. 51 were human rights related.³⁴⁹ The OECD-NCP system is thus a prominent example of a “state-based non-judicial grievance mechanism” that contributes to the implementation of the third pillar of the UNGP on Access to Remedy. Currently, the Guidelines are the only government-backed international instrument on responsible business conduct that has a built-in grievance mechanism.³⁵⁰

[208] The extent to which the NCP appropriately fulfil their roles depends, among other factors, on their organization, composition and working strategy when handling complaints.³⁵¹ In this regard,

³⁴⁴ Since, as we have discussed above, other more relevant types of procedures exist in the various countries, we have not addressed joinder of actions in detail here.

³⁴⁵ § 59 German Code of Civil Procedure.

³⁴⁶ §147 German Code of Civil Procedure.

³⁴⁷ All 35 OECD countries and the following 13 non-OECD countries: Argentina, Brazil, Colombia, Costa Rica, Egypt, Jordan, Kazakhstan, Lithuania, Morocco, Peru, Romania, Tunisia, and the Ukraine, available at: <http://mneguidelines.oecd.org/oecddeclarationanddecisions.htm> (accessed on 11.07.17).

³⁴⁸ See OECD, Annual Report 2016, p. 33; RUGGIE & NELSON, p. 6 and 8. Not all of these cases were considered by the NCP on their merits. There exists no single database of *all* complaints filed with NCP.

³⁴⁹ Specific instances filed under the revised Guidelines after June 2011: OECD database on specific instances (<http://mneguidelines.oecd.org/database/> (accessed on 25.04.17)); OECD, Implementing the OECD Guidelines, pp. 38 *et seq.* See also RUGGIE & NELSON.

³⁵⁰ OECD, Implementation of an Action Plan to Strengthen National Contact Points, p. 2.

³⁵¹ KAUFMANN *et al.*, Baseline Study, p. 61; OECD, Guidelines 2011, p. 71, A.. Some authors argue that the wide margin of interpretation when handling specific instances is partly due to the vague and ambiguous language

the Guidelines leave the adhering governments a wide margin of discretion.³⁵² Many NCP have their own internal procedures, which often differ considerably. The only specification the Guidelines provide for is the concept of functional equivalence, which requires NCP to deliver comparable results in similar situations.³⁵³ NCP should operate in a visible,³⁵⁴ accessible,³⁵⁵ transparent³⁵⁶ and accountable³⁵⁷ manner.³⁵⁸ Furthermore, the Guidelines require governments to provide their NCP with human and financial resources.³⁵⁹

[209] Due to divergent country-specific legal and cultural traditions, there is no standardised NCP model. The following section shows how the NCP in selected countries are organized, and more importantly, in what manner they assess specific complaints against corporate-related human rights violations.

1.2. Denmark

[210] In 2012, Denmark established the so-called Mediation and Complaints Handling Institution for Responsible Business Conduct (MKI) that serves as the current Danish NCP.³⁶⁰ The Danish NCP is structured as an independent body housed within the Danish Business Authority, which is located within the Ministry of Business and Growth. It is composed of five members (a chairperson and an expert member, appointed by the Minister for Business and Growth, as well as three other members appointed by business associations, trade unions and NGOs).³⁶¹ Additionally, the Danish NCP is supported and served by a secretariat, which is incorporated into the Danish Business

used in the Guidelines, see DAVARNEJAD, pp. 363 *et seq*; OSHIONEBO, p. 583; EGELOUND OLSEN & ENGSIG SØRENSEN, p. 24.

³⁵² OECD, Guidelines 2011, p. 72, A.2.

³⁵³ OECD, 2013 Chair's Report, p. 8.

³⁵⁴ OECD, Guidelines 2011, p. 79. Visibility means that adhering governments must inform different stakeholders about their NCP and take an active role in promoting the Guidelines.

³⁵⁵ OECD, Guidelines 2011, p. 79. NCP should be accessible in order to function effectively. Therefore NCP should facilitate access, be it through electronic communication, by responding to all legitimate requests for information or through acting in an efficient and timely manner.

³⁵⁶ OECD, Guidelines 2011, p. 79. In general, the activities of the NCP should be transparent in order to gain the confidence of the public, unless it is better for the effective implementation of the Guidelines to act confidentially.

³⁵⁷ OECD, Guidelines 2011, p. 79. NCP are in the public eye and must therefore act in an accountable manner, be it through publishing annual reports and organising or attending regular meetings in order to share experiences, to encourage "best practices" or to assess the activities of NCP.

³⁵⁸ OECD, Guidelines 2011, p. 71, I.

³⁵⁹ OECD, Guidelines 2011, p. 68, I.4.

³⁶⁰ See Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 3(1); OECD, Denmark NCP Peer Review Report, p. 5: The prior version of the Danish NCP was established in the Ministry of Employment and perceived as ineffective; The Norwegian NCP has been a source of inspiration for the restructuring of the Danish NCP see e.g. EGELOUND OLSEN & ENGSIG SØRENSEN, pp. 11 *et seq*.

³⁶¹ See Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 2(1); OECD, Denmark NCP Peer Review Report, p. 7. The chairperson serves for a term of four years and the other members, for a three-year period. All have the possibility of re-appointment, see Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 1(4).

Authority. Its three full-time staff members assume an active role in the specific instance procedure. The NCP has an annual budget of 3 million DKK (about 400'000 Euro) at its disposal.³⁶²

[211] With its basis in a formal law, the Danish NCP shows specific particularities regarding its mode of operation.³⁶³ It holds two mandates that do not entirely overlap: the OECD mandate, under which it must fulfil the functions of a NCP, and a domestic mandate, where it assumes tasks that go further than those required by the OECD mandate.³⁶⁴

[212] According to Danish law, the MKI can accept submissions not only regarding multinational, small or medium-sized private or public companies domiciled in Denmark,³⁶⁵ but also regarding the Danish government or regional authorities and Danish private or public organizations. The MKI may further consider complaints relating to the company's, authority's or organisation's business associates.³⁶⁶ However, for complaints to be admissible, the Danish law provides for a statute of limitation. Complaints are only accepted by the NCP if they relate to business conduct or activities that occurred within the past five years.³⁶⁷ Neither such a broad passive legitimation nor a time limitation is foreseen in the OECD Guidelines. Any person may bring a complaint before the Danish NCP, either on their own behalf, or that of a third party. Furthermore, the MKI has the authority to initiate proceedings at its own discretion, which is an uncommon feature as compared to other NCP; so far, the Danish NCP has not yet used this competence.³⁶⁸

[213] When handling specific instances, the Danish NCP follows a five-stage approach: 1) Initial Assessment; 2) Opportunity for Independent Resolution; 3) Preliminary Investigation; 4) Mediation; and 5) Actual Investigation.³⁶⁹ In its initial assessment, the Secretariat of the Danish NCP evaluates the complaints - ideally within two weeks – for eligibility criteria,³⁷⁰ objective justification,³⁷¹ and reasonable documentation.³⁷² It does not examine the interest which the complainant has in a case,

³⁶² OECD, Denmark NCP Peer Review Report, p. 7; <http://businessconduct.dk/file/631202/ncp-finance.pdf> (accessed on 11.07.17).

³⁶³ Act on a Mediation and Complaints-Handling Institution; Executive Order on a Mediation and Complaints-Handling Institution; Workshop Report, OECD National Contact Points and the Extractive Sector, p. 4.

³⁶⁴ See EGELUND OLSEN & ENGSIG SØRENSEN, p. 17; OECD, Denmark NCP Peer Review Report, pp. 2 and 7. The main differences concern a broader interpretation of the concept of passive and active legitimization, the time-bound eligibility of complaints and the five-stage assessment of specific instances.

³⁶⁵ See Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 3.

³⁶⁶ See Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 3(1-3): Business associates are business partners, entities in the supply chain, and other non-public or public entities that can be related directly to the business activities, products or services of the company, authority or organisation; EGELUND OLSEN & ENGSIG SØRENSEN, p. 17.

³⁶⁷ See Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 6.

³⁶⁸ See Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 3; Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 3(2). For a critical viewpoint see e.g. EGELUND OLSEN & ENGSIG SØRENSEN, p. 16; see also OECD, Denmark NCP Peer Review Report, p. 19, recognising the challenges of initiating complaints in practice.

³⁶⁹ OECD, Denmark NCP Peer Review Report, p. 11.

³⁷⁰ For the basic eligibility criteria assessed by the Danish NCP see OECD, Denmark NCP Peer Review Report, Annex C.

³⁷¹ OECD, Denmark NCP Peer Review Report, Annex C: "Objective Justification requires: (i) a determination by the Secretariat that the complaint concerns a relevant provision of the Guidelines; and (ii) that the complainant is acting in good faith. [...] The good faith provisions refer to the willingness of the parties to participate in the NCP procedures and maintain confidentiality".

³⁷² OECD, Denmark NCP Peer Review Report, Annex C: Reasonable documentation could include: description of the events, supplemented by photos, original documents, video documentation, etc., but not, for instance, solely a reference to a broadcasted television documentary. There needs to be a connection between the

nor does it require the complainant to identify relevant sections of the Guidelines.³⁷³ If the complaint is not to be pursued, the NCP notifies the parties accordingly.³⁷⁴ If the NCP declares the complaint admissible, it will first give the parties the opportunity to reach an independent resolution within a two-month period before the NCP gets involved. In the event the parties succeed, the NCP will make no pronouncement on the case.³⁷⁵ If the parties do not reach an independent resolution, the Secretariat conducts a preliminary investigation, where it assesses the information provided and issues a recommendation to the NCP regarding mediation.³⁷⁶ The MKI then decides whether the case is to be rejected, whether mediation can be offered, or whether it should perform an actual investigation of the case.³⁷⁷ Should the NCP decide to reject the case, it publishes a brief description of the case containing the reasons for the rejection without naming the parties.³⁷⁸ Mediation may be conducted by the chairperson alone or together with other NCP members, if both parties agree. There is also the possibility of engaging external co-mediators.³⁷⁹ If the mediation is successful, the NCP publishes a statement with the results. It also describes how the mediation result is in accordance with the Guidelines. The parties are consulted prior to the publication of the statement.³⁸⁰ One year after the agreement is reached, the NCP conducts follow-up activities to ensure the implementation of the mediation agreement. It publishes a new statement on the respective company's compliance with the original statement.³⁸¹ With this one-year follow-up procedure, the Danish NCP goes beyond the requirements of the OECD Guidelines.³⁸²

[214] The actual investigation of the case starts if the NCP does not offer mediation; the parties do not consent to mediation; the parties do not manage to find a solution after a mediation attempt; or in the event of gross non-compliance with the Guidelines.³⁸³ During this phase, the NCP reaches out to the parties and stakeholders in order to obtain additional information. If deemed necessary, the NCP may even perform inspections at the site where the alleged non-compliance is taking or

infringement of the Guidelines and the company's activities (its own or directly related through a business partner). If insufficient, additional information may be requested.

³⁷³ See EGELUND OLSEN & ENGSIG SØRENSEN, p. 16; OECD, Denmark NCP Peer Review Report, pp. 14 and 21.

³⁷⁴ Where complaints are dismissed or there is an agreement, Danish law does not allow access to the information see Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 10(4); see also EGELUND OLSEN & ENGSIG SØRENSEN, p. 32.

³⁷⁵ Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 7(1).

³⁷⁶ Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 11; OECD, Denmark NCP Peer Review Report, p. 11.

³⁷⁷ Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 12(3).

³⁷⁸ Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 7(2). The statement will be accessible until the annual report has been published, see Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 12(4).

³⁷⁹ OECD, Denmark NCP Peer Review Report, p. 11.

³⁸⁰ Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 13(6).

³⁸¹ OECD, Denmark NCP Peer Review Report, p. 11. Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 13(7): "If the parties have complied with the mediation result, the statement is deleted from the Institution's website, and the parties are informed thereof. If the parties have not complied with the mediation result, the statement remains on the website for maximum five years from the date of its publication. The Mediation and Complaints-Handling Institution may furthermore delete the statement from the Institution's website if there is no longer any basis for publication. The Mediation and Complaints-Handling Institution performs an annual follow-up on the statement".

³⁸² Whether a follow-up takes place, and in what way, is left to the discretion of the individual NCP, see UTZ, p. 9.

³⁸³ Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 14(1).

has taken place.³⁸⁴ Once this phase is concluded, the NCP issues a final statement that determines whether or not the Guidelines were breached and makes recommendations to the company as to how it can comply with the Guidelines. One year after the final statement, the NCP conducts a follow-up analysis and publishes a new statement.³⁸⁵ Under special circumstances – such as the emergence of new factual information or significant procedural errors – the Danish NCP may decide to re-consider a case that has already been deliberated and concluded.³⁸⁶

[215] In 2015, the Danish NCP underwent a voluntary peer review within the OECD. The review showed that business and civil society stakeholders perceive the Danish NCP generally as a highly credible institution. It draws its legitimacy from different key aspects such as its independent structure,³⁸⁷ its multi-stakeholder composition, its power to raise a legal issue with a specific corporation and the fact that it is vested with sufficient human and financial resources. In addition, the power of the NCP to conduct investigations and issue final statements was highlighted.³⁸⁸ Due to its clear, transparent and comprehensive rules of procedure, its regularly updated website and its significant number of publications, the NCP is deemed to be visible, predictable and transparent.³⁸⁹ Additionally, the NCP's composition and its annual report were rated positively with regard to the core criterion of *accountability*.³⁹⁰

[216] Despite the overall positive appearance and performance of the Danish NCP, the peer review team expressed concerns regarding the NCP's dual mandate in particular and the statute of limitation for complaints included in the domestic mandate. In practice, the latter may mean that the NCP may reject a case that would otherwise be admissible under the Guidelines. That in turn raises questions related to the NCP compliance with the Guidelines and with regard to the functional equivalence across NCP, especially concerning the core criteria of accessibility.³⁹¹ Furthermore, the two mandates cause uncertainty among many stakeholders as to which other activities of an NCP – besides the handling of specific instances – are part of the MKI's mandate (e.g. promotional activities).³⁹² Other concerns raised related to the independent resolution phase, which lacks transparency and exacerbates existing power imbalances between the parties, and to the short timeframe of the initial assessment, which might prevent the NCP from considering complex complaints in depth.³⁹³

³⁸⁴ Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 14(2).

³⁸⁵ OECD, Denmark NCP Peer Review Report, p. 11; Denmark, Act on a Mediation and Complaints-Handling Institution, Sec. 8; Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 14(4).

³⁸⁶ Denmark, Executive Order on a Mediation and Complaints-Handling Institution, Sec. 16.

³⁸⁷ Regarding the independent structure of an NCP see also Norway, NCP Peer Review Report 2013, pp. 1 and 4.

³⁸⁸ See OECD, Denmark NCP Peer Review Report, pp. 2 and 8; Workshop Report, OECD National Contact Points and the Extractive Sector, p. 6: „NCP participants in the Workshop underscored that it is unwise to expect NCP to be too proactive in finding complaints themselves, due to limited resources and also their own neutrality“.

³⁸⁹ See OECD, Denmark NCP Peer Review Report, pp. 11 and 17.

³⁹⁰ See OECD, Denmark NCP Peer Review Report, p. 18.

³⁹¹ See OECD, Denmark NCP Peer Review Report, pp. 8 and 12: So far, the Danish NCP has rejected one complaint because the complaint referred to business activities that occurred more than 5 years prior to the complaint; see also p. 16 where the peer review team concludes that this time limitation is not in alignment with the OECD Guidelines.

³⁹² See OECD, Denmark NCP Peer Review Report, p. 10.

³⁹³ *Ibid.*

1.3. Germany

[217] The German NCP (Deutsche Nationale Kontaktstelle) opted for the interagency model. The NCP is based in the Federal Ministry for Economic Affairs and Energy (BMWi) within the Directorate-General for External Economic Policy and acts in coordination with the Interministerial Steering Group for the OECD Guidelines.³⁹⁴ The “OECD Guidelines Working Group” functions as the NCP advisory body.³⁹⁵ It advises the NCP on its working methods and on current issues relating to the Guidelines (e.g. how to improve their dissemination). Whenever a complaint is received, the members of the Working Group are notified.³⁹⁶ The German NCP has one full-time and two part-time staff members.³⁹⁷ From fiscal year 2017 on, the German NCP will receive a fixed budget.³⁹⁸

[218] Every natural or legal person including trade unions, non-governmental organisations and companies can file a complaint, either on their own behalf or on behalf of a third party. Complainants are required to present their legitimate interest in the matter at stake and act in good faith. Respondents are multinational enterprises as well as small and medium-sized enterprises, established in more than one country.³⁹⁹ In order for the German NCP to exercise its jurisdiction, the company must be domiciled or have its headquarters in Germany or the alleged violations of the Guidelines must have occurred in Germany. Furthermore, the company’s own activities or, where practicable, those of the company’s business partners, must have a direct link to the issues raised. The official language in the proceedings is German. However, during the most important phases of the proceedings, the NCP offers translation or interpretation services in English and French.⁴⁰⁰

[219] When handling specific instances, the German NCP acts in accordance with its internal procedural notes: After receipt of a complaint, the NCP will first assess whether the submission is intelligible, whether it poses a threat to a third party’s right to data privacy and whether there is additional information needed for the assessment. Then the submission will be sent to the company concerned with the invitation who must respond to the allegations within six weeks. Both parties

³⁹⁴ See Germany, Annual Report of the NCP 2016, pp. 4 *et seq.* In December 2016, the German NCP was transferred from the Directorate for Foreign Trade and Investment Promotion into a distinct structure within the Directorate-General for External Economic Policy; Germany, Procedural Notes for Specific Instances, fn., p. 1, the Interministerial Steering Group for the OECD Guidelines is a body which unites representatives of all the competent ministries (Federal Foreign Office, Federal Ministry of Justice and Consumer Protection, Federal Ministry of Finance, Federal Ministry of Labour and Social Affairs, Federal Ministry of Food and Agriculture, Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety, Federal Ministry for Economic Co-operation and Development); Germany, Procedural Notes for Specific Instances, p. 10: The involvement of the Steering Group in the examination of a particular complaint, in the consultations with the parties, and in the co-ordination process regarding specific procedural steps and decisions depends on the extent to which the subject matter falls into the remit of this ministry.

³⁹⁵ According to Germany, Procedural Notes for Specific Instances, p. 10, the following representatives are members of the Working Group: “Confederation of German Employers’ Association (BDA), Federation of German Industries (BDI), Association of German Chambers of Commerce and Industry (DIHK), Association of German Banks (BdB), German Confederation of Trade Unions (DGB), German Metalworkers’ Union (IG Metall), German multi-service trade union (Ver.di), BdB, Brot für die Welt / Protestant Development Service (mandated by VENRO), ECCHR (mandated by the Human Rights Forum), Germanwatch, and Transparency International Deutschland”. See also Germany, Annual Report of the NCP 2016, pp. 4 *et seq.*

³⁹⁶ See Germany, Procedural Notes for Specific Instances, p.10.

³⁹⁷ See Germany, Annual Report of the NCP 2016, p. 3.

³⁹⁸ See *Bundesministerium für Wirtschaft und Energie, Bericht der Bundesregierung*, p. 5.

³⁹⁹ See Germany, Procedural Notes for Specific Instances, pp. 2 *et seq.*

⁴⁰⁰ See Germany, Procedural Notes for Specific Instances, p. 9.

are required to treat as confidential the information obtained throughout the whole NCP proceedings. The company is not obliged to respond to the allegations. If requested, the NCP may offer separate talks with the involved parties in order to give detailed information about the proceedings and to answer questions.⁴⁰¹

[220] For a complaint to be admissible, the Interministerial Steering Group ascertains the following: the eligibility of the parties, the scope of application of the Guidelines and compliance with their intentions as well as the territorial competence. Ideally, the initial assessment stage is concluded within three months of the complaint having been filed. If the Interministerial Steering Group decides not to examine the complaint further, the NCP will issue a final statement including the identity of the parties (if there is agreement), the allegations on which the complaint is based, a summary of the process and the grounds for rejecting the case. The parties may comment on the draft final statement within ten days. It is, however, within the NCP's discretion whether or not to include these comments.⁴⁰²

[221] When a submission is declared admissible, the mediation process starts. The NCP will not publish its initial assessment in order to protect the closed room discussions between the parties.⁴⁰³ Mediation talks are usually conducted in the presence of the members of the Interministerial Steering Group. During the process, the NCP can seek advice from competent public authorities / agencies, the local embassies or other stakeholders. While the mediation talks remain confidential, the published joint final statement of the parties may contain details on the initial assessment,⁴⁰⁴ a summary of the complaints procedure, information regarding the outcome of the mediation, a joint statement by the parties summarizing the outcome and, if agreed upon by the parties, the recommendations of the NCP.⁴⁰⁵ If the parties are unable to agree on substantial points, are unwilling to participate or do not abide by the principle of good faith, the NCP also publishes a final statement. This includes details on the parties, a summary of the complaints procedure, the reasons why the mediation talks had been abandoned and recommendations as to how to implement the OECD Guidelines. Additionally, the final statement will indicate which parts of the OECD Guidelines are considered to have been breached.⁴⁰⁶ According to the German NCP, it would not be logical to issue recommendations to a company without first indicating whether the company has departed from the OECD Guidelines.⁴⁰⁷ The language used, however, is less specific compared, for instance, to that of the UK NCP.⁴⁰⁸

⁴⁰¹ See Germany, Procedural Notes for Specific Instances, p. 2.

⁴⁰² See Germany, Procedural Notes for Specific Instances, pp. 2 *et seq.*

⁴⁰³ See Germany, Annual Report of the NCP 2015, p. 13; Germany, Procedural Notes for Specific Instances, p. 4; Germany, Annual Report of the NCP 2016, p. 13.

⁴⁰⁴ Germany, Procedural Notes for Specific Instances, p. 5. The identity will not be disclosed if it would have negative consequences for the parties.

⁴⁰⁵ See Germany, Procedural Notes for Specific Instances, pp. 4 *et seq.*

⁴⁰⁶ See Germany, Procedural Notes for Specific Instances, p. 6.

⁴⁰⁷ See OECD, Report by the Chair 2011, p. 24: "Germany and the United Kingdom expressed the view that the updated Guidelines do not prohibit assessments on a company's compliance with the Guidelines, and they explained that, in some instances (such as when conciliation/mediation fails or is declined), this may be necessary in order to make meaningful recommendations to a company [...]".

⁴⁰⁸ See MAHEANDIRAN, p. 223; Germany, Final Statement: *Industriegewerkschaft Metall (IG Metall) against Hyundai Motor Europe Technical Center GmbH (HMETC)*, p. 5, available at: <http://www.bmwi.de/English/Redaktion/Pdf/oecd-ac-final-statement-hyundai.property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf> (accessed on 10.05.2016); Germany, Final Statement: *Uwe Kekeritz (Member of the German Bundestag) against KiK Textilien und Non-Food*

[222] The German NCP will only follow up its recommendations if it has been agreed upon by the parties. In the event the parties come to an agreement outside of the NCP process, the NCP will nevertheless publish a final statement.⁴⁰⁹

[223] Other important developments concern the recently adopted German NAP which establishes a link between the participation in a specific instance procedure before the NCP and the approval of certain instruments to promote foreign trade and investment. Companies making use of such instruments are therefore expected to participate in specific instance procedures at the NCP.⁴¹⁰

[224] When assessing the policies and practices of the German NCP against the effectiveness criteria of the UN Guiding Principles (UNGPs 31) and the OECD Guidelines, the following can be noted: the German NCP has a comprehensive internet page – accessible in German, French and English – providing all necessary information related to the OECD Guidelines and the functioning of the NCP. It regularly publishes its annual reports and final statements. All of this can be rated positively with regard to the core criteria of visibility, accessibility and transparency. However, the fact that positive initial assessments are not published precludes a comparison between the positive and negative initial assessment, which would be conducive with regard to the transparency criterion.

1.4. United Kingdom

[225] Like Germany, the UK follows the interagency model for its NCP.⁴¹¹ The NCP is based in the Department for International Trade (DIT).⁴¹² It consists of three officials (civil servants) based in the DIT as well as an independent Steering Board consisting of four external representatives from business, trade union, non-governmental organisations and five representatives of government departments.⁴¹³ The Steering Board monitors the effectiveness of the operation of the NCP and its compliance with the procedural rules, and supports the implementation and promotion of the OECD Guidelines. Furthermore, if a party wants to assert procedural violations, it can file a complaint with the Steering Board.⁴¹⁴ The Steering Board however does not take any decisions on the substance of specific instances, nor will it consider material errors for review. The review can only deal with procedural errors.⁴¹⁵ If the Board decides to remit the decision back to the NCP in order to rectify the procedural irregularity, the NCP will re-open the case, correct the deficiencies and if necessary,

GmbH, C&A Mode GmbH & CO., und Karl Rieker GmbH & Co. KG, p. 4, available at: <http://www.bmwi.de/English/Redaktion/Pdf/oecd-ac-final-statement-kik.property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf> (accessed on 10.5.2016); KAUFMANN *et al.*, Baseline Study, p. 62.

⁴⁰⁹ See Germany, Procedural Notes for Specific Instances, pp. 5 and 9.

⁴¹⁰ See Bundesministerium für Wirtschaft und Energie, Bericht der Bundesregierung, p. 5; Germany, NAP, p. 25.

⁴¹¹ See OECD, Annual Report 2014, p. 19.

⁴¹² <https://www.gov.uk/government/groups/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-guidelines#uk-ncp-steering-board> (accessed on 12.07.17).

⁴¹³ See UK, Annual Report 2012, p. 4; UK, Review Procedure 2011. The Board board is composed of representatives of the Foreign and Commonwealth Office, Department for International Development, Department for Work and Pensions, UK Trade and Investment, and Export Credits Guarantee Department and meets at least four times a year; the meeting minutes are usually published, see UK, Role of the Steering Board, p. 1.

⁴¹⁴ See UK, Review Procedure 2011, p. 3.

⁴¹⁵ See UK, Review Procedure 2011, p. 4; UK, Procedures for Dealing with Complaints, p. 12.

reconsider its final statement.⁴¹⁶ The UK NCP has an annual budget of approximately GBP 150'000 (EUR 177'000) at its disposal.⁴¹⁷

[226] When handling specific instances, the UK NCP follows its own procedural rules, which include three key stages: 1) from the receipt of complaint to initial assessment; 2) from acceptance of a case to the conclusion of mediation or, if mediation is refused or fails, fact finding; 3) lastly, drafting and publication of the final statement. Where necessary, the NCP may also conduct and report on follow-up actions.⁴¹⁸

[227] Any interested party can file a complaint with the British NCP, either on its own, or on behalf of other parties against UK registered multinationals or their subsidiaries.⁴¹⁹ The complainants, however, need to provide detailed information on the alleged breaches of the Guidelines by listing the relevant chapter(s) and paragraph(s). They must also reveal their identity. They should have a clear view of the outcome they wish to achieve and show a close interest in the case by providing detailed evidence and information (e.g. official documents, reports, studies, articles, witness statements) that support the allegations.⁴²⁰ If the complainant fails to deliver the information or the necessary evidence promptly or at all, the NCP may decline the case or base its decision solely on the information provided.⁴²¹ The British NCP publishes both positive and negative initial assessments.⁴²² It includes *inter alia* the names of the parties if the complaint is accepted (if it is rejected, the assessment will not name the parties without their agreement); reference to the Guidelines alleged to have been breached; a summary of the process so far and an outline of the next stages; the reasons for acceptance or refusal of the case.⁴²³ The NCP advises parties not to share information provided by another party or the NCP during the initial assessment stage. However, it does not foresee any consequences if the parties behave differently.⁴²⁴ Before issuing the Initial Assessment, parties have the possibility of commenting on a draft version. The final decision on whether to include these comments is within the NCP's discretion.⁴²⁵ The UK NCP

⁴¹⁶ See UK, Review Procedure 2011, p. 7; see e.g. UK NCP, Revised Final Statement: *Corner House vs. Baku-Tbilisi-Ceyhan (BTC) Pipeline*, 2011, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31805/11-766-revised-final-statement-ncp-btc.pdf (accessed on 21.08.2017).

⁴¹⁷ EGELUND OLSEN & ENGSIG SØRENSEN, p. 14; The NCP is partly funded by the Department for International Development, see UK, Annual Report 2012, p. 7; for more information on the UK NCP, <https://www.gov.uk/government/groups/uk-national-contact-point-for-the-organisation-for-economic-co-operation-and-development-guidelines> (accessed on 12.07.17).

⁴¹⁸ See UK, Procedures for Dealing with Complaints, p. 6. So far, the UK NCP has received approximately 45 complaints concerning both UK-based companies acting in the UK or abroad. The UK NCP is one of the NCP that has received the most specific instances, see e.g. EGELUND OLSEN & ENGSIG SØRENSEN, p. 13; RUGGIE & NELSON, p. 12; OECD, Implementing the OECD Guidelines, p. 41.

⁴¹⁹ See UK, Procedures for Dealing with Complaints, pp. 6 *et seq.*; EGELUND OLSEN & ENGSIG SØRENSEN, p. 17.

⁴²⁰ See UK, Procedures for Dealing with Complaints, pp. 6 *et seq.*; UK, Checklist for Bringing a Complaint.

⁴²¹ UK, Procedures for dealing with Complaints, p. 6. In 2012, the British NCP rejected a complaint because the complainant did not provide supporting evidence, see UK NCP, Initial Assessment: 14 May 2012, p. 7, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31770/12-895-initial-assessment-ncp-non-government-organisation-uk-company.pdf (accessed on 11.05.2016).

⁴²² See <https://www.gov.uk/government/collections/uk-national-contact-point-statements> (accessed on 11.05.2016).

⁴²³ UK, Procedures for Dealing with Complaints, p. 12.

⁴²⁴ See the remarks to the U.S., para. [252] and Swiss NCP, para. [52].

⁴²⁵ UK, Procedures for Dealing with Complaints, p. 13.

specifically states that the acceptance of a complaint does not imply a breach of the OECD Guidelines.⁴²⁶

[228] In the second key stage, the British NCP differentiates between *mediation process* and *examination process*. The preferred outcome of the mediation process is that the parties come to a mutually agreed resolution.⁴²⁷ For each complaint, the parties agree (together with the NCP) whether the mediation should take place within or outside of the NCP process.⁴²⁸ If the parties wish to mediate outside of the NCP process, the case will be suspended. Every two months, the NCP requests an update of progress to determine whether the specific instance needs to be reopened. If mediation was successful, the NCP publishes a brief final statement explaining that the parties have come to a solution outside of the NCP process.⁴²⁹ If the parties opt for mediation inside the NCP proceedings, then mediation will be conducted by professional mediator(s), who are contracted for and payed by the NCP. The NCP itself does not take part in the mediation session(s), but will be updated by the mediator(s).⁴³⁰ Mediation sessions are informal, confidential and will not be minuted.⁴³¹ They are usually held in London. The NCP has, however, already used more flexible avenues such as mediation via phone (provided the other party is willing), which increases accessibility for those who are not able to afford a trip to the UK, since the UK NCP does not normally bear travel expenses.⁴³² If mediation is successful, the parties draft a Mediation Agreement that will be published fully, or as a summary statement, as part of the final assessment. Parties are also encouraged to include follow-up arrangements in the final assessment.⁴³³

[229] If mediation is refused or fails to achieve an agreement, the complaint or the relevant aspects will return to the NCP for examination. The objective of the *examination phase* is to investigate the complaint in order to assess whether it is justified. The examination may involve the collection of further information from the parties involved (e.g. through meetings) or from other relevant stakeholders (e.g. government departments, UK diplomatic missions, overseas DFID offices, business associations, NGO's or other agencies). In exceptional cases, the NCP may even undertake a field visit. Information and evidence gathered and received by the NCP will be shared with the parties, unless it is necessary for information to be withheld. After all the information and evidence has been reviewed, the NCP decides whether or not the OECD Guidelines have been breached.⁴³⁴

[230] After concluding the mediation or examination process, the UK NCP publishes a final statement on its website. The latter *inter alia* includes details of the parties involved; the results of the examination (if any) including a clear statement as to whether or not the company is in breach

⁴²⁶ *Ibid.*, at 11.

⁴²⁷ *Ibid.*, at 14.

⁴²⁸ *Ibid.*

⁴²⁹ *Ibid.* at 16 *et seq.*

⁴³⁰ UK, Procedures for Dealing with Complaints, p. 15; McCORQUODALE, p. 32: "While the UK NCP is unusual in that it pays for external mediators, which is a considerable assistance to victims [...]; Amnesty International UK, p. 45.

⁴³¹ UK, Procedures for Dealing with Complaints, p. 16.

⁴³² According to information provided on 13 July 2016 by an UK NCP staff member via email, parties with financial difficulties are usually encouraged and assisted by the UK NCP to find an organisation or individual in the UK willing to represent them in mediation. If no other options were available, the NCP may consider a request for help with travel expenses on an exceptional basis; see also OSHIONEBO, p. 582.

⁴³³ UK, Procedures for Dealing with Complaints, p. 15.

⁴³⁴ *Ibid.* *et seq.*

of the OECD Guidelines; where agreed upon, or appropriate, specific recommendations to the company on how its activities may be brought into line with the OECD Guidelines; and a date, by which both parties will be asked to submit an update on measurable progress towards meeting the recommendations.⁴³⁵ After receipt of the update, the company will prepare and publish a follow-up statement that reflects the parties' response and, where appropriate, the NCP's conclusion.⁴³⁶

[231] Another important development concerns the reference made to the UK NCP in the statutory guidance to section 54 of the UK Modern Slavery Act, expressing the UK government's expectation towards businesses based or operating in the UK to engage with the UK NCP where complaints are made against them.⁴³⁷ Additionally, the UK NCP shares its initial and final statements with the Export Credit team who are also represented on the Steering Board.⁴³⁸

[232] The UK NCP is widely perceived as highly effective.⁴³⁹ Where attempts at mediation fail, the NCP is known for its investigation phase that often ends in a clear and far-reaching statement as to whether the OECD Guidelines have been breached or not.⁴⁴⁰ Furthermore, mediation is conducted by professional mediators and not the NCP members themselves. This may be beneficial to the NCP's impartiality and credibility.⁴⁴¹ The same benefits apply to the independent Steering Board, which functions as a form of appeal mechanism against the initial assessment or final statement of the NCP based on procedural grounds.⁴⁴² Moreover, the fact that external mediators get paid by the NCP is a considerable benefit for victims and of great relevance with regard to the core criteria of accessibility.⁴⁴³ The same applies to mediation sessions held via phone since the UK NCP in principle does not bear travel expenses.⁴⁴⁴ The clear and comprehensive website and procedure rules – including a checklist for the complainant – as well as the fact that all statements are published, can be rated positively with regard to the core criteria of visibility, accessibility and transparency.

1.5. France

[233] The French NCP is tripartite. Located in the Treasury of the Ministry of Economy and Finance, it is composed of representatives from several ministries, trade unions and an employer's federation. If necessary, the NCP members can also involve external experts for their technical

⁴³⁵ UK, Procedures for Dealing with Complaints, p. 18; Regarding the clear statement as to whether the company is in breach of the Guidelines, see e.g. Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: *Afrimex (UK) LTD*, pp. 13 *et seq.*, available at: <http://www.oecd.org/investment/mne/43750590.pdf> (accessed on 21.08.2017); see also Raid & ENRC: Final Statement after Examination of Complaint, 2016, p. 19, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/506285/BIS-16-156-raid-and-enrc-final-statement-after-complaint.pdf (accessed on 21.08.2017).

⁴³⁶ UK, Procedures for Dealing with Complaints, p. 19.

⁴³⁷ UK, Guidance Modern Slavery Act, p. 26.

⁴³⁸ OECD, Annual Report 2016, p. 79.

⁴³⁹ See EVANS & DREW, pp. 130 and 135; Amnesty International UK, p. 3.

⁴⁴⁰ See OSHIONEBO, p. 581; DAVARNEJAD, pp. 381 *et seq.*

⁴⁴¹ However, see McCORQUODALE, pp. 32 *et seq.*

⁴⁴² UTZ, p. 10; DANIEL *et al.*, Remedy Remains Rare, p. 34; Amnesty International UK, pp. 6 *et seq.*

⁴⁴³ See McCORQUODALE, p. 32.

⁴⁴⁴ Email communication with a UK NCP staff member, 13 July 2016.

expertise in specific fields.⁴⁴⁵ Once a year, the NCP holds a meeting to discuss its activities with organisations representing civil society (e.g. NGOs, associations).⁴⁴⁶ The NCP has neither an allocated budget nor an advisory or oversight body.⁴⁴⁷

[234] When handling specific instances, the NCP follows the procedures set out in its bylaw and guidance note. A referral to the NCP can be made by associations, non-governmental organisations, trade unions and by any member of the French NCP against French multinational enterprises.⁴⁴⁸ It must stipulate the identities of both parties, the details of the facts of which the enterprise is accused, and must make reference to the provisions of the OECD Guidelines related to the specific referral.⁴⁴⁹ In addition to the formal conditions, the NCP ascertains the interest of the complainant (good faith), the significance and importance of the issue, the apparent connection between the enterprise's activities and the matter raised in the specific instance as well as the relevance of applicable laws and procedures. After the initial evaluation it issues a statement irrespective of whether it declares the complaint admissible or inadmissible.⁴⁵⁰ Admissibility does not mean that the Guidelines have been violated.⁴⁵¹ The positive statement stipulates the identity of the parties, the country or countries concerned by the case and a summary of its initial evaluation. The negative statement outlines the reasons for the inadmissibility. The identity of the enterprise concerned, however, will not be included.⁴⁵²

[235] The examination of the specific instance includes a series of consultations between the parties involved and the NCP. During this phase, the NCP may seek advice from experts and other competent authorities from different stakeholder groups or consult with other NCP. With the agreement of the parties, the NCP will facilitate conciliation or mediation. NCP members are allowed to provide the NCP with additional materials to supplement those already submitted by the parties. If the parties reach an agreement, the NCP will issue a report that describes the issues raised and the procedures used. Information concerning the content of the agreement will only be included with the consent of the parties. If the examination phase was not successful, be it because the parties could not reach an agreement or were unwilling to participate in the procedures, the NCP issues a final statement including the NCP recommendations and, where appropriate, the reasons why an agreement was not reached. A statement as to whether the company has acted in

⁴⁴⁵ France, NCP Bylaw, pp. 1 *et seq.*; *Plaquette de présentation du PCN français*, p. 7: Its members are Ministries in charge of Economy and Finance, Labour and Employment, Foreign Affairs, Ecology, Sustainable Development and Energy, six French Trade Unions (CFDT, CGT, FO, CFE-CGC, CFTC, UNSA) and the employers' organisation MEDEF.

⁴⁴⁶ France, NCP Bylaw, p. 2.

⁴⁴⁷ OECD, Annual Report 2014, pp. 22 *et seq.*; OECD, Annual Report 2016, p. 40: The French NCP, however, receives funds for specific instances, organising promotional events, attending NCP meetings at the OECD, attending events organised by other NCP as well as for attending events organised by other stakeholders.

⁴⁴⁸ France, Guidance Note from the NCP; France, NCP Bylaw, p. 4.

⁴⁴⁹ France, NCP Bylaw, p. 3.

⁴⁵⁰ France, NCP Bylaw, p. 3.

⁴⁵¹ France, Guidance Note from the NCP.

⁴⁵² France, NCP Bylaw, p. 3.

accordance with the Guidelines may also be included.⁴⁵³ Where necessary, the NCP may also conduct and report on follow-up actions.⁴⁵⁴

[236] Other important activities concern the publication of a comprehensive report by the French NCP on adverse effects indirectly or directly related to MNE's activities in connection with the supply chain in the textile and ready-made garment sector. By providing practical recommendations to MNEs on how to apply the Guidelines, it serves as a guide to the implementation of the Guidelines. All French companies active in this specific sector shall implement the recommendations. Since its release, the report is being promoted by other NCP and the French embassies abroad.⁴⁵⁵ Other examples relate to the current legislation adopted by the French National Assembly in early 2017, which mandates supply chain due diligence in accordance with the Guidelines for companies of a certain size as well as the recently adopted National Action Plan recognizing the potential of the NCP for facilitating victims' access to remedies.⁴⁵⁶

[237] When assessing the French NCP, it becomes evident that the procedural rules are not as detailed as – for instance – those of the UK or Danish NCP. Furthermore, the NCP does not publish its annual reports online.⁴⁵⁷ In addition, the active legitimization for filing a complaint is more narrowly phrased than in other NCP; this might cause uncertainty or even be problematic with regard to the core criteria of admissibility. The fact that NCP members may make a referral to the NCP is advocated by some and rejected by others.⁴⁵⁸

1.6. Netherlands

[238] The Dutch NCP is an Independent Expert Body established within the Ministry of Foreign Affairs. It consists of four independent members with expertise in the area of the OECD Guidelines and mediation, four advisory members from the most relevant government ministries,⁴⁵⁹ ensuring the commitment of the Dutch government in the work of the NCP, and a Secretariat that assists the NCP in various ways.⁴⁶⁰ Decisions on the performance of tasks and the organisation of working

⁴⁵³ See e.g. *Circonstance Spécifique UPM Docelles EN France*, 2015, *Communiqué du Point de contact national français*, p. 4: “[...] le PCN estime que le Groupe UPM n'a pas agi en pleine conformité avec les recommandations de l'OCDE de l' article 6 du chapitre V relatif à l'emploi et aux relations professionnelles dans la recherche d'un repreneur de la Papeterie de Docelles”, available at: <http://www.tresor.economie.gouv.fr/File/427412> (accessed on 30.09.2017); see also 3 June 2013, SOCAPALM, *Rapport du PCN France*, available at: <http://www.tresor.economie.gouv.fr/File/397319>; OECD, Annual Report, 2014, pp. 94 et seq; KAUFMANN *et al.*, Baseline Study, p. 62; France, NCP Bylaw, pp. 4 et seq.

⁴⁵⁴ France, NCP Bylaw, p. 4.

⁴⁵⁵ OECD, Annual Report 2014, p. 29.

⁴⁵⁶ See New Art. L225-102-4, L225-102-5 Code de commerce, introduced by the Loi 2017-399 (*Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, 27.03.2017, *Journal Officiel*, 28.03.2017 ; OECD, Annual Report 2016, p. 7 and 19; France, NAP, p. 61).

⁴⁵⁷ OECD, Annual Report 2014, p. 27; <http://www.tresor.economie.gouv.fr/pcn> (accessed on 18.07.2017).

⁴⁵⁸ This element is contested *inter alia* regarding the credibility and neutrality of the NCP as well as its resources, see also *supra*, fn. 343.

⁴⁵⁹ Ministry of Economic Affairs; Foreign Affairs; Infrastructure & Environment; Social Affairs & Employment.

⁴⁶⁰ Netherlands, Annual Report 2015, p. 4; NCP Establishment Order, Art. 3, para. 4; the tasks of the secretariat include *inter alia* working together with the members of the NCP on specific instances, facilitating dialogue between parties, providing information and promotional work regarding OECD Guidelines, answering questions, (co)-organizing events and establishing cooperation with other NCP, see <http://www.oecdguidelines.nl/ncp/contents/hcp-secretariat> (accessed on 15.05.2016). In 2014, the Dutch Ministry of Foreign Affairs has published a revised government decree on the establishment of the NCP (NCP Establishment Order), which replaced the former decree of 2011. It sets out the institutional arrangements as

methods are only taken by the independent members.⁴⁶¹ Four times a year, the NCP conducts an (advisory) meeting with representatives from its key stakeholders: the FNV (representation of trade unions), OECD Watch (representation of NGOs) and VON-NCW (representation of the business community) to discuss developments and the NCP operations. Additionally, every six months, open stakeholder meetings are held to provide a platform for various other organisations.⁴⁶² The NCP has a budget at its disposal that is structurally incorporated into the budget of the Ministry of Foreign Affairs. The members of the NCP receive a fixed remuneration that depends on the scope of the expected activities.⁴⁶³

[239] Every interested party can submit a complaint (in English or Dutch) against Dutch enterprises to the NCP.⁴⁶⁴ For example in its preliminary statement ABP/APG – SOMO/Bothends of 2013, the Dutch NCP made a pioneering decision regarding the applicability of the Guidelines to the financial sector. It confirmed that the term “business relationship” also applies to financial relationships, and thus, to minority shareholdings of financial institutions.⁴⁶⁵

[240] To pass the initial assessment, the complaint must *inter alia* include information about the concerned parties and reference the parts of the OECD Guidelines to which the alleged breach relates. The NCP also ascertains the interest of the complainant in the case and whether the issues are material and substantiated.⁴⁶⁶ It then conducts separate confidential meetings with both parties unless it has already concluded that the complaint does not merit further considerations. The initial assessment is published on the NCP website. It does not include the original notification and the response of the company. So far, the names of the parties involved have always been included.⁴⁶⁷

[241] Following the initial assessment, the NCP starts the mediation phase. It may act as a mediator itself or appoint an external mediator to fulfil this role. The NCP may also conduct field visits. This phase is concluded when an agreement is reached that is supported by all parties, or when the NCP arrives at the conclusion that the issue is not likely to be resolved within a reasonable timeframe. In both cases, the NCP publishes a final statement or report. The statement names the parties and refers to their agreement. If the parties have not reached an agreement, the NCP qualifies the proceedings and includes recommendations concerning the implementation of the

well as the working methods and tasks of the NCP Netherlands, see <https://www.oecdguidelines.nl/latest/news/2014/7/30/netherlands-ncp-strengthened-with-revised-government-decree> (accessed on 18.07.2017).

⁴⁶¹ NCP Establishment Order 2014, p. 6.

⁴⁶² <http://www.oecdguidelines.nl/ncp/contents/stakeholders> (accessed on 18.07.2017).

⁴⁶³ Netherlands, Annual Report 2015, p. 5; NCP Establishment Order, p. 6; Report of the NCP Peer Review Team 2010, p. 13. The NCP was allocated a budget of around €900.000 for three years, which covered remuneration of the NCP members, (inter)national travel expenses, hiring of experts, the communication officer's remuneration, and promotional activities.

⁴⁶⁴ NCP Establishment Order, p. 6.

⁴⁶⁵ See <http://www.oecdguidelines.nl/notifications/documents/publication/2015/1/6/ncp-preliminary-statement-abp-apg---somo-bothends> (accessed on 17.05.2016); RUGGIE & NELSON, p. 19.

⁴⁶⁶ The Dutch NCP also considers whether the Dutch NCP is the appropriate entity, whether there seems to be a link between the enterprise's activities and the issue raised in the specific instance; the relevance of applicable law and procedures, including court rulings; how similar issues have been, or are being, treated in other domestic or international proceedings; and whether consideration of this specific problem would contribute to the purposes and effectiveness of the Guidelines, see Netherlands, Specific Instance Procedure, p. 2.

⁴⁶⁷ See <http://www.oecdguidelines.nl/notifications/contents/overview-notifications> (accessed on 12.07.2016).

OECD Guidelines.⁴⁶⁸ The issuing of recommendations does not necessarily mean that the Dutch NCP makes a determination as to whether or not the Guidelines have been violated. Yet, such a determination is not formally excluded from the Dutch NCP Specific Instance Procedure.⁴⁶⁹ Lastly, the final statement is sent to the Minister for Foreign Trade and Development Cooperation, who must add his or her findings to the statement after consultation with other ministers.⁴⁷⁰

[242] The Dutch NCP does not provide parties with a direct mechanism to appeal a final statement, either on procedural grounds or on the merits of a final statement. However, if parties do not accept the followed procedure, or the findings of the NCP, they can register a complaint directly with the Minister for Foreign Trade and Development Cooperation, who adds his/her opinion to a final statement before it is published.⁴⁷¹ The minister, however, can only comment, but may not change the final statement.⁴⁷²

[243] One year after the completion of the specific instance procedure, the NCP publishes a brief evaluation of the implementation of the agreement and/or recommendations based on the information provided by the parties.⁴⁷³

[244] In addition to the basic arrangements of the NCP, the NCP Establishment Order also entitles the NCP to conduct sector-wide or cross-company research on CSR, if requested by the Dutch government. Furthermore, it leaves room for the NCP to facilitate a dialogue on the Guidelines, even if that dialogue is not prompted by a specific instance.⁴⁷⁴

[245] In 2009, the Dutch NCP underwent the first peer review ever conducted within the OECD. Amongst other propositions, the peer review team recommended the following: an Appeal or Steering Board for appeals on procedural grounds; a proper and extensive assessment of the interest of the complainant; and the involvement of Dutch embassies, especially with regard to protective measures for complainants. These may mitigate the fear of retaliation and enhance accessibility. Furthermore, the peer review team commented positively on the sufficiency of the human and financial resources of the Dutch NCP.⁴⁷⁵

⁴⁶⁸ Netherlands, Specific Instance Procedure, p. 3.

⁴⁶⁹ Email communication with a staff member of the Dutch NCP, 13 July 2016.

⁴⁷⁰ NCP Establishment Order, Art. 7.

⁴⁷¹ Report of the NCP Peer Review Team 2010, pp. 6 *et seq.* and 13.

⁴⁷² Netherlands, Response to Peer Review, p. 2.

⁴⁷³ Netherlands, Specific Instance Procedure, pp. 2 *et seq.*

⁴⁷⁴ NCP Establishment Order, p. 5.

⁴⁷⁵ Report of the NCP Peer Review Team 2010, pp. 13 and 18; It is also worth mentioning the requirement for applicants for Dutch business programmes or facilities to state that they are aware of the Guidelines and that they will endeavour to comply with them. For special programmes, they even need to prepare a CSR policy plan based on the Guidelines see OECD, Annual Report 2014, p. 87. For further details see VAN 'T FOORT & PALM, pp. 8 *et seq.* Further to this, the Dutch government adopted two agreements (the Sustainable Garment and Textile Agreement and the Dutch Banking Sector Agreement on international responsible business conduct regarding human rights) which both make significant reference to the Guidelines, see OECD, Annual Report 2016, p. 2. Lastly, the Dutch Export Credit Agency is reported to have a formal process for considering statements or reports from the Dutch NCP, see OECD, Annual Report 2016, pp. 8 and 69.

1.7. Canada

[246] The Canadian NCP is a seven-department⁴⁷⁶ interagency committee that collaborates with three official non-governmental partners and with the Canadian Office of the Corporate Social Responsibility Counsellor for the Extractive Sector.⁴⁷⁷ It is funded by government budget and equipped with two full-time and six part-time staff members. It conducts stakeholder information sessions annually.⁴⁷⁸

[247] When handling specific instances, the Canadian NCP acts in accordance with its procedural guide. Any interested party may file a complaint (in French or English) with the Canadian NCP, either alone or on behalf of other identified parties against Canadian MNEs. The request must include *inter alia* information regarding the parties and the action or activities of the MNE. Furthermore, the complainant must outline its interest in the case and must substantiate the allegations within a reasonable period. The NCP may set a deadline beyond which additional evidence is no longer taken into account. Additionally, the request must cite the parts of the OECD Guidelines which are considered to be most relevant for the case and include a list of any relevant or applicable law as well as a description of the action(s) the complainant considers the MNE should take to resolve the issues. When making their submission, complainants may request a meeting with the NCP. In its initial assessment, the Canadian NCP reviews the information received and open source information. If deemed necessary, the NCP consults with relevant government departments. Both positive and negative initial assessments are published and may include the identity of the parties involved.

[248] If the specific instance merits further examination, the NCP will use conciliation or mediation procedures, provided the parties involved agree. During this phase, the NCP is allowed to pursue enquiries and engage in other fact-finding activities (e.g. contact government officials in the non-adhering country or the management of the firm in the home country). If the parties reach an agreement, the NCP publishes a final statement. Information on the content of the agreement will only be included insofar as the parties involved agree with the publication.

[249] If the parties do not agree on the matters raised or are unwilling to engage in the procedures, the NCP issues a final statement. If deemed necessary, the NCP may include recommendations on the implementation of the OECD Guidelines with a possible time frame for follow-up. Where appropriate, the statement may also mention the reasons for not reaching an agreement, the identities of the parties concerned as well as any other observations of the NCP.⁴⁷⁹ In a recent case, for instance, the Canadian NCP concluded "that the Company has not demonstrated that it is operating in a manner that can be considered to be consistent with the voluntary OECD

⁴⁷⁶ See Canada, Annual Report 2016: These departments are Employment and Social Development Canada (ESDC); Environment and Climate Change Canada (ECCC); Finance Canada; Global Affairs Canada (GAC); Indigenous and Northern Affairs Canada (INAC); Innovation, Science and Economic Development Canada (ISED); and, Natural Resources Canada (NRCan).

⁴⁷⁷ See Canada, Annual Report 2016; Canada, Procedures Guide: The Counsellor is mandated to review the CSR practices of Canadian extractive sector companies operating outside Canada, and to advise stakeholders on the implementation of different performance guidelines including the OECD Guidelines. Requests that only concern the Guidelines are referred to the NCP. On other requests that also include the OECD Guidelines the Counsellor consults with the NCP. Furthermore, in 2014/2015 the NCP participated in the work of different CSR related advisory groups.

⁴⁷⁸ See Canada, Annual Report 2016; OECD, Annual Report 2016, p. 39.

⁴⁷⁹ See Canada, Annual Report 2016; Canada, Procedures Guide.

Guidelines [...]".⁴⁸⁰ It also made use of a new provision – stemming from the updated 2014 CSR Strategy – that encourages reluctant companies to take part in the NCP proceedings. If companies refuse to take part in the NCP process, they can be denied access to economic and trade advocacy from the Trade Commissioner Service and/or Export Development Canada (EDC). Should the company wish to receive future support, it will either need to submit a request for review to the NCP or show the Canadian government that it has engaged in good-faith dialogue with its former opponent of the specific instance.⁴⁸¹

[250] The Canadian NCP operates a clear and comprehensive website, featuring all relevant information regarding the Guidelines and the functioning of the NCP. It has a dense and a detailed procedure guide and regularly publishes its annual reports and statements. All of this can be rated positively with regard to the core criteria of visibility and transparency. The deadline for additional evidence might be problematic in situations where parties have differing bargaining powers or where the information or evidence needed was unavailable or unknown prior to the filing or the deadline.⁴⁸² If companies are reluctant to participate in the NCP process, the Canadian NCP may not only name them in its statements, but may also exert further pressure by impeding access to specific government support.⁴⁸³ Canada is therefore the first government that publicly stated that non-cooperation with the NCP will have material consequences. In sum, the Canadian NCP is well suited for being a source of continuous learning and for preventing future harms.⁴⁸⁴

⁴⁸⁰ See Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region, 2015, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng> (accessed on 02.06.2016); see also Final Statement Bruno Manser Fund (BMF) and Sakto Corporations *et. al.* (Sakto), July 2017: "[...]while the Canadian NCP is not required to determine a "breach" of the Guidelines, it can, at its sole and entire discretion, make a determination on whether conduct is inconsistent with the Guidelines, just like it also can, at its sole and entire discretion, recommend the use of the sanction related to the provision of Government of Canada's trade advocacy services. These are tools that can act as important incentives for generating good faith collaboration with the NCP review process.", available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/final_stat-bmf-sakto-comm_finale.aspx?lang=eng (accessed on 18.07.2017). This statement indicates that the Canadian NCP has changed its previous approach not to determine whether the OECD Guidelines have been breached, or not, see e.g. Final Statement Ivanhoe Mines Ltd and the Canadian Labour Congress, p. 2, available at: <http://www.oecd.org/daf/inv/mne/37205653.pdf> (02.06.2016).

⁴⁸¹ See e.g. <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/csr-strat-rse.aspx?lang=eng> (accessed on 02.06.2016); Final Statement on the Request for Review regarding the Operation of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region, available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ncp-pcn/statement-gyama-valley.aspx?lang=eng> (accessed on 02.06.2016); see Final Statement regarding Sakto, *supra*, fn.480: "Should Sakto approach the Government of Canada Trade Commissioner Service (TCS) in future to access trade advocacy support, the NCP recommends that the company's actions during this NCP review process be taken into account by the TCS". Canada's export credit agency applies a formal process for considering statements or reports from the Canadian NCP, see OECD, Annual Report 2016, pp. 8. and 69.

⁴⁸² See e.g OSHIONEBO, p. 582.

⁴⁸³ Professor Ruggie advocated such an approach in a written submission to the OECD stating: "[...]where an enterprise fails to cooperate, the default presumption should be that a negative finding will be made public, and that it could affect the enterprise's access to certain forms of public support and services [...]", see Ruggie, Discussion Paper, para. 35.

⁴⁸⁴ See RUGGIE & NELSON, p. 21.

1.8. United States

[251] The U.S. NCP has opted for the monopartite ‘plus’ structure.⁴⁸⁵ It is incorporated in the Bureau of Economic and Business Affairs of the U.S. Department of State and comprised of three full-time and twelve part-time staff members. It regularly consults with an interagency working group (IWG) that includes representatives from different departments.⁴⁸⁶ Additionally, the NCP is supported by a stakeholder advisory board (SAB), whose function is to provide recommendations on the implementation of the Guidelines and collaborate with different stakeholders as well as review the work of the NCP. The advisory board is a subcommittee of the Advisory Committee on International Economic Policy and is comprised of leaders from business, labour, civil society and academia.⁴⁸⁷ The NCP is funded by the budget of the U.S. Department of State.⁴⁸⁸

[252] The NCP handles specific instances according to its own procedures, which are available in English, French and Spanish. Any affected party may file a complaint with the U.S. NCP against an enterprise operating or headquartered in the U.S.⁴⁸⁹ Upon receipt of a submission, it informs all relevant parties and consults the interagency working group, in order to check whether the issue raised is pending in any other proceeding.⁴⁹⁰ During the entire process, which already includes the submission, the parties are required to treat communications with each other and the NCP as completely confidential. A failure to honour these confidentiality expectations is considered bad faith and may lead to the immediate termination of the U.S. NCP involvement in the case.⁴⁹¹ A similar confidentiality requirement is found within the Swiss NCP.⁴⁹²

[253] When considering the initial assessment criteria,⁴⁹³ in consultation with the IWG, the U.S. NCP evaluates the information and documentation provided by the parties. In addition, it may independently seek advice from relevant stakeholders (experts, representatives of the business community, worker organizations etc.) or request further information from the parties.⁴⁹⁴ During the whole process, the U.S. NCP remains open to the submission of amendments, clarifications or additional information from the parties.⁴⁹⁵ If the initial assessment criteria are met, the NCP will proceed with the mediation phase without issuing and publishing the initial assessment.⁴⁹⁶ If the

⁴⁸⁵ OECD, Implementing the OECD Guidelines, p. 69.

⁴⁸⁶ U.S., Annual Report 2014/5, p. 3; U.S., Guide to the NCP, p. 16: “The representatives [are] from the Department of Commerce, the Department of Labor, the Department of the Treasury, the Office of the U.S. Trade Representative, the Export-Import Bank, the Overseas Private Investment Corporation, and the Environmental Protection Agency. The working group also includes Department of State officials from the Office of the Legal Adviser; the Bureau of Democracy, Human Rights and Labor; the Bureau of Oceans, International Environmental and Scientific Affairs; regional country desk officers; and officers at U.S. missions abroad, as appropriate”.

⁴⁸⁷ U.S., Guide to the NCP, p. 16; OECD Annual Report 2014, p. 69.

⁴⁸⁸ U.S., Annual Report 2016, p. 5

⁴⁸⁹ U.S., Guide to the NCP, p. 6.

⁴⁹⁰ *Ibid.*, p. 9.

⁴⁹¹ U.S., NCP Procedures, p. 1.

⁴⁹² See above, para. [52].

⁴⁹³ See U.S., Guide to the NCP, p. 9.

⁴⁹⁴ U.S., NCP Procedures, p. 2; U.S., Guide to the NCP, p. 11. The NCP often relies on other governmental entities to gather facts, see U.S., SAB Report.

⁴⁹⁵ U.S., Guide to the NCP, p. 11.

⁴⁹⁶ U.S., Guide to the NCP, p. 9; U.S., NCP Procedures, p. 3; U.S., Annual Report (2016), p. 15.

NCP concludes that the criteria are not met, it will publish a final statement that includes the issues raised, the reasons for its decision and, if appropriate, the identity of the parties involved.⁴⁹⁷

[254] By agreement of both parties, the U.S. NCP assists with mediation or otherwise facilitates a resolution. Mediation sessions are conducted by a neutral third party, which is employed by the U.S. Federal Mediation and Conciliation Service (FMCS).⁴⁹⁸ If necessary, the U.S. NCP may consider conducting mediation at the location of the allegations or employ local mediators. It may further consider translation services on a case-by-case basis. The cost of the mediators and, when relevant, their travel expenses, are borne by the NCP.⁴⁹⁹

[255] If the parties reach an agreement, the NCP, in consultation with the parties and the IWG, issues a final statement, which may include recommendations. Information on the content and the identity of the parties will only be included to the extent that both parties agree. If no agreement is reached, or a party is unwilling to participate in the process, the NCP closes the case and publishes a statement that may include *inter alia* the identity of the parties and, if appropriate, recommendations and the reasons an agreement could not be reached.⁵⁰⁰ Moreover, it has consistently taken the view that it will not make a determination as to whether or not the company has violated the Guidelines.⁵⁰¹

[256] Following the conclusion of the proceedings, the U.S. NCP, upon request of the parties, may consider follow-up on, or monitoring, the implementation of an agreement reached or recommendations made by the NCP.. Such monitoring however is only done on an exceptional basis and depends on the discretion and the resources of the NCP. Six months after successful

⁴⁹⁷ U.S. Guide to the NCP, p. 9; U.S., NCP Procedures, p. 3; SAB members expressed their concerns with regard to a specific instance that was dismissed by the U.S. NCP at the initial assessment phase on the basis that the complainant should have exhausted local remedies by taking the complaint to local courts in India. According to the SAB neither the Guidelines nor the Procedural Guidance foresee an exhaustion requirement, see U.S., SAB Report and U.S., NCP Annual Reporting 2011-2012, para. 16(c); Another submission was rejected on the basis that the remedy sought by the complainant – financial settlement – was deemed by the NCP to fall outside of its responsibilities, see U.S., SAB Report and U.S. *NCP Initial Assessment: Individual A/Company X and MNE Number One* (Aug. 28, 2012), available at: <http://www.state.gov/e/eb/oecd/usncp/links/rls/197795.htm> (accessed on 21.08.2017).

⁴⁹⁸ U.S., Guide to the NCP, pp. 13 *et seq.* The FMCS is an independent U.S. government agency that resolves labor-management conflicts and promotes cooperative workplace relationships domestically and abroad. FMCS mediators are professionals in labor relations and conflict management; SAB members recommend that the mediators from FMCS become familiar with the Guidelines *inter alia* by undertaking training, see U.S., SAB Report.

⁴⁹⁹ U.S., Guide to the NCP, p. 22.

⁵⁰⁰ U.S., Guide to the NCP, pp. 14 *et seq.*; U.S., NCP Procedures, p. 3; In one instance, the NCP informed the corporate respondent that its non-cooperative approach would be highlighted in the final statement. SAB members recommended that the NCP develop options for assisting dispute resolution even where the corporate respondent declines to engage in mediation, see U.S., SAB Report.

⁵⁰¹ See e.g. <http://www.state.gov/e/eb/oecd/usncp/us/index.htm> (accessed on 04.06.2016); OECD, Report by the Chair 2011, p. 24. The United States is of the view that the practice is difficult to reconcile with a procedure based upon “good offices” and that it is enough to make recommendations on how to better fulfill the objectives of the OECD Guidelines; see also U.S. NCP Initial Assessment: Edouard Teumagnie and AES Corporation, available at: <http://www.state.gov/e/eb/oecd/usncp/links/rls/197766.htm> (accessed on 21.08.2017); some members of the SAB advocate that the U.S. NCP should be empowered to make findings of fact and draw conclusions as to whether the corporation’s conduct complies with the Guidelines. According to them determinations and recommendations are a crucial part of the U.S. NCP’s role, see U.S., SAB Report.

mediation, the parties are asked to submit a confidential report on the *status quo* of the agreement and any further impacts.⁵⁰²

[257] The U.S. NCP is regularly criticized for its position of not issuing a determination as to whether the OECD Guidelines have been breached.⁵⁰³ Where mediation fails, the NCP concludes the case without imposing any consequences on the company. The policy of the U.S. NCP to conclude a specific instance at the very beginning due to a breach of the confidentiality requirement appears not to be in line with the OECD Guidelines and in contrast to the core criteria of accessibility.⁵⁰⁴ However, in comparison to the other analysed NCP, the U.S. NCP is the only NCP to explicitly foresee that mediation can be conducted abroad. If applied, this would specifically be to the benefit of parties that cannot afford travel expenses and would enhance accessibility.⁵⁰⁵ Recently, the U.S. NCP has published its second annual report in its seventeen-year history; this and the clear and comprehensive website renders the activities of the NCP fairly transparent and accountable. Other important developments concern the first peer-review of the U.S. NCP to be conducted in September 2017, the implementation of stakeholder feedback into NCP processes or the different promotional activities of the U.S. NCP.⁵⁰⁶

1.9. Conclusion

[258] NCP are expected to facilitate access through different means and to handle specific instances in an efficient and equitable manner.⁵⁰⁷ As recognized by the Guidelines, the accessibility of a NCP to affected individuals and other stakeholders is therefore critical to its effectiveness. Also sufficient financial and human resources are deemed important for the NCP to function effectively. The preceding overview however has shown that the NCP do not act in a heterogeneous way, but instead have different approaches when handling specific instances.

[259] The NCP system, as it now stands, is criticised for not meeting its potential. Critics mention the lack of enforcement of recommendations and the lack of oversight from independent bodies. Other perceived shortcomings relate to barriers to accessibility or the absence of an explicit adjudicatory role.⁵⁰⁸ Obstacles to accessibility range from language barriers to resource constraints, especially in cases where the NCP does not bear the travel expenses incurred.⁵⁰⁹ Moreover, according to John Ruggie it is unclear which changes in company practices and policies

⁵⁰² U.S., Guide to the NCP, pp. 10 and 15.

⁵⁰³ See e.g. KITA, pp. 359 *et seqq.*; MAHEANDIRAN, p. 225; see U.S., SAB Report.

⁵⁰⁴ See OECD, Guidelines 2011, p. 79. In general, the activities of the NCP should be transparent, unless, due to the purpose of greater effectiveness of the Guidelines, it seems advisable to preserve confidentiality. The argument that the Guidelines are more effective if the specific instance is concluded instead of pursued is not convincing. See <http://www.state.gov/e/eb/adcom/aciexp/rls/225959.htm> (report of the SAB; accessed on 21.08.2017), questioning whether the public release of a specific instance is a sufficient ground to discontinue the NCP involvement.

⁵⁰⁵ For more detail see OSHIONEBO, p. 582.

⁵⁰⁶ U.S., NCP Fact Sheet, pp. 1 *et seqq.*; U.S., Annual Report 2016, p. 8.

⁵⁰⁷ OECD, Guidelines 2011, p. 79.

⁵⁰⁸ See e.g. MAHEANDIRAN, pp. 217 *et seqq.*; OSHIONEBO, p. 583; McCORQUODALE, pp. 32 *et seqq.*

⁵⁰⁹ See OSHIONEBO, p. 582.

or what, if any, actual remedy complainants receive as a result of NCP findings and/or mediation.⁵¹⁰ The latter is amplified by the fact that the Guidelines themselves do not address the forms of relief, leaving the NCP without guidance and thus the victims without (predictable) remedy.⁵¹¹ Nonetheless, a recent OECD report, analysing NCP outcomes of the last 15 years, shows an increasing number of human rights cases being brought before NCP, a diversification of industries against which complaints are brought and the growing role of the OECD Guidelines' due diligence provisions. Between 2011 and 2015, approximately half of the accepted cases were concluded by an agreement between the parties, whereas 36% (19 specific instances) resulted in an internal policy change by the company in question. As such, NCP contribute to the prevention of adverse future impacts.⁵¹² However, NCP have been less successful in providing access to remedy for actual harms committed.⁵¹³

[260] The preceding comparison indicates that most NCP provide a clear and known procedure, making them a predictable and transparent, non-judicial grievance mechanism as understood by UNGHP 31. Moreover, most of the NCP under review consult with different stakeholders, a procedure which enhances their credibility and legitimacy. This is even more accurate for those NCP that are assisted by an oversight or advisory body.

[261] The question whether a NCP should assume an adjudicatory role and make a determination in the final statement in cases where mediation has failed, is intensively debated both among scholars as well as within the OECD.⁵¹⁴ Many authors advocate for the NCP to issue a determination or some other consequences, as this would strengthen the NCP's position.⁵¹⁵ Such determinations may have an impact similar to a court ruling since it could lead to altered conduct by the company concerned or other groups (suppliers, customers, end users).⁵¹⁶

2. National Human Rights Institutions

2.1. General Remarks

[262] According to UNGP 27, States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive state-based system for the remedy of business-related human rights abuses. The Commentary to the Guiding Principles mentions that national human rights institutions might play a particularly important role in this regard: NHRI can introduce state-based, non-judicial grievance mechanisms and consider

⁵¹⁰ See RUGGIE & NELSON, p. 20. The specific instance WWF-SOCO before the UK NCP represents the first case where for the first time the involved company agreed to halt operations during NCP-facilitated mediation; DANIEL *et al.*, *Remedy Remains Rare*, pp. 17 *et seq.* and 32.

⁵¹¹ See U.S., SAB Report; see also the practice of the U.S. NCP *supra* paras. [253] *et seq.*; DANIEL *et al.*, *Remedy Remains Rare*, pp. 17 *et seq.* and 32.

⁵¹² See OECD, *Implementing the OECD Guidelines*, pp. 40 *et seq.*

⁵¹³ For examples of specific instances resulting in direct remedy see OECD, *Implementing the OECD Guidelines*, p. 44.

⁵¹⁴ See e.g. OCHOA SANCHEZ, pp. 107 *et seq.*; DAVARNEJAD, pp. 381 *et seq.*; OSHIONEBO, p. 586.

⁵¹⁵ See e.g. RUGGIE & NELSON: "Forty years of pure voluntarism should be a long enough period of time to conclude that it cannot be counted on to do the job by itself"; EVANS & DREW, p. 135.

⁵¹⁶ See KAUFMANN *et al.*, *Baseline Study*, p. 63; DAVARNEJAD, p. 382; EGELUND OLSEN & ENGSIG SØRENSEN, p. 22; DANIEL *et al.*, *Remedy Remains Rare*, p. 17; McCORQUODALE, p. 32.

individual complaints in concrete cases of human rights violations, when mandated by law to do so. The following section shows if and how the NHRI in the compared countries provide remedy mechanisms for individual victims of corporate-related human rights violations. However, already the Commentary to the Guiding Principles states that NHRI should not only comply with the Paris Principles, but also meet the criteria set out in Principle 31, in order to guarantee their effectiveness.⁵¹⁷ This analysis is therefore limited to national human rights institutions that are NHRI in terms of the Paris Principles.

[263] The Paris Principles prescribe different criteria for NHRI to be effective; whether an NHRI meets these requirements is examined in an international accreditation procedure.⁵¹⁸ According to the criteria set out in the Paris Principles, an NHRI has the obligation to investigate research and report upon any matter affecting the enjoyment of human rights, including "any situation of violation of human rights which it decides to take up."⁵¹⁹ Moreover, the Paris Principles require that NHRI be established by a constitutional or other legislative act and independent from government, that pluralism in their composition be ensured and that they have a suitable infrastructure including adequate funding.⁵²⁰

[264] The handling of individual complaints is only given additional or optional status in the Paris Principles.⁵²¹ However, if a NHRI is vested with quasi-judicial powers, it should (a) be able to seek amicable settlements through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality; (b) inform the potential victim about the remedies available to him, and promote his access to them; (c) hear any complaints or petitions or transmit them to any other competent authority within the limits prescribed by the law; and (d) make recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights. Moreover, the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights, and more specifically the Sub-Committee on Accreditation (SCA), has developed so called General Observations on interpretative issues regarding the Paris Principles and has also issued one on quasi-judicial powers of NHRI for those institutions that are provided with such a mandate.⁵²² This General Observation is further complemented by recommendations of the OHCHR on how NHRI with quasi-judicial competences should exercise their powers to ensure effective investigations.⁵²³

[265] Finally, it is important to add that the Paris Principles do not explicitly require NHRI to engage directly with human rights violations committed by non-state actors; yet, NHRI are encouraged to take action to provide protection against human rights violations by private actors (including

⁵¹⁷ UN Guiding Principles, Commentary, pp. 6 and 30.

⁵¹⁸ International Coordination Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights (ICC), SCA Rules of Procedure (2004); SCA Accreditation Guidelines (2008).

⁵¹⁹ UNGA, Paris Principles 1993, Sec. A3(a)(ii).

⁵²⁰ BURDEKIN, pp. 660 *et seq.*; on the importance of independence, see UNSG, Report 2009 para. 109 *et seq.* See also OHCHR, Survey NHRI 2009, pp. 52 *et seq.*

⁵²¹ For the following, see UNGA, Paris Principles 1993, Sec. D.

⁵²² SCA, General Observations, 2.10 – The quasi-judicial competency of National Human Rights Institutions (complaints-handling).

⁵²³ OHCHR, NHRI 2010, p. 81.

business).⁵²⁴ The same is relevant regarding the jurisdiction of an NHRI: The Paris Principles require a “sphere of competence”, as set out in a constitutional provision or legislation; thus, the jurisdiction of NHRI should be as broad as possible.⁵²⁵

2.2. Denmark

[266] In Denmark, the *Institut for Menneskerettigheder* (IMR, The Danish Institute for Human Rights [DIHR]) is the national human rights institution. It is an independent self-governing institution; in its current form, it finds its legal basis in the Act on the Institute for Human Rights that entered into force on 1 January 2013.⁵²⁶ The DIHR has the clear legal objective of ensuring compliance with the Paris Principles and has held A-status since 2007.⁵²⁷

[267] The DIHR has no quasi-judicial competences, thus it has no mandate to investigate individual complaints or specific incidents.⁵²⁸ This task is accomplished by other institutions established for this purpose, such as the Parliamentary Ombudsman, the Data Protection Agency, the Independent Police Complaints Authority and the Equality Board.⁵²⁹ However, the DIHR has been designated as a national equality body on gender, race and ethnic origin and is responsible for promoting and monitoring the implementation of the Convention on the Rights of Persons with Disabilities (CRPD) in Denmark. As such it gives advice and assistance to individuals who file discrimination complaints.⁵³⁰ Individuals considering themselves victims of discrimination due to one of these grounds can contact the Equality Counselling of DIHR to learn more about their rights and how to proceed.⁵³¹ Furthermore, the Institute closely cooperates with the other core national human rights structures such as the Parliamentary Ombudsman, the Danish National Council for Children and the Data Protection Agency as well as civil society organisations working in the field of human rights.⁵³²

[268] Some authors have called for a more proactive effort in the area of *amicus curiae* or support for concrete domestic cases relevant for developing human rights jurisprudence as an avenue to

⁵²⁴ HAÁSZ, p. 168; see also the Edinburgh Declaration, particularly emphasizing NHRI's duty to monitor states' and nonstate actors' compliance with human rights as well as advising all relevant actors on how to prevent and remedy abuses in the area of business and human rights.

⁵²⁵ OHCHR, NHRI 2010, p. 32.

⁵²⁶ Act on the Danish Institute for Human Rights – Denmark's National Human Rights Institution, Act. No. 553 of 18 June 2012, as amended by Act No. 656 of 12 June 2013; bylaws of The Institute for Human Rights – Denmark's National Human Rights Institution, adopted by the Board on 19 June 2013 and approved by the Minister of Development Cooperation on 9 August 2013 (see <https://www.humanrights.dk/about-us/acts-bylaws> (accessed on 26.09.2017)). The DIHR continues the mandate vested in the Danish Centre for Human Rights established in 1987 by a Parliamentary decision.

⁵²⁷ Re-accreditation in November 2012 (see ICC, Chart of the Status of National Institutions, p. 5).

⁵²⁸ BADSE, p. 34.

⁵²⁹ Other bodies relevant in relation to complaints on human rights violations and cases of discrimination include the Parliamentary Commissioner for Civil and Military Administration in Denmark and the Refugee Appeals Board.

⁵³⁰ As the body designated for the promotion of equal treatment and effective protection against discrimination on grounds of racial or ethnic origin as set out in Art. 13 of the Racial Equality Directive 2000/43/EC on Equal Treatment Irrespective of Race and Ethnic Origin, the DIHR was also dealing with individual complaints between 2003 and 2009; this function was taken over in 2009 by the Equality Board.

⁵³¹ Denmark, Human Rights and Business Country Guide, p. 25.

⁵³² For an overview over DIHR's interactions with other actors active in the field of human rights, see BADSE, pp. 47 *et seq.*

consider for the future of the DIHR; quasi-judicial powers are however not being discussed – at least as long as other statutory bodies fulfil that role.⁵³³

2.3. Germany

[269] The *Deutsches Institut für Menschenrechte* (DIMR, German Institute for Human Rights [GIHR]) was founded in 2001 and finds its current legal basis in the Act on the Legal Status and Mandate of the German Institute for Human Rights.⁵³⁴ It has been accredited as an A-status NHRI since 2001.⁵³⁵

[270] According to the constitutive documents of the Institute, the GIHR is not mandated to deal with individual complaints.⁵³⁶ In practice, however, it might act as *amicus curiae* in legal proceedings before higher courts and it assists victims by referring them to competent institutions.⁵³⁷ Recently, some of these activities referred to alleged corporate-related human rights violations.⁵³⁸

2.4. United Kingdom

[271] The Equality and Human Rights Commission (EHRC) is the human rights commission for Great Britain (England, Scotland and Wales); it is a public body established by the United Kingdom/Equality Acts 2006 and 2010 with a general mandate to protect and promote human rights and to eliminate discrimination.⁵³⁹ The EHRC has been accredited as an A-status NHRI since November 2008.⁵⁴⁰ Recently, the EHRC has begun to actively engage in business and human rights issues, not least with its publication “Business and human rights: A five-step guide for company boards”.⁵⁴¹

[272] The Commission has the power to initiate judicial review of decisions of public authorities, to act as *amicus curiae* and it can intervene in legal proceedings regarding issues of public policy and general public concern. Moreover, the EHRC has the power to order the disclosure of documents

⁵³³ BADSE, p. 57.

⁵³⁴ Act on the Legal Status and Mandate of the German Institute for Human Rights, 16 July 2015, Federal Law Gazette 2015 I p. 1194, available at http://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/PDF-Dateien/Sonstiges/Gesetz_ueber_die_Rechtsstellung_und_Aufgaben_des_Deutschen_Instituts_fuer_Menschenrechte_DIMRG_16_07_2015.pdf (accessed on 26.09.2017).

⁵³⁵ Last re-accreditation in November 2015, see ICC, Chart of the Status of National Institutions, p. 6; ICC, Reports and Recommendations of the SCA 2015, p. 14.

⁵³⁶ Statutes of the German Institute for Human Rights, as amended on 22 September 2015, available (in German) at: <http://www.institut-fuer-menschenrechte.de/ueber-uns/auftrag/satzung/> (accessed on 21.08.2017).

⁵³⁷ See <http://www.institut-fuer-menschenrechte.de/stellungnahmen-vor-gericht/> (accessed on 21.08.2017); German Institute for Human Rights, National Baseline Assessment, p. 61.

⁵³⁸ In 2013, an *amicus curiae* brief of the GIHR concerned the dismissal of an HIV-positive complainant from his employment position for a private pharma company, see <http://www.institut-fuer-menschenrechte.de/stellungnahmen-vor-gericht/2013-kuendigung-wegen-hiv/> (accessed on 21.08.2017).

⁵³⁹ www.equalityhumanrights.com (accessed on 21.08.2017); both Northern Ireland and Scotland have additional, independent Human Rights Commissions carrying out similar functions.

⁵⁴⁰ Re-accreditation in October 2010, see ICC, Chart of the Status of National Institutions, p. 5; ICC, Reports and Recommendations of the SCA 2010, p. 8; ICC, Reports and Recommendations of the SCA 2008, p. 4.

⁵⁴¹ Published 13 May 2016, available at: <https://www.equalityhumanrights.com/en/publication-download/business-and-human-rights-five-step-guide-company-boards> (accessed on 21.08.2017).

and to call and cross-examine witnesses for investigations and inquiries.⁵⁴² It has carried out such investigations and issued codes of practice and guidance on a sectoral or thematic basis in the area of business and human rights.⁵⁴³ The EHRC does not however deal with individual complaints and cannot mediate in individual cases; moreover, its territorial jurisdiction is understood to be limited to acts committed within the UK.⁵⁴⁴

2.5. France

[273] In France, the Commission Nationale Consultative des Droits de l'Homme (CNCDH, National Consultative Human Rights Commission [NCHRC]) is the independent public body with a broad human rights mandate.⁵⁴⁵ The NCHRC was created in 1947 and finds its current legal basis in the Law on the National Consultative Commission of Human Rights of 2007.⁵⁴⁶ The Commission has been accredited as an A-status NHRI since 1999.⁵⁴⁷

[274] The French Commission has no mandate to handle (business-related) complaints in any formal sense.⁵⁴⁸ In order to avoid overlaps the Commission does not engage in areas dealt with by other bodies, particularly with the Defender on Human Rights, to which it transmits individual petitions.⁵⁴⁹

[275] The Commission has created a working group on the question of corporate social responsibility. In addition, the NCHRC issues studies and formulates recommendations to both business enterprises and the French government.⁵⁵⁰ In its newest opinion on the topic, the Commission recommends strengthening France's National Contact Point *inter alia* through the

⁵⁴² www.equalityhumanrights.com/legal-and-policy/commission/legal-powers (accessed on 21.08.2017); Commonwealth Secretariat, pp. 67 *et seq.*; McCORQUODALE, p. 37.

⁵⁴³ See especially the 2010 EHRC, Meat and poultry processing inquiry review, Report of the findings and recommendations, available at: <http://www.equalityhumanrights.com/publication/meat-and-poultry-processing-review> (accessed on 21.08.2017), and the Inquiry into Human Trafficking in Scotland, published in 2011 and follow-on report in 2013, available at: <https://www.equalityhumanrights.com/en/human-rights-scotland/inquiry-human-trafficking-scotland> (accessed on 21.08.2017); McCORQUODALE, p. 38.

⁵⁴⁴ See Joint Committee on Human Rights, Any of our business?, Comment Christie A., Ev. 52; advisory services in individual cases are provided by the Equality Advisory Support Service, available at: www.equalityadvisoryservice.com (accessed on 21.08.2017).

⁵⁴⁵ www.cncdh.fr (accessed on 21.08.2017).

⁵⁴⁶ Loi n° 2007-292 du 5 mars 2007 relative à la Commission nationale consultative des droits de l'homme ; see also Décret n° 2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme ; Décret n° 2008-925 du 11 septembre 2008 modifiant le décret n° 2007-1137 du 26 juillet 2007 relatif à la composition et au fonctionnement de la Commission nationale consultative des droits de l'homme.

⁵⁴⁷ Re-accreditation in October 2007 and May 2013, see ICC, Chart of the Status of National Institutions, p. 5; ICC, Reports and Recommendations of the SCA 2013, p. 10.

⁵⁴⁸ OHCHR, Survey NHRI 2009, p. 15.

⁵⁴⁹ ICC, Reports and Recommendations of the SCA 2013, p. 12. Other Bodies dealing with individual complaints are namely the French Data Protection Authority and the "Contrôleur général des lieux de privation de liberté (CGLPL).

⁵⁵⁰ For an overview of publications see: <http://www.cncdh.fr/fr/dossiers-thematiques/entreprises> (accessed on 10.02.2016).

association of independent experts with the NCP, the NCHRC being one of these suggested experts.⁵⁵¹

2.6. Netherlands

[276] In the Netherlands, the *College voor de Rechten van de Mens* (Netherlands Institute for Human Rights [NIHR]) is an independent administrative body established in 2012 through an act of parliament in accordance with the Paris Principles for independent NHRI.⁵⁵² It was accredited with an A-status in March 2014.⁵⁵³

[277] The NIHR's mandate is only to hear individual complaints related to the national equality legislation. The Institute reviews individual cases to assess whether persons have suffered from discrimination at their workplace, in education, housing, entertainment, sports or as a consumer; one of the non-discrimination grounds laid down in the Equal Treatment Act must be applicable. The procedure is relatively informal and cost-free for the petitioner: The NIHR has a so-called Front Office, serving as the initial contact point for all questions about human rights and equal treatment. The Office answers questions, offers advice and refers callers to other appropriate organisations such as the Legal Office, the Children's Ombudsman, the National Ombudsman, anti-discrimination agencies or the Dutch Data Protection Agency. It also explains the options available to submit a written request for an opinion of the NIHR and refers to opinions in earlier cases.⁵⁵⁴ On a written request from anyone who believes that they are a victim of discrimination, the NIHR may then conduct an investigation, hold a hearing and issue a legally non-binding opinion.⁵⁵⁵

[278] As such, the Institute provides an additional possibility for promoting observance of the equal treatment legislation, even if there are no specific legal consequences attached to the investigations and opinions of the Institute.⁵⁵⁶ The Institute can make recommendations to the parties involved, the government, parliament and other relevant bodies with a view to addressing discrimination and preventing future violations; it also follows up on compliance. Nonetheless, its opinions are not binding.⁵⁵⁷ Victims of discrimination may however subsequently initiate proceedings before the courts.

[279] Individual complaints in relation to other human rights cannot be dealt with by the NIHR; however, the Institute can act as an expert in legal actions when a member of the Institute is summoned to appear by the courts.⁵⁵⁸

⁵⁵¹ *Entreprises et droits de l'homme : avis sur les enjeux de l'application par la France des Principes directeurs des Nations unies*, 24 October 2013, p. 21.

⁵⁵² <https://mensenrechten.nl/> (accessed on 21.08.2017); Netherlands Institute for Human Rights Act (*Wet van 24 November 2011, houdende de oprichting van het College voor de rechten van de mens*) entered into force on 1 October 2012.

⁵⁵³ ICC, Chart of the Status of National Institutions, p. 6.

⁵⁵⁴ NIHR, Annual Report, 2012-2013, p. 15.

⁵⁵⁵ NIHR, Annual Report, 2012-2013, p. 5; Netherlands, Explanatory Memorandum, p. 43; OHCHR, Survey NHRI 2009, p. 16.

⁵⁵⁶ Netherlands, Explanatory Memorandum, p. 42.

⁵⁵⁷ Secs. 10-13 Netherlands, Explanatory Memorandum, pp. 42 *et seq*; OHCHR, Survey NHRI 2009, p. 21.

⁵⁵⁸ Netherlands, Explanatory Memorandum, pp. 26 *et seq*; DONDERS & OLDE MONNIKHOF, p. 89.

2.7. Canada and the United States

[280] The Canadian Human Rights Commission (CHRC) was established in 1981 and finds its legal basis in the Canadian Human Rights Act of 1977.⁵⁵⁹ The Commission is the only Canadian human rights institution that has sought accreditation as an NHRI – and thus is in compliance with the Paris Principles.⁵⁶⁰ It has held A status since 1999.⁵⁶¹

[281] The Commission has quasi-judicial competences and deals with discrimination complaints against the federal government, First Nations governments, and private companies that are regulated by the federal government such as banks, trucking companies as well as broadcasters and telecommunications companies.⁵⁶² The CHRC has established an alternative dispute resolution service with different stages, involving mediation, investigation and conciliation; moreover, the Commission has the authority to appear before courts based on public interest standing. The CHRC makes use of this instrument to target systemic human rights abuses and discrimination. It has also developed a discrimination prevention program that includes establishing internal grievance procedures for federally regulated employers and service providers.⁵⁶³

[282] However, as stated above, the CHRC is only competent for federally regulated employers and service providers. Thus, the provinces and territories are responsible for the majority of employers and service providers in Canada. They have also implemented dispute settlement mechanisms in individual discrimination cases, and dealt with by Provincial and Territorial Human Rights Agencies.⁵⁶⁴

[283] The United States do not have a National Human Rights Institution in compliance with the Paris Principles.⁵⁶⁵

2.8. Relevant Complaint Mechanisms in Other Countries

[284] The Office of the High Commissioner for Human Rights (OHCHR), conducted a survey in 2008 providing information about the mandate and capacities of NHRI to manage corporate-related grievances.⁵⁶⁶ The results showed that out of 41 responding NHRI, 10 institutions had the mandate to deal with complaints concerning any kind of company and any type of right, 10 NHRI had a mandate to deal with complaints with regard to any rights but only with regards to certain kinds of companies such as state-owned companies, 8 NHRI were allowed to handle complaints with regards to any kind of company but only regarding certain rights and 13 institutions had no competences to deal with corporate-related complaints. According to the survey, most of the NHRI

⁵⁵⁹ <http://www.chrc-ccdp.gc.ca> (accessed on 21.07.2017).

⁵⁶⁰ See N [263].

⁵⁶¹ Next re-accreditation is planned for May 2016, see ICC, Chart of the Status of National Institutions, p. 4.

⁵⁶² <http://www.chrc-ccdp.gc.ca/eng/content/our-work> (accessed on 21.08.2017).

⁵⁶³ Commonwealth Secretariat, pp. 67-70, 80; Canadian Human Rights Commission, Submission; HAÁSZ, pp. 165-187, 183.

⁵⁶⁴ For a list of all relevant institutions see <http://www.chrc-ccdp.ca/eng/content/provincial-and-territorial-human-rights-agencies> (accessed on 21.08.2017).

⁵⁶⁵ See however the U.S. Commission on Civil Rights, created through the Civil Rights Act of 1957, available at: www.usccr.gov (accessed on 11.08.2017). This Commission does not have a complaint mechanism or enforcement powers; however, it has a complaint referral service.

⁵⁶⁶ OHCHR, Survey NHRI Practices 2008.

with quasi-judicial competences in the area of business and human rights are on the African continent. Hence, these NHRI do not fall within the scope of comparison of this study. However, they might include good case studies exemplifying the possible role of grievance mechanisms for corporate-related complaints at NHRI.⁵⁶⁷

2.9. Conclusion

[285] According to VERONIKA HAÀSZ's assessment, the complaint-mechanisms of NHRI meet the effectiveness criteria for non-judicial grievance mechanisms named in UNGP 31:

*"The legitimacy of national institutions is rooted in their legal status. As the Paris Principles require their establishment by law, the institutions are more likely to be accountable. Accessibility is an important issue for NHRI because their visibility is of essential importance for their reasonable functioning. The necessary independence and pluralistic composition make them more accessible and equitable. The institutions' predictability and transparency depend on the clearness of their mandate, which is also required by the Paris Principles. The international human rights law-related character of their mandate ensures that their outcomes are in compliance with internationally recognized human rights. As preventive actions are of particular importance in NHRI proceedings, the institutions are well suited to being sources of continuous learning."*⁵⁶⁸

[286] Other authors assess NHRI complaint mechanisms more critically, particularly with regard to their assumed accessibility.⁵⁶⁹ However, Veronika Haàsz concludes her analysis with the statement that the role of NHRI in implementing the third pillar of the UN Guiding Principles is in practice (still) often overemphasized as only a small number of NHRI have quasi-judicial powers and, if foreseen, they often do not meet the aforementioned criteria of providing NHRI with the necessary investigatory and enforcement powers.⁵⁷⁰ It is likely that the relatively minor role of NHRI individual grievance-mechanisms in the area of business and human rights will not change significantly in the near future. At least in its 2011-2013 strategic action plan, the ICC Working Group on Business and Human Rights named only four main activity areas; NHRI's role in providing access to remedy was not one of them.

3. Ombudsperson Offices

3.1. General Remarks

[287] The commentary to Guiding Principle 25 of the UN Guiding Principles on Business and Human Rights (UNGPs) explicitly mentions ombudsperson offices as state-based non-judicial grievance mechanisms, in addition *inter alia* national to human rights institutions and the OECD National Contact Points. The Guiding Principles do not further define the notion of ombudsperson

⁵⁶⁷ For examples in Uganda, Malawi and Korea, see HAÀSZ, pp. 165-187, esp. p. 182.

⁵⁶⁸ HAÀSZ, pp. 165-187, 176 *et seq.*

⁵⁶⁹ BURDEKIN, , pp. 659-654, 660 *et seq.*; CARVER, pp. 75-99, 93 *et seq.*

⁵⁷⁰ HAÀSZ, pp. 165-187, 169 *et seq.* For the question of enforcement powers granted compare also BRIAN BURDEKIN, pp. 659-654, 660 *et seq.*

offices, but emphasise their complementary role *vis-à-vis* judicial and other non-judicial mechanisms. Pursuant to Guiding Principles 27 and 31, states should ensure that non-judicial mechanisms such as ombudsperson offices are effective and appropriate.

[288] Today a great number of states have embraced the ombudsperson concept, albeit in varying forms and with differing mandates, functions and powers.⁵⁷¹ The extent to which an ombudsperson office may consider human rights in its assessments, both generally and in the business context, thus differs accordingly.⁵⁷² Ombudsperson offices are traditionally installed by the legislative and/or executive branches and focus on hierarchical relationships between the state and the individual, as governed by public law.⁵⁷³ A broader reading of ombudsperson offices, however, also takes into account state-based mechanisms that address relationships between private actors, for example in a particular sector, and private ombudspersons.⁵⁷⁴ In line with the study's emphasis, only those ombudspersons that are appointed by the respective State, not by private actors, will be reviewed in the following analysis.⁵⁷⁵ Furthermore, the study focuses on those ombudspersons that can address human rights infringements, especially those related to business activities.

3.2. Denmark

[289] Regarding ombudspersons in Denmark, the Parliamentary Ombudsman (*Folketingets Ombudsmand*) in particular needs be addressed. It is a parliamentary control body established by law to control public administration.⁵⁷⁶ In his or her work, the ombudsperson is independent from the Parliament.⁵⁷⁷ According to the Ombudsman Act, a complaint can be lodged by "any person" within twelve months after the commission of the impugned *administrative* act.⁵⁷⁸ The Ombudsperson may also investigate *ex officio*.⁵⁷⁹ He evaluates whether "authorities or persons falling within his jurisdiction act in contravention of existing legislation or otherwise commit errors or derelictions in the discharge of their duties."⁵⁸⁰ This may include human rights law, among others also in the field of business and human rights, insofar as the authority or person falls under the personal jurisdiction of the Ombudsman.⁵⁸¹ For example, the Ombudsman has investigated

⁵⁷¹ <http://www.theioi.org/loi-members#anchor-index-1703> (accessed on 11.08.2017); <http://www.ombudsman.europa.eu/de/atyourservice/nationalombudsmen.faces> (accessed on 11.08.2017). See generally HAAS J., pp. 30, 234 *et seq.*; CREUTZFELDT, p. 5; KUCSKO-STADLMAYER; REIF.

⁵⁷² HAAS J., p. 350.

⁵⁷³ HAAS J., pp. 88 *et seq.*

⁵⁷⁴ The latter mechanisms are then largely guided by private law; see HAAS J., pp. 88 *et seq.*, 96; REIF, pp. 26 *et seq.*

⁵⁷⁵ For further details on private-sector ombudsperson offices, see HAAS J., pp. 88 *et seq.*

⁵⁷⁶ Para. 55 of the Danish Constitution; see also Law 556 of 24/6/2005; <https://en.ombudsmanden.dk/> (accessed on 21.08.2017); STERN, Denmark, p. 154.

⁵⁷⁷ Sec. 10 of the Ombudsman Act, available at: <https://en.ombudsmanden.dk/loven/> (accessed on 21.08.2017).

⁵⁷⁸ Sec. 13 of the Ombudsman Act.

⁵⁷⁹ See Sec. 17 and 18 of the Ombudsman Act.

⁵⁸⁰ Sec. 21 of the Ombudsman Act; see also Sec. 7 of the Ombudsman Act.

⁵⁸¹ Sec. 18 of the Ombudsman Act explicitly mentions that assessments in such investigations shall be based on "human and humanitarian considerations". On investigations into the respect of the rights of children and respective criticisms of the office's accessibility, see REIF, p. 304; other systematic inspections into the human rights standards of institutions where fundamental rights are restricted, e.g. of prisons, have been conducted, see STERN, DENMARK, p. 159. See also Sec. 7(1) and Sec. 19 of the Ombudsman Act. The Parliamentary Ombudsman is also the National Preventive Mechanism under the Optional Protocol to the Convention against Torture (OPCAT); see <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms>.

complaints relating to unemployment insurance and sickness benefits.⁵⁸² Besides public administrative authorities, the jurisdiction *ratione personae* can include companies if they "fully or partly are subject to the rules and principles applicable to the public administration."⁵⁸³ The extraterritorial scope of the Ombudsman's jurisdiction is not explicitly addressed in the Ombudsman Act. The reports and the website of the Danish Ombudsman merely note the office's international cooperation, e.g. with the EU and China.⁵⁸⁴ If the Ombudsman considers that the authority has committed an error in its decision, he may criticize the decision and issue recommendations. The Ombudsman cannot however render a new decision in lieu of that of the authority.⁵⁸⁵

[290] There are also several specialized mechanisms which address specific human rights-related aspects that may, at least to some extent, be relevant in the business and human rights context, and fall under a broad definition of ombudsperson offices.⁵⁸⁶ These include *inter alia* the consumer ombudsman,⁵⁸⁷ the Danish Data Protection Agency,⁵⁸⁸ the Board of Equal Treatment,⁵⁸⁹ the

aspx (accesssed on 11.08.2017). The Ombudsman Office can e.g. deal with issues pertaining to company law and employment law; see The Danish Parliamentary Ombudsman, Annual Report 2009, p. 21.

⁵⁸² See for example Case No. 2006-2447-025. For an overview of the Ombudsman's fields of activity, see The Danish Parliamentary Ombudsman, Annual Report 2009, p. 20.

⁵⁸³ See Secs. 7(1) and 7(4) of the Ombudsman Act ("If companies, institutions, associations, etc. legally or administratively fully or partly are subject to the rules and principles applicable to the public administration, the Ombudsman may determine that his jurisdiction shall extend to those bodies to the same extent."). For further information, see STERN, Denmark, p. 156, noting that private companies may be covered if they are entirely financed by public funds.

⁵⁸⁴ <https://en.ombudsmanden.dk/dokument/> (accessed on 11.08.2017).

⁵⁸⁵ See Chapter 7 of the Ombudsman Act.

⁵⁸⁶ For a selective overview of key human rights bodies in Denmark, including ombudsperson-like mechanisms, see <http://www.humanrights.dk/research/human-rights-in-denmark> (accessed on 11.08.2017).

⁵⁸⁷ See <http://www.consumerombudsman.dk/> (accessed on 11.08.2017). The Consumer Ombudsman supervises compliance with the Danish Marketing Practices Act, the Danish Act on Payment Services, the Act on Legal Counselling, the E-commerce Act, the Ban on Tobacco Advertising Act and several civil law provisions relating to consumer protection. The Consumer Ombudsman has an extensive scope of powers of control, including legal powers. For instance, he can investigate individual and collective complaints against companies and enquiries and may even bring criminal and civil actions on behalf of complainants; see generally <http://www.consumerombudsman.dk/About-us/introduction> (accessed on 2017).

⁵⁸⁸ The Data Protection Agency was established by the Act on Processing of Personal Data (Act No. 429 of 31 May 2000; see Title VI, Chapter 16), which implements EU Directive 95/46/E and pertains to the processing of personal data for example in relation to video surveillance. Sec. 2(2) of the Act explicitly sets out that the application of the Act shall not violate the freedom of information and expression and refers to Art. 10 of the ECHR. The Agency gives advice and guidance to authorities, companies and individuals and has some powers of control. It may furthermore hear complaints from citizens and may take up cases *ex officio*. On the powers of the Agency, see in particular Chapter 16 of the Act on Processing of Personal Data. See generally <http://www.datatilsynet.dk/english/the-danish-data-protection-agency/introduction-to-the-danish-data-protection-agency/> (accessed on 14.08.2017). On the geographic area of application of the aforementioned Act and the resulting jurisdiction *ratione loci*, see <http://www.datatilsynet.dk/english/the-act-on-processing-of-personal-data/geographic-area-of-application/> (accessed on 14.08.2017).

⁵⁸⁹ The Board of Equal Treatment, which was established in January 2009 (see Act No. 387 of 27 May 2008) deals with complaints about all forms of discrimination, including in the labour context. Its decisions on complaints are legally binding and the Board has the power to award compensation. See Board of Equal Treatment, Brief Profile (available at <http://adsdatabase.ohchr.org/IssueLibrary/Board%20of%20Equal%20Treatment%20-Denmark.pdf> (accessed on 21.08.2017)

National Council for Children,⁵⁹⁰ and the Danish Press Council.⁵⁹¹ The chairpersons of these institutions are appointed by the executive branch.⁵⁹² These specific mechanisms differ considerably with regard to the scope of their powers and functions. While e.g. the Board of Equal Treatment may even issue legally binding decisions in individual complaints and award compensation, and can therefore hardly be qualified as a non-judicial mechanism, other mechanisms cannot hear individual complaints and their mandate is restricted to offering consultancy and advice (e.g. the National Council for Children).⁵⁹³ The respective mandates of the Consumer Ombudsman, the Data Protection Agency, the Board of Equal Treatment and the Press Council extend to private companies.⁵⁹⁴

3.3. Germany

[291] Germany remains one of the few EU member states which do not have a unified ombudsperson office at the federal level.⁵⁹⁵ Nor is there a federal ombudsperson with an explicit, general human rights mandate.⁵⁹⁶ On the *Länder* (state) level, some ombudsman offices (*Bürgerbeauftragte*) have been created in Rhineland-Palatinate, Thuringia, Schleswig-Holstein, Baden Württemberg and Mecklenburg-Western Pomerania, which assist the regional petition offices.⁵⁹⁷ Their jurisdiction, however, seems to be restricted to corporations providing public services.⁵⁹⁸ Besides these, there are several specialized mechanisms dealing with certain aspects of human rights on the federal and state level, such as the federal *Wehrbeauftragte*, who is a specific ombudsperson for the military⁵⁹⁹, or the data protection authorities.⁶⁰⁰ As part of their

⁵⁹⁰ The National Council for Children, based on Executive Order No. 1367 of 20th December 2012 (<http://www.boerneraadet.dk/english/legal-basis> (accessed on 14.08.2017)), has an advisory role to the authorities on the conditions and rights of children; see generally paras. 5 to 12 of the Executive Order No. 1367 and <http://www.boerneraadet.dk/english> (accessed on 14.08.2017). It also reports to the UN Committee on the Rights of the Child and the UPR; see <http://www.boerneraadet.dk/english/reports-to-the-committee-of-the-rights-of-the-child> (accessed on 14.08.2017). According to para. 6 of Executive Order No. 1367, the Council shall “refer specific requests from children and young people to relevant authorities”.

⁵⁹¹ Under the Media Liability Act (available at: <http://www.pressenaevnet.dk/media-liability-act/> (accessed on 14.08.2017)), the Danish Press Council deals with individual and collective complaints against mass media. It determines whether the sound press ethics were violated and a reply has to be published. The members of the Council are appointed by the Danish Minister of Justice. See Sections 41 to 51 of the Media Liability Act; <http://www.pressenaevnet.dk/Information-in-English.aspx>. The Radio and Television Board (RTB) has supervising functions, e.g. regarding the protection of minors; see <http://mediesekretariatet.dk/>; http://ejc.net/media_landscapes/denmark (accessed on 14.08.2017).

⁵⁹² The Chairperson of the National Council for Children is appointed by the Ministry for Social Affairs and the members of the Press Council as well as the Council of the Data Protection Agency by the Minister of Justice. The Consumer Ombudsman is appointed by the minister responsible for business and consumer affairs.

⁵⁹³ See paras. 5-12 of the Executive Order No. 1367 of 20th December 2012; <http://www.boerneraadet.dk/english/legal-basis> (accessed on 14.08.2017).

⁵⁹⁴ See *supra*, fns. 556-560. The National Council for Children in contrast seems to be focused on the exchange with public authorities, including in legislative processes; <http://www.boerneraadet.dk/english/legal-basis> (accessed on 14.08.2017).

⁵⁹⁵ HAAS J., p. 156; KOFLER, Germany, pp. 203 *et seq.*

⁵⁹⁶ German Institute for Human Rights, National Baseline Assessment, p. 61.

⁵⁹⁷ HAAS J., pp. 162-180; KOFLER, Germany, p. 204.

⁵⁹⁸ E.g. Sec. 4 LGBB and Sec. 4 ThürBÜBG; HAAS J., p. 169.

⁵⁹⁹ Art. 45b of the German Basic Law (*Grundgesetz*). The Wehrbeauftragte is neither a soldier nor a member of the Bundestag; see <https://www.bundestag.de/bundestag/wehrbeauftragter> (accessed on 14.08.2017).

⁶⁰⁰ The federal data protection office for example addresses rights of employees; see http://www.bfdi.bund.de/DE/Datenschutz/Themen/Arbeit_Bildung/arbeit_bildung-node.html (accessed on 14.08.2017). For an

mandates, they might address some issues relating to business and human rights (e.g. data protection of employees in the public sector), but due to their restricted scope of jurisdiction they cannot cover all aspects of the UN Guiding Principles, as was criticized by civil society in the discussion on the German National Action Plan.⁶⁰¹

[292] A number of petition offices have been established on the federal and *Länder* levels, but they are not independent from the parliaments and have been qualified as conceptually different from ombudsman institutions.⁶⁰² The Federal Petition Committee for instance is a committee of the German Parliament (*Bundestag*) established to address individual complaints and petitions against the Federal Government, federal public authorities as well as institutions that perform public functions.⁶⁰³ All of its members are delegates of the Parliament's factions; for this reason *inter alia* the Committee cannot be described as an independent authority under Guiding Principle 31.⁶⁰⁴ Monitoring the protection of human rights is considered to be part of the Committee's mandate.⁶⁰⁵ Some of the petitions addressed by the Committee relate to the field of business and human rights, such as whether an export ban is needed for arms and related material destined for waging war.⁶⁰⁶ If a petition is successful, the German Parliament for instance issues a recommendation to act to the German government, which however is not bound by the Parliament's assessment and recommendation.⁶⁰⁷ Natural persons can file a petition independently of their nationality, even if they live abroad.⁶⁰⁸

[293] Overall, the general idea of ombudsperson offices does not yet seem as prominently anchored in Germany as it is in other European countries. There is no ombudsperson office specifically for business and human rights either at federal or state levels. Some mechanisms merely address certain aspects, especially if they pertain to state (in-)action (and, hence, to the

overview, see <http://datenschutz-ratgeber.info/aufsichtsbehoerden.html> (accessed on 14.08.2017). See furthermore <https://www.schlichtungsstelle-energie.de/> (accessed on 14.08.2017); http://www.bundesnetzagentur.de/cln_1411/DE/Sachgebiete/Post/Verbraucher/Streitbeilegung/streitbeilegung-node.html; https://www.verbraucherzentrale.de/wir-ueber-uns_ (accessed on 14.08.2017); http://www.antidiskriminierungsstelle.de/DE/Home/home_node.html (accessed on 14.08.2017) (not all of these mechanisms can hear claims).

⁶⁰¹ German Institute for Human Rights, National Baseline Assessment, p. 61. The federal data protection office for instance has looked into video surveillance of employees by their employers, see *Bundesbeauftragter für den Datenschutz und die Informationsfreiheit, Tätigkeitsbericht*, p. 49.

⁶⁰² KOFLER, Germany, pp. 203 *et seq.*

⁶⁰³ See Arts. 17 and 45c of the German Basic Law; <http://www.bundestag.de/bundestag/ausschuesse18/a02/> (accessed on 14.08.2017); KOFLER, Germany, p. 205. Sec. 2(1) of the principles of procedure of the Committee of 15 January 2014 (*Verfahrensgrundsätze*) defines petitions as follows: "Eingaben, mit denen Bitten oder Beschwerden in eigener Sache, für andere oder im allgemeinen Interesse vorgetragen werden." On the procedure, see said principles of procedure and the *Gesetz über die Befugnisse des Petitionsausschusses des Deutschen Bundestages*. In 2014, the Federal Petition Office received 15.325 petitions, see Deutscher Bundestag, Bericht des Petitionsausschusses, p. 7.

⁶⁰⁴ KOFLER, Germany, p. 204.

⁶⁰⁵ KOFLER, Germany, p. 207.

⁶⁰⁶ See for example petition no. 54223 which was submitted by the Petition Office to the German Parliament and then forwarded to the German Government: https://epetitionen.bundestag.de/petitionen/_2014/_08/_20/Petition_54223.abschlussbegruendung.pdf (accessed on 24.05.2018) . In 2014, the Petition Office also dealt with food speculation, see Deutscher Bundestag, Bericht des Petitionsausschusses, pp. 40 *et seq.*

⁶⁰⁷ See <http://www.bundestag.de/bundestag/ausschuesse18/a02/grundsaeze/hinweise/260542> (accessed on 14.08.2017). On the possible remedies, see Sec. 7.14 of the principles of procedure of the Committee.

⁶⁰⁸ See Sec. 3 of the principles of procedure of the Committee; as well as Art. 17 of the German Basic Law.

first and third pillar of the UN Guiding Principles), but the scope of remedies for individual victims nevertheless remains limited.

3.4. United Kingdom

[294] The ombudsperson concept is common in the UK and there exist a number of public ombudspersons, in addition to several private ombudspersons.⁶⁰⁹ The institution of the Parliamentary and Health Services Ombudsman hears and decides on individual complaints relating to alleged maladministration by government departments, public organizations and the National Health Service (NHS) in England.⁶¹⁰ A complaint however must first be made to a member of the House of Commons, and is subsequently referred to the Ombudsman.⁶¹¹ The Ombudsman issues recommendations to public services on how to remedy their mistakes and asks them to set out action plans on how they will ensure that such mistakes are prevented in the future.⁶¹² He cannot investigate *ex officio*. The protection of human rights is not mentioned as a distinct function of the Ombudsman, but may guide the office's actions indirectly.⁶¹³ Private companies do not fall under the Ombudsman's jurisdiction, except when they act on behalf of the government.⁶¹⁴ Nor are the commercial and contractual activities of government covered.⁶¹⁵

[295] Several so-called Local Government Ombudsmen are appointed by the Commission for Local Administration in England to control local councils and other administrative authorities, including education admission boards and care homes.⁶¹⁶ They investigate individual complaints and may issue reports.⁶¹⁷ The Local Government Ombudsmen also monitor government actions particularly in the education, housing, town planning and building regulation sectors and publish general guidance on good practice.⁶¹⁸ Public Services Ombudsmen have also been established in Scotland and Wales.⁶¹⁹ In principle, these mechanisms do not control private corporations.⁶²⁰

⁶⁰⁹ For an overview, see CREUTZFELDT, p. 3. See also the private ombudsman office, which is a not for profit private company, <http://www.consumer-ombudsman.org/> (accessed on 14.08.2017). On the Citizens Advice Bureau (<https://www.citizensadvice.org.uk/> (accessed on 14.08.2017)), which refers complainants to the competent bodies, see MCCORQUODALE, p. 40.

⁶¹⁰ See the Parliamentary Commissioner Act of 1967 and the Health Service Commissioners Act of 1993. See generally HAAS J., pp. 127-141; KOFLER, United Kingdom of Great Britain and Northern Ireland, p. 434; <http://www.theioi.org/oi-members/europe/united-kingdom/parliamentary-and-health-service-ombudsman> (accessed on 14.08.2017); Parliamentary and Health Service Ombudsman, Strategic Plan, p. 4.

⁶¹¹ KOFLER, United Kingdom of Great Britain and Northern Ireland, p. 435; HAAS J., p.135-13 (referring to criticism of this filter).

⁶¹² <https://www.ombudsman.org.uk/about-us/what-we-do>.

⁶¹³ KOFLER, United Kingdom of Great Britain and Northern Ireland, p. 437.

⁶¹⁴ HAAS J., p.133.

⁶¹⁵ HAAS J., p. 134.

⁶¹⁶ <http://www.lgo.org.uk/> (accessed on 14.08.2017).

⁶¹⁷ KOFLER, United Kingdom of Great Britain and Northern Ireland, p. 438. For an overview of the extensive powers, see HAAS J., pp. 138 *et seq.*

⁶¹⁸ KOFLER, United Kingdom of Great Britain and Northern Ireland, p. 438.

⁶¹⁹ See <http://www.spso.org.uk/> and <http://www.ombudsman-wales.org.uk/> (accessed on 14.08.2017). See generally KOFLER, United Kingdom of Great Britain and Northern Ireland, pp. 438 *et seq.*

⁶²⁰ MCCORQUODALE, p. 39.

[296] Furthermore, specialized and sector-specific ombudsperson offices were established by public law.⁶²¹ The Information Commissioner's Office, an independent body to safeguard information rights, is competent to hear claims against companies relating to information and privacy rights. It can, for example, instigate prosecutions or fine companies in case of violations.⁶²² The Legal Ombudsman for England and Wales, which is created by the Office for Legal Complaints under the Legal Services Act 2007, investigates complaints on legal service providers.⁶²³ The Financial Ombudsman Services, which are set up by Parliament, look into individual complaints of consumers against financial businesses and may impose fines.⁶²⁴ Both mechanisms could potentially be relevant in regard to business and human rights issues, though their mandate does not explicitly refer to human rights.⁶²⁵

[297] The fragmented landscape of public ombudsman offices in the UK has given rise to calls for a more uniform approach.⁶²⁶ The Parliamentary and Health Services Ombudsman for instance asked Parliament to introduce legislation in this regard and to make the Ombudsman office more accessible, including by introducing a power to conduct investigations *ex officio*.⁶²⁷ Furthermore, the jurisdiction of the mechanisms established by the government are in principle limited to the UK, *i.e.* they do not have extraterritorial jurisdiction.⁶²⁸ The existing ombudsperson offices seem, if at all, mainly linked to the first and third pillar of the UNGP, particularly since most lack jurisdiction over private companies and/or are focused on specific sectors.⁶²⁹

3.5. France

[298] In France, a specific ombudsperson, the Defender of Rights (*Défenseur des Droits*), is tasked with supervising the protection of (human) rights and seems particularly relevant to this study in light of the mechanism's scope of jurisdiction.⁶³⁰

[299] Pursuant to Art. 71-1 of the French Constitution, the Defender of Rights is an independent constitutional authority that can hear cases brought before it by natural or legal persons.⁶³¹ The

⁶²¹ McCORQUODALE, pp. 39 *et seq.*

⁶²² See <https://ico.org.uk/> (accessed on 14.08.2017); McCORQUODALE, p. 39.

⁶²³ <http://www.legalombudsman.org.uk/> (accessed on 14.08.2017).

⁶²⁴ <http://www.financial-ombudsman.org.uk/about/index.html> (accessed on 14.08.2017).

⁶²⁵ McCORQUODALE, p. 40.

⁶²⁶ HAAS J., pp. 132 *et seq.*

⁶²⁷ https://www.ombudsman.org.uk/sites/default/files/Strategic_plan_2013-18_final.pdf.

⁶²⁸ McCORQUODALE, p. 41.

⁶²⁹ See also McCORQUODALE, p. 41.

⁶³⁰ On its competence, see Art. 4 and 5 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits*. There also exist other mechanisms specialized in a particular sector, similar to those in other countries; *e.g.* the *médiateur national de l'énergie*; http://www.energie-mediateur.fr/le_mEDIATEUR/missions.html (accessed on 14.08.2017). See generally HAAS J., pp. 145 *et seq.*

⁶³¹ Art. 1 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits*. For further information, see <http://www.defenseurdesdroits.fr/en> (accessed on 14.08.2017); <http://www.theioi.org/ioi-members/europe/france/le-dfenseur-des-droits> (accessed on 14.08.2017). This ombudsperson office combines the areas of competence of the previous ombudsperson offices, which were the *Médiateur de la République* (French Mediator), the *Défenseur des enfants* (Children's Ombudsman), the *Haute Autorité de lutte contre les discriminations et pour l'égalité* (HALDE, equality and anti-discrimination authority), as well as the *Commission nationale de déontologie de la sécurité* (CNDS, national commission on security ethics).

Defender is appointed by the executive, but exercises his functions independently.⁶³² The *Défenseur des Droits* chairs three boards in the fields of the defense of the rights of children, the fight against discrimination and inequality, and security ethics, and is supported by three deputies: the Children's Ombudsman, the Vice-Chair of the Board in charge of the fight against discrimination and for the promotion of equality, and the Vice-Chair of the Board in charge of security ethics.⁶³³ The ombudsperson enjoys extensive powers of investigation and intervention.⁶³⁴ He may furthermore propose amendments to laws or regulations and consult the Prime Minister and Members of Parliament on legislative proposals.⁶³⁵ The Defender also engages in promoting human rights, for example through best practices.⁶³⁶ The jurisdiction *ratione personae* is not restricted to public authorities and may extend to private companies in relation to discrimination, upholding security ethics and the protection of children's rights.⁶³⁷ He furthermore has a mediator role in conflicts between citizens and public services.⁶³⁸ The remedies include non-binding measures (e.g. mediation) as well as binding measures such as, *inter alia*, requests for disciplinary action or recommendations for administrative sanctions against the corporation that discriminated against an individual.⁶³⁹

[300] The establishment of a specific human rights ombudsperson, which has jurisdiction even over private companies and may issue binding solutions to conflicts, is particularly noteworthy compared with other European countries, in its implementation of the UN Guiding Principles.

3.6. Netherlands

[301] Several specialized ombudsperson offices have already been mentioned in the previous section on NHRI, which may also hear complaints.⁶⁴⁰ Specialized public mechanisms include *inter alia* the Dutch Data Protection Agency, which supervises the compliance of the processing of personal data with data protection laws. The Agency's functions extend to conducting investigations to determine compliance with the law and to mediation. It also has an advisory role and shall inform and educate on data protection.⁶⁴¹

[302] In addition, the institution of the National Ombudsman (*Nationale Ombudsman*) is enshrined in the Dutch Constitution and mandated to "investigate, on request or of his own accord, actions taken by central government administrative authorities and other administrative authorities designated by or pursuant to Act of Parliament".⁶⁴² The National Ombudsman is appointed by the

⁶³² Art. 1-2 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits* ("nommé par décret en conseil des ministres").

⁶³³ See Art. 11-17 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits*; <https://www.defenseurdesdroits.fr/en/colleges> (acceessed on 30.09.2017).

⁶³⁴ See Art. 18-36 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits*;

⁶³⁵ Art. 32 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits*.

⁶³⁶ Art. 34 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits*.

⁶³⁷ Art. 5 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits*; HAAS J., p. 15.

⁶³⁸ Art. 26 of the *loi organique n°2011-333 du 29 mars 2011 relative au Défenseur des droits*.

⁶³⁹ <https://www.defenseurdesdroits.fr/fr/institution/moyens/protection> (accessed on 30.09.2017).

⁶⁴⁰ *Supra*, para. [264].

⁶⁴¹ See <https://autoriteitpersoonsgegevens.nl/en/node/1930> (accessed on 14.08.2017). See also the *Inspectie voor de Gezondheidszorg*, [6] <http://www.igz.nl/english/complaints/>.

⁶⁴² Art. 78a(1) of the Dutch Constitution (*Grondwet*). There also exist several municipal ombudsmen, e.g. in Amsterdam and Rotterdam, see <http://www.theioi.org/loi-members/europe/the-netherlands/municipal-and->

House of Representatives of the States General and belongs to the High Councils of State, alongside the Chambers of Parliament, the Council of State and the Court of Audit.⁶⁴³ The Ombudsman currently has two Deputy Ombudspersons; one of whom is the children's ombudsman.⁶⁴⁴ The National Ombudsman can investigate claims by individuals or on its own initiative.⁶⁴⁵ To assess "whether or not the administrative authority acted properly",⁶⁴⁶ the Ombudsman enjoys broad powers of investigation, e.g. on-site investigations.⁶⁴⁷ The administration must cooperate with the National Ombudsman in the investigations.⁶⁴⁸ The standard of review includes the entire legal regime, which comprises human rights.⁶⁴⁹ However, the Ombudsman has no additional powers or specific mandate regarding the protection of human rights.⁶⁵⁰ As a result of the investigations, the National Ombudsman issues reports containing the findings and decisions as well as recommendations to the public administration.⁶⁵¹ Private companies do not, in principle, fall within the Ombudsman's jurisdiction. Overall, due to its restricted jurisdiction which only covers actions by government authorities, the scope of action of the National Ombudsman in the field of business and human rights appears to be limited.

3.7. Selected States of the United States and Canada

[303] While no unified ombudsman office has been established on the federal level in Canada, there are a number of specialized federal ombudsmen.⁶⁵² Some of them could be of interest in the field of business and human rights, for example the Office of the Procurement Ombudsman⁶⁵³ and the Office of the Federal Ombudsman for Victims of Crime,⁶⁵⁴ that can hear claims by victims who criticize that the laws and policies do not sufficiently meet their needs and thus could potentially

children-s-ombudsman-of-rotterdam (accessed on 14.08.2017); <http://www.theioi.org/loi-members/europe/the-netherlands/municipal-ombudsman-amsterdam> (accessed on 14.08.2017).

⁶⁴³ Art. 73 et seq., 78a(2) of the Dutch Constitution; Sec. 2(2) of the National Ombudsman Act (Wet Nationale Ombudsman). See also <https://www.nationaleombudsman.nl/> (accessed on 14.08.2017); STERN, Netherlands, pp. 323, 324-325.

⁶⁴⁴ See Sec. 9 of the National Ombudsman Act; <https://www.nationaleombudsman.nl/international> (accessed on 14.08.2017). See also Dutch Ombudsman for Children, Report.

⁶⁴⁵ Secs 9:18 of the General Administrative Law Act.

⁶⁴⁶ Secs 9:27 of the General Administrative Law Act.

⁶⁴⁷ Secs 9:31-34 of the General Administrative Law Act.

⁶⁴⁸ Sec. 9:34 of the General Administrative Law Act.

⁶⁴⁹ STERN, Netherlands, p. 326; REIF, pp. 142-145.

⁶⁵⁰ STERN, Netherlands, p. 329.

⁶⁵¹ Secs. 9:27; 9:35-9:36 of the General Administrative Law Act. See also <http://www.collectiveredress.org/collective-redress/alternative-ombudsman-the-netherlands> (focusing on collective redress; accessed on 14.08.2017).

⁶⁵² http://www.ombudsmanforum.ca/en/?page_id=176/ (accessed on 14.08.2017): These are the CBC Ombudsman; the Canada Post-Office of the Ombudsman; the Correctional Investigator of Canada; Health Canada; the Information Commissioner of Canada; the National Capital Commission (NCC) Ombudsman, the National Defence and Canadian Forces Ombudsman, the Office of the Commissioner of Official Languages, the Office of the Procurement Ombudsman, the Privacy Commissioner of Canada, Radio-Canada, the Taxpayers' Ombudsman, the Veterans' Ombudsman, and the Office of the Federal Ombudsman for Victims of Crime. See also REIF, pp. 42 et seq.

⁶⁵³ The Office of the Procurement Ombudsman decides on contractual disputes between the Canadian government and contractors. Participation in the process is on a voluntary basis for both parties. See <http://opo-boa.gc.ca/reglement-resolving-eng.html> (accessed on 14.08.2017).

⁶⁵⁴ <http://www.victimsfirst.gc.ca/mac-fup/faq-faq.html> (accessed on 14.08.2017).

relate to the first and third pillar of the UNGP.⁶⁵⁵ Several associations and fora exist for exchange amongst ombudsperson offices in Canada.⁶⁵⁶ Moreover, a number of ombudsperson offices at the provincial and municipal levels have been created.⁶⁵⁷

[304] In addition, the Canadian Human Rights Tribunal is particularly noteworthy, as it hears discrimination claims under the Canadian Human Rights Act and the Employment Equity Act.⁶⁵⁸ Its jurisdiction extends to individuals and organizations, if they are federally regulated (e.g. chartered banks or airlines).⁶⁵⁹ Complaints can be brought *inter alia* by individual Canadians, unions and NGOs. The Tribunal can only hear complaints that have been referred to it by the Canadian Human Rights Commission, mentioned *supra* in the context of NHRI.⁶⁶⁰ Importantly, the Tribunal acts independently from the Commission in deciding on the complaints.⁶⁶¹ It enjoys extensive powers, similar to those of a court of law and may decide on a remedy to correct the discrimination experienced.⁶⁶² The decision is open to review by the Federal Court of Canada.⁶⁶³ The Tribunal may also issue orders to adjust public policy.⁶⁶⁴

[305] Recently, the Private Member's bill C-584 sought the establishment of a federal independent ombudsperson for the extractive industry sector in Canada, but was defeated.⁶⁶⁵ The proposed bill requested Canadian corporations, acting directly or through foreign affiliates under their control, to comply with international human rights standards in their activities in "developing countries"; the bill – and, implicitly, the jurisdiction of the ombudsperson - would hence have had considerable extraterritorial scope.⁶⁶⁶

[306] On the federal level in the *United States*, there is no ombudsperson service with general jurisdiction. However, a number of ombudsperson offices address specific complaints concerning particular federal authorities and may indirectly address human rights issues, for example the

⁶⁵⁵ Another ombudsperson office of relevance could be the CBC Ombudsman, which addresses complaints relating to current and public affairs content on radio, television and internet (<http://www.ombudsman.cbc.ca/en/about/mandate/> (accessed on 14.08.2017)).

⁶⁵⁶ http://www.ombudsmanforum.ca/en/?page_id=170/ (accessed on 14.08.2017).

⁶⁵⁷ http://www.ombudsmanforum.ca/en/?page_id=176/ (accessed on 14.08.2017).

⁶⁵⁸ Canadian Human Rights Act, R.S.C. 1985, c. H -6v (<http://laws-lois.justice.gc.ca/eng/acts/H-6/> (accessed on 14.08.2017)); Employment Equity Act, S.C. 1995, c. 44vi. (<http://laws-lois.justice.gc.ca/eng/acts/E-5.401/> (accessed 14.08.2017)). On the procedure, see the Canadian Human Rights Tribunal Rules of Procedure, 03-05-04, (http://www.chrt-tcdp.gc.ca/operations/documents/CHRT_Rules_of_Procedure-Regles_de_procedure_du_TCDP.pdf) accessed 11.10.2017)). For the most recent performance review, see Canadian Human Rights Tribunal, Performance Report.

⁶⁵⁹ <http://www.chrt-tcdp.gc.ca/resources/guide-to-understanding-the-chrt-en.html> (accessed 11.10.2017).

⁶⁶⁰ <http://www.chrt-tcdp.gc.ca/resources/guide-to-understanding-the-chrt-en.html#section3-2> (accessed 11.10.2017).

⁶⁶¹ <http://www.chrt-tcdp.gc.ca/resources/guide-to-understanding-the-chrt-en.html#section4> (accessed 11.10.2017).

⁶⁶² Canadian Human Rights Act, sec. 53 (2).

⁶⁶³ Federal Courts Act, R.S.C., 1985, c. F-7 (<http://laws.justice.gc.ca/eng/acts/F-7/page-4.html#docCont> (accessed 11.10.2017)), sec. 18(1).

⁶⁶⁴ Canadian Human Rights Tribunal, Performance Report, p. 4; for the provincial Human Rights Commission see also *supra*, n. [282].

⁶⁶⁵ For a discussion, see JANDA, pp. 97 *et seq.*

⁶⁶⁶ Bill C-584, available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6497386&File=36#4> (accessed on 14.08.2017). See also the defeated bill C-300, available at: <http://www.parl.ca/DocumentViewer/en/40-2/bill/C-300/first-reading> (accessed on 14.08.2017).

Department of State Office of the Ombudsman or the Food and Drug Administration Ombudsman.⁶⁶⁷ Furthermore, several ombudsperson offices have been created on the state level.⁶⁶⁸ Most of these (heterogeneous) state ombudsperson offices address complaints against state or local agencies only.⁶⁶⁹ Some ombudsperson offices focus on specific sectors or particular fields of discrimination, e.g. employment,⁶⁷⁰ education,⁶⁷¹ disability services,⁶⁷² child welfare,⁶⁷³ or consumer protection (those may deal with complaints against investor-owned corporations in the public service sector).⁶⁷⁴ Specific human rights ombudsperson offices neither exist on the federal nor on the state level in the United States. Overall, the jurisdiction in the United States regarding corporations therefore appears to be very limited on the federal level.

3.8. Relevant Complaint Mechanisms in Other Countries and the EU

[307] A number of human rights ombudsperson offices have recently been created in several other countries, including Eastern Europe; they have explicit jurisdiction regarding human rights and broad powers.⁶⁷⁵ While these fall outside the scope of this study, they might nevertheless provide valuable information on the possible role of ombudsperson offices in human rights complaints also for the corporate context.

[308] An analysis of mechanisms on the EU level furthermore reveals several ombudsperson offices that are relevant in the field of business and human rights. In member states of the EU, developments such as the directive on consumer ADR have furthermore contributed to the creation and development of ombudsperson offices.⁶⁷⁶

[309] The European Ombudsman can independently hear complaints by NGOs, associations, interest groups, businesses, universities, municipalities, research centres and other organizations about maladministration of EU institutions, offices, bodies and individuals.⁶⁷⁷ No complaints against businesses or private individuals can however be brought before the European Ombudsman.⁶⁷⁸ In its determination of maladministration, the Ombudsman refers *inter alia* to fundamental rights, in particular Art. 41 of the EU Charter of Fundamental Rights, which establishes the fundamental right

⁶⁶⁷ <http://www.state.gov/s/ombudsman/> (accessed on 14.08.2017). See also REIF, p. 41.

⁶⁶⁸ <http://www.usombudsman.org/about/ombudsman-websites/> (accessed on 14.08.2017).

⁶⁶⁹ See, e.g. <http://www.azoca.gov/>; <http://ombud.alaska.gov/> (both accessed on 14.08.2017).

⁶⁷⁰ <https://www.eeoc.gov/> (accessed on 14.08.2017).

⁶⁷¹ <http://sboe.dc.gov/page/about-the-ombudsman> (accessed on 14.08.2017).

⁶⁷² <http://dso.georgia.gov/> (accessed on 14.08.2017).

⁶⁷³ E.g. the Office of the Child Advocate of Georgia, <http://oca.georgia.gov/about-oca> (accessed on 14.08.2017); the Office of the Family & Children's Ombuds, <http://www.governor.wa.gov/ofco> (accessed on 14.08.2017). See also REIF, pp. 328 *et seq.*

⁶⁷⁴ E.g., the Missouri Office of Public Counsel, <http://opc.mo.gov/who-we-are.html> (accessed on 14.08.2017); the Commissioner of Transportation of Minnesota, <https://www.revisor.mn.gov/statutes/?id=174.02> (accessed on 14.08.2017).

⁶⁷⁵ E.g. in Slovenia and Bosnia-Herzegovina. For a discussion and overview, see in particular HAAS J., pp. 350 *et seq.*; KUCSKO-STADLMAYER, pp. 60 *et seq.*, 64 *et seq.*, 503 *et seq.*; REIF, pp. 87 *et seq.*

⁶⁷⁶ European Parliament and European Council, Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L165/63, 18.06.2013; CREUTZFELD, p. 3.

⁶⁷⁷ Art. 2 European Parliament, Decision Ombudsman's duties of 9 March 1994.

⁶⁷⁸ <http://www.ombudsman.europa.eu/de/atyourservice/infosheet.faces> (accessed on 14.08.2017).

to good administration. The European Code of Good Administrative Behaviour is another point of reference as it contains core principles of good administration, such as non-discrimination and proportionality.⁶⁷⁹ The European Ombudsman has the power to issue recommendations in a case, but the decisions are not legally binding.⁶⁸⁰ If the institution objects to the recommendations, the Ombudsman can issue a special report to the European Parliament.⁶⁸¹ Several of the inquiries dealt with by the European Ombudsman concern the field of business and human rights. For instance, it held that the European Commission's failure to conduct a specific human rights impact assessment in relation to the EU-Vietnam free trade agreement amounted to maladministration.⁶⁸² A memorandum of understanding regulates the cooperation between the European Ombudsman and the European Data Protection Supervisor (EDPS).⁶⁸³

[310] In addition, the European Union Agency for Fundamental Rights (FRA) is tasked with providing expert advice to EU institutions and Member States on the protection of the fundamental rights in the EU. This broad mandate may determine how fundamental rights are to be respected in the business context. However, the FRA does not hear complaints. It mainly collects and analyses information, provides expertise and support, and raises awareness on fundamental rights.⁶⁸⁴

3.9. Conclusion

[311] The preceding overview shows the heterogeneity of the different approaches to ombudsperson offices.⁶⁸⁵ The protection and promotion of human rights have increasingly been considered to fall within the mandate of ombudspersons, including as indirect or even explicit standards of control.⁶⁸⁶ Human rights ombudsperson offices with an explicit human rights mandate have been created in a number of States and may overlap with, or be identical to, national human rights institutions.⁶⁸⁷ Furthermore, specialized ombudsperson institutions focus on specific aspects related to human rights, such as anti-discrimination, data protection, consumer protection or the rights of children. Overall, the mechanisms and developments in France and Canada appear to be particularly progressive amongst the States under review.

[312] The relevance of ombudsperson offices for the protection and promotion of national and international human rights has been recognized by international organisations, such as the Council

⁶⁷⁹ European Ombudsman, The European Code of Good Administrative Behaviour.

⁶⁸⁰ Art. 2 and 3 European Parliament, Decision Ombudsman's duties of 9 March 1994..

⁶⁸¹ Art. 3 European Parliament, Decision Ombudsman's duties of 9 March 1994.

⁶⁸² <http://www.ombudsman.europa.eu/cases/caseopened.faces/en/54682/html.bookmark> (accessed on 14.08.2017).

⁶⁸³ European Ombudsman, European Data Protection Supervisor. The EDPS is a specialized mechanism dealing with complaints from persons who claim that an EU institution has violated their rights to data protection; see <https://secure.edps.europa.eu/EDPSWEB/edps/site/mySite/Complaints> (accessed on 14.08.2017).

⁶⁸⁴ <http://fra.europa.eu/en/about-fra/what-we-do> (accessed on 14.08.2017).

⁶⁸⁵ Various approaches to the definition and classification of ombudsperson offices have been proposed in the literature; see for example REIF, pp. 7 *et seq.* (in particular *ibid.*, p. 26-27 where she outlines ten different variations of the ombudsperson mechanism in the public and private domains); HAAS J., pp. 84 *et seq.*

⁶⁸⁶ KUCSKO-STADLMAYER, p. 503.

⁶⁸⁷ HAAS J., pp. 350 *et seq.*; KUCSKO-STADLMAYER, pp. 60 *et seq.*, 64 *et seq.*, 503 *et seq.*; REIF, pp. 87 *et seq.*

of Europe.⁶⁸⁸ However, ombudsperson offices are only regarded as one component of human rights protection, which is complementary to judicial mechanisms.⁶⁸⁹

[313] No ombudsperson office in the States under review is explicitly and/or specifically tasked with business and human rights in general. In most States that were reviewed, existing ombudsperson offices do not cover all aspects of human rights protection as set out by the UN Guiding Principles, namely because the mechanisms focus on administrative action only or on specific human rights issues such as discrimination and/or on specific sectors. In particular, most of the aforementioned ombudspersons do not have direct jurisdiction over private corporations and their respective extraterritorial jurisdiction seems to be very limited.

4. Non-judicial Remedy Mechanisms in Export Finance Institutions and Development Finance Institutions

4.1. General Remarks

[314] According to the UN Guiding Principles (formally or informally) state-controlled institutions such as export credit agencies (ECAs) or bilateral development finance institutions (DFIs) should be encouraged or even required to perform an effective human rights due diligence in their financial support activities.⁶⁹⁰ Most western countries have an official ECA or DFI. Due to different legal and cultural traditions, they vary greatly with regard to size, mandate, function, objectives, organizational structure and ownership which makes it difficult to compare them with each other. However, most follow a certain set of international guidelines as well as internal policies that require them to take social and environmental issues, including human rights, into account when engaging in investment or insurance activities.⁶⁹¹ Some have even established or are currently in the process of setting up non-judicial grievance mechanisms for financial support-related human rights violations. The following section provides an aggregate overview on the current state within official ECAs and DFIs in selected countries based on information publicly available on their websites.⁶⁹²

⁶⁸⁸ Council of Europe, Parliamentary Assembly 757 (1975) on the conclusions of the meeting of the Assembly's Legal Affairs Committee with the Ombudsmen and Parliamentary Commissioners in Council of Europe Member States (adopted 29 January 1975), Yrbk. European Conv. H.R. 16 (1975), 60; Council of Europe, Committee of Ministers, Recommendation No. R (85) 13 of the Committee of Ministers to Member States on the Institution of the Ombudsman (adopted 23 September 1985), 234; No. Rec(2000)10 and Resolution (77) 31; Council of Europe, Parliamentary Assembly, Strengthening the institution of ombudsman in Europe, Resolution 1959 (2013).

⁶⁸⁹ HAAS J., p. 351.

⁶⁹⁰ UNGP 4; UNGP, commentary, p. 7.

⁶⁹¹ For ECA see OECD, Common Approaches; for European DFIs see EDFI Principles for Responsible Financing, available at http://www.swedfund.se/media/1123/edfi_principles_responsible_financing-signed_copy_09-05-07.pdf (accessed on 30.8.2016), as well as the relevant standards and policies available on each institution's website.

⁶⁹² Although there might be other national agencies involved in development finance, the following section only looks at official ECAs and DFIs listed on the OECD-website: For ECA see <http://www.oecd.org/tad/xcred/eca.htm> (accessed on 14.08.2017), for DFIs see <http://www.oecd.org/dac/stats/development-finance-institutions-private-sector-development.htm> (accessed on 30.8.2016).

4.2. Remedy Mechanisms within Export Credit Agencies

[315] Denmark's ECA Eksport Kredit Fonden (EKF) does not yet have a remedy mechanism in place. However, the establishment of a whistle blower or grievance function is planned.⁶⁹³

[316] The German ECA Euler Hermes Aktiengesellschaft⁶⁹⁴, which – in collaboration with PricewaterhouseCoopers – handles export credit guarantees on behalf of the German government,⁶⁹⁵ does not yet have a defined grievance mechanism for human rights complaints.⁶⁹⁶

[317] In the UK, UK Export Finance offers a complaints procedure where claims regarding the support offered or services provided can be lodged by email or phone. However, due to the phrasing of the website with a particular focus on customers, it is unclear whether it is also open to human rights-related complaints by third parties who are not customers. Nonetheless, the website mentions the possibility of bringing complaints that have not been dealt with in a satisfactory way to ministers or to the Parliamentary Commissioner for Administration (Ombudsman).⁶⁹⁷

[318] The French official ECA, the *Compagnie française d'Assurance pour le commerce extérieur* (COFACE),⁶⁹⁸ does not provide for a non-judicial grievance mechanism for human-rights related concerns.⁶⁹⁹

[319] In the Netherlands, its ECA Atradius Dutch State Business⁷⁰⁰ does not seem to have a non-judicial grievance mechanism in place either.⁷⁰¹ However, Atradius Dutch State Business was involved in a specific instance procedure at the Dutch NCP that was concluded on 30 November 2016 after a facilitated dialogue took place between the parties. The notifiers' claimed that Atradius Dutch State Business had violated the OECD Guidelines for Multinational Enterprises by failing to ensure that its client Van Oord complied with the OECD Guidelines and the UNGP in both of Van Oord's projects in Suape, Brazil. While the Dutch NCP handled the specific instance against Atradius, the Brazilian NCP handles the case against Van Oord Marine Ingenuity and Complexo Industrial Portuário Eraldo Gueiros – Empresa Suape. The Dutch NCP confirmed in its Final Statement that the OECD Guidelines for Multinational Enterprises apply to Atradius Dutch State Business and concluded that it should have used (more of) its leverage to prevent and mitigate possible adverse impacts. It also suggested that the Dutch ECA publish a complaint procedure, including a time frame of the procedure.⁷⁰²

⁶⁹³ Eksport Kredit Fonden, CSR Report 2015, p. 24 and 44, available at <http://www.ekf.dk/da/om-ekf/CSR-i-EKF/Documents/EKF-CSR-report-2015.pdf> (accessed on 30.8.2016).

⁶⁹⁴ www.hermes-kredit.com (accessed on 30.8.2016).

⁶⁹⁵ <http://www.agaportal.de/pages/aga/index.html> (accessed on 30.8.2016).

⁶⁹⁶ FIDH, Guide, p. 516.

⁶⁹⁷ <https://www.gov.uk/government/organisations/uk-export-finance/about/complaints-procedure> (accessed on 30.8.2016).

⁶⁹⁸ www.coface.com (accessed on 30.8.2016).

⁶⁹⁹ FIDH, Guide, p. 516.

⁷⁰⁰ <https://atradiusdutchstatebusiness.nl/en> (accessed on 30.8.2016).

⁷⁰¹ There is only a general complaint form available on their website: <https://atradiusdutchstatebusiness.nl/en/contact/> (accessed on 14.08.2017).

⁷⁰² Final Statement Notification Both ENDS – Fórum Suape vs. Atradius DSB, 30 November 2016, available at <https://www.oecdguidelines.nl/latest/news/2016/11/30/final-statement-both-ends-associacao-forum-suape-vs-atradius-dutch-state-business> (accessed on 14.08.2017); in this context see also the Report of 9 June 2016 submitted by Both ENDS on the gaps between the Common Approaches and the OECD Guidelines that was

[320] Canada's ECA, Export Development Canada (EDC), has implemented a grievance mechanism that is run by EDC's Vice-President and Chief Compliance and Ethics Officer. It is mandated to receive and review complaints from stakeholders in connection with EDC's internal ethics codes, as well as external inquiries regarding EDC's corporate social responsibility policies and initiatives.⁷⁰³ These include their commitment to provide services with a view to the promotion and protection of internationally-recognized human rights.⁷⁰⁴ Any individual, group, community, entity or other party affected or likely to be affected by EDC's corporate social responsibility policies and initiatives can submit a complaint, either in writing or electronically via an online form. Languages accepted are French and English. Once a complaint is determined to fall within the mandate, it will be assessed and the complainant will be informed on the options to proceed. The complaint can generally be resolved through dialogue, dispute resolution or compliance audit. If a satisfactory resolution has been reached or it does not seem viable that problem-solving techniques will be productive, the case will be closed by the Compliance Officer and reported to the Board of Directors. The Compliance Officer can also make recommendations about future action and ask EDC to help ensure monitoring and follow-up after resolution of the case.⁷⁰⁵

[321] In the U.S., the Export-Import Bank of the United States (EXIM Bank) provides a process for customers, individuals and organisations to submit information or share environmental and social concerns about a project that may receive or has got export financing support from EXIM Bank.⁷⁰⁶ Complaints can be made in English via an online form or by email. Once a complaint or concern has been lodged it is forwarded to an inter-divisional collaboration team or the transaction team which will get in touch with the complainant to inform about follow-up actions or require further information (unless the complaint was made anonymously).⁷⁰⁷ There is no public information available as to what outcomes can be reached through this process (e.g. dispute-resolution, compliance review etc.).

[322] In countries outside the scope of this study, some ECA have established similar or more sophisticated grievance mechanisms, among them Japan Bank for International Cooperation (JBIC)⁷⁰⁸, Nippon Export and Investment Insurance (NEXI),⁷⁰⁹ Export Finance and Insurance

referenced in the Dutch NCP's Final Statement, available at https://www.oecdwatch.org/cases-fr/Case_365 (accessed on 13.09.2017).

⁷⁰³ <http://www.edc.ca/EN/About-Us/Management-and-Governance/Pages/default.aspx> (accessed on 30.08.2016).

⁷⁰⁴ See EDC Statement on Human Rights and its brochure on Corporate Social Responsibility, available at <http://www.edc.ca/EN/About-Us/Corporate-Social-Responsibility/Pages/default.aspx> (accessed on 30.08.2016).

⁷⁰⁵ <http://www.edc.ca/EN/About-Us/Management-and-Governance/Pages/default.aspx> (accessed on 30.08.2016).

⁷⁰⁶ <http://www.exim.gov/policies/ex-im-bank-and-the-environment/environmental-and-social-project-information-and-concerns> (accessed on 30.8.2016).

⁷⁰⁷ See process flow chart, available at http://www.exim.gov/sites/default/files/flow_chart.pdf (accessed on 30.08.2016).

⁷⁰⁸ <https://www.jbic.go.jp/en/efforts/environment/disagree/procedure> (accessed on 30.08.2016).

⁷⁰⁹ <http://nexi.go.jp/en/environment/objection.html> (accessed on 30.08.2016).

Corporation (EFIC) in Australia,⁷¹⁰ Austria's Oesterreichische Kontrollbank AG (OeKB)⁷¹¹ and the Swedish Exportkreditnämnden (EKN).⁷¹²

4.3. Remedy Mechanisms within Bilateral Development Finance Institutions

[323] Denmark's Investment Fund for Developing Countries (IFU) offers a grievance mechanism for individuals and communities who are adversely affected by the activities of an IFU investee who does not attempt or fails to resolve the issues itself. The grievance must be related to an investee and may include a request for review of its conformance with IFU's sustainability policy and exclusion list. It must be submitted by online form, email, letter or fax, preferably in English. The grievances are investigated by IFU's Sustainability Unit. Once all relevant information has been gathered and the issues raised have been reviewed, an internal report on the grievance is prepared that includes recommendations, e.g. improvements of existing policies and procedures in the investee or operational corrective actions. The final decision on the course of action lies with IFU's executive board (unless there is a conflict of interest). Finally, the complainant is informed on the decision taken and the outcome is reported in the annual report on an aggregated basis.⁷¹³

[324] A different approach was taken by the *German Deutsche Investitions- und Entwicklungsgesellschaft mbH* (KFW/DEG) and the *Dutch FMO Entrepreneurial Development Bank*. In a shared initiative, they developed an Independent Complaints Mechanism (operational since 2014) that accepts complaints by individuals, communities and others that feel adversely impacted by a project currently or prospectively co-financed or financed by either institution. Grievances are reviewed by an Independent Expert Panel operating completely independently from DEG and FMO. The panel consists of three experts and is responsible for deciding on the admissibility of the grievance, corresponding with the complainants, engaging in dispute resolution, performing compliance review and reporting on the outcomes.⁷¹⁴ Complaints can be submitted through an online form or by mail or email in any official language. If the complaint is declared eligible by the Independent Expert Panel and enough information to assess the situation has been gathered, the Panel will decide on the next steps, which could include either a dispute resolution process or a compliance review process. During a compliance review process, the Panel will investigate if the project was financed in conformance with the relevant policies. During a dispute resolution process, the Panel will engage in discussions or mediation with the claimants and the project sponsor (client) in order to find an appropriate solution acceptable to all involved parties. In some cases these two processes may be combined.⁷¹⁵ To date, there have only been two cases filed with FMO (one admissible, one inadmissible) and two cases filed with DEG and FMO regarding a joint client (one

⁷¹⁰ <http://www.efic.gov.au/about-efic/our-organisation/complaints-mechanism/> (accessed on 30.08.2016).

⁷¹¹ <http://www.oekb.at/de/unternehmen/nachhaltigkeit/seiten/beschwerdemechanismus.aspx> (accessed on 30.8.2016).

⁷¹² <https://report.whistleb.com/en/EKN> (accessed on 30.8.2016).

⁷¹³ <http://www.ifu.dk/en/values/sustainable-investments/grievance-mechanism> (accessed on 30.08.2016).

⁷¹⁴ KFW-DEG, Independent Complaints Mechanism DEG, 2014, available at: <https://www.deginvest.de/Internationale-Finanzierung/DEG/%C3%9Cber-uns/Verantwortung/> (accessed on 30.08.2016).

⁷¹⁵ Except for the two institutions' differing policies, standards or appraisal criteria that are investigated by the Panel, the grievance process is mostly identical and can be found at <https://www.deginvest.de/Internationale-Finanzierung/DEG/Die-DEG/Verantwortung/Beschwerdemanagement/> (accessed on 30.08.2016) or <https://www.fmo.nl/project-related-complaints> (accessed on 30.8.2016). The complete Independent Complaints Mechanism Policy is available at https://www.deginvest.de/DEG-Documents-in-English/About-DEG/Responsibility/DEG_Complaints-Mechanism_2014_05.pdf (accessed on 30.08.2016).

admissible, one inadmissible).⁷¹⁶ Of the two cases declared eligible by the Panel, one is currently in the compliance review phase⁷¹⁷ and the other one is in the monitoring stage following a compliance review and management's decisions concerning subsequent action steps.⁷¹⁸

[325] In France, AFD/Proparco Groupe Agence Française de Développement, has recently developed a grievance mechanism concerning environmental and social issues in connection with projects financed by AFD or Proparco (Environmental and Social Complaints Mechanism). Complaints can be made by anyone who is negatively affected by an AFD-funded project, be it with regard to the contracting authority who received AFD funding or with regard to a report of non-compliance with AFD's environmental and social procedures. However, there is a precondition that the complainant have exhausted all possibilities for dialogue or finding an out-of-court solution with the contracting authority before lodging the complaint with the AFD mechanism. The cases are handled by a panel of independent experts who can either engage in dispute resolution and/or perform a compliance review.⁷¹⁹ This procedure is aimed to eventually be aligned with the FMO/DEG mechanism.⁷²⁰

[326] The British CDC (formerly Commonwealth Development Corporation) offers a grievance mechanism that deals with complaints by anyone who believes that he or she has been negatively affected by a breach of CDC's Code of Responsible Investing through CDC itself, operations of a company in which CDC's capital is invested or operations of a fund manager in which CDC's capital is invested. CDC will get in touch with the investee who should start an investigation and engage with the complainant (where possible) to find an appropriate resolution to the situation. The complainant will be informed of the progress of his complaint as well as its conclusion and outcomes. The decisions are final unless new evidence comes to light. The entire process is overseen by CDC's board.⁷²¹

[327] Canada does not yet have a bilateral development finance institution but is currently in the process of establishing one that is planned to become operational in January 2018. It will be a subsidiary of Export Development Canada.⁷²² So far, not much information is available regarding the concrete set-up,⁷²³ any planned grievance mechanism or its potential alignment with the Compliance Officer Mechanism of Export Development Canada.⁷²⁴

⁷¹⁶ See DEG/FMO Independent Complaints Mechanism Annual Report 2015, available at <https://www.fmo.nl/icm-annual-reports> (accessed on 30.08.2016) and <https://www.fmo.nl/complaints-disclosure> (regarding the 2016 case lodged with FMO).

⁷¹⁷ See case *Sendou/16-01*. Status overview available <https://www.fmo.nl/independent-complaints-mechanism> (accessed on 14.08.2017).

⁷¹⁸ See case *Barro Blanco/14-002*. Status overview, panel report, management responses and recent monitoring reports available at <https://www.fmo.nl/complaints-disclosure> (30.08.2016).

⁷¹⁹ <http://www.afd.fr/lang/en/home/AFD/redevabilite-dialogues/dispositif-gestion-reclamations> (accessed on 14.08.2017).

⁷²⁰ See AFD, CSR Report 2015, p. 35.

⁷²¹ <http://www.cdcgroup.com/Get-in-touch/Make-a-complaint/> (accessed on 30.08.2016).

⁷²² See http://international.gc.ca/world-monde/international_relations-relations_internationales/multilateral-multilateraux/dfi-ifd.aspx?lang=eng (accessed on 14.08.2017).

⁷²³ See The McLeod Group, A Backgrounder on Canada's Development Finance Initiative, May 2016, available at <http://www.mcleodgroup.ca/wp-content/uploads/2016/05/REVISED-McLeod-Group-Policy-Brief-16-DFI-UPDATED.pdf> (30.08.2016).

⁷²⁴ See above para. [307].

[328] In the U.S., the Overseas Private Investment Corporation (OPIC) established an Office of Accountability in 2005 which is set up as an independent authority within the OPIC that handles social and environmental complaints in connection with OPIC-funded projects available to project-affected communities, project sponsors or project workers. The Office is mandated to engage in dispute resolution with the parties (problem-solving) or to perform a review how relevant OPIC policies had been applied in a specific project (compliance review). A compliance review can also be ordered from OPIC's board of directors and president. Complaints can be filed in English or in a native language by hand delivery, mail, fax or email. Once a complaint is received and deemed eligible, the Office will make a site-visit in order to decide on the next steps.⁷²⁵ In cases of ineligibility, it will suggest alternative ways to raise a concern, e.g. through a project-level grievance mechanism. To date, OPIC has conducted three compliance review cases and one management requested review.⁷²⁶

4.4. Conclusion

[329] Due to the broad spectrum of financial services offered as well as goals, policies and standards followed by ECA and DFIs, the mandates, procedures, functions and potential outcomes of existing complaint mechanisms vary greatly. Detailed comparisons between the complaint mechanisms are therefore very difficult and would need to take into account the concrete set-ups and mandates of ECA and DFIs which differ significantly. However, there are some general trends that can be identified with regard to grievance procedures in these institutions. Many of the mechanisms reviewed have been set up rather recently, in the past two years, and only limited information is available as to the number and types of cases that were dealt with. Moreover, it can be stated that the majority of the mechanisms explicitly or implicitly welcome human rights-related concerns and that they have processes in place to review whether the investment or insurance decision in question was made in accordance with the relevant environmental, social and human rights policies. Some even have the mandate to engage in problem-solving with complainants and the client. The few existing ECA grievance mechanisms are all managed internally. Due to the limited number of cases and the lack of transparency, especially with regard to ECA grievance mechanisms, there is only limited data so far on their compliance with the UNGP effectiveness criteria.⁷²⁷

[330] DFI's mechanisms tend to be handled by independent complaint offices that generally report on the cases in a more transparent manner. Since the landscape in development finance and export risk funding is currently very much in flux, with some existing mechanisms being adjusted according to lessons learned and new mechanisms being set up, it remains to be seen whether they eventually contribute to enhancing access to remedy for individuals and communities who encounter project- or investment-related human rights infringements and to providing them with an effective remedy to actually improve their situations on the ground.

⁷²⁵ <https://www.opic.gov/who-we-are/office-of-accountability> (accessed on 30.8.2016).

⁷²⁶ See the case reports available at: <https://www.opic.gov/who-we-are/office-of-accountability/public-registry-cases> (accessed on 30.08.2016).

⁷²⁷ See DANIEL *et al.* (eds.), *Glass Half Full?*, pp. 19, 61, who shed light on the fact that most cases filed are closed due to ineligibility, and those that are found eligible often fail to proceed to a substantive phase of the complaints process in which a solution is actually reached. Grievance mechanisms that have been reviewed recently in light of UN GP 31 include those of FMO/DEG, JBIC and OPIC, see DANIEL *et al.* (eds.), *Glass Half Full?*, pp. 116 *et seq.* and Annexes 10, 13 and 14.

V. INTERPLAY BETWEEN JUDICIAL AND NON-JUDICIAL REMEDIES

[331] In order to examine the relationship between the judicial and the non-judicial remedies, the situation will be briefly described in each jurisdiction individually, focussing on mechanisms that facilitate access to judicial remedies and those specifically designed for the context of business and Human rights (OECD National Contact Points, National Human Rights Institutions, ombudsperson-institutions), but not include non-judicial remedies such as ADR procedures. The following report will rather consider if and to what extent non-judicial remedies were designed to address or allow addressing difficulties with access to judicial remedies in the context of business and Human rights and analyse a possible interplay between the two.

[332] German law facilitates access to judicial remedies to victims by allowing them to participate to a considerable extent in criminal proceedings and by providing legal aid in civil proceedings (under certain circumstances). Legal aid is also available to foreign plaintiffs. However, several barriers hinder such access, especially for remedies against corporations. One barrier is the impossibility in principle to prosecute corporations (though administrative sanctions are possible in some cases), another is the lack of mechanisms allowing for collective redress (except in the field of the environment and discrimination) or uncertainties resulting from judicial decisions as to the extent to which parent companies can be held liable for acts/omissions of their subsidiaries. Also, rules relating to evidence in criminal proceedings are not particularly victim friendly. In the area of non-judicial remedies, it is the OECD NCP that provides victims with remedies in several circumstances, and a number of cases show that the NCP has played an important role including in cases where judicial remedies were sought in addition to or before the NCP procedure. Germany did not create other institutions offering non-judicial remedies in the present context, as its NHRI does not receive individual complaints, and ombudspersons have very limited jurisdiction. More generally, mediation in Germany is voluntary, *i.e.* depends entirely on the decision of the parties. However, the German Development Finance Institution *Deutsche Investitions- und Entwicklungsgesellschaft mbH* (KfW/DEG) has developed an interesting Independent Complaints Mechanism, together with the Dutch FMO Entrepreneurial Development Bank. This shows that, overall, judicial remedies play a bigger role in Germany, with non-judicial remedies mainly being effective within the OECD framework.

[333] In France, several mechanisms facilitate access to judicial remedies in criminal law: the victim has relatively broad rights to participate; corporations can be prosecuted, including subsidiaries under full and effective control of the parent company, and ordered to pay compensation to the victim. Also, in civil law, several characteristics are favourable for victims, such as a relatively broad rule of liability and the possibility of liability on the basis of voluntary assumptions (especially in the context of environmental damages). In addition, recently passed legislation on reporting obligations could have consequences for the liability of corporations, though there are no judicial decisions as yet on this matter. Individual directors' liability is relatively limited. Procedurally, principles such as the availability of legal aid (though linked to a residence requirement) or the access to court free of cost are facilitating access to remedy. As to the burden of proof, the court has relatively wide discretion that could benefit victims. Other measures such as fee arrangements are lacking, and mechanisms of collective redress are only available to a limited extent (in consumer and competition disputes, and then only for accredited organisations, with legislative proposals pending in the field of environment and discrimination). With regards to non-judicial remedies, the OECD NCP is the most relevant in the context of business and human rights. While there is a relatively small number of requests (26 requests in 15 years), the NCP offers especially NGOs and Unions

an avenue for redress that can be effective, in spite of the fact that there are fewer parties with standing to sue than in other states. While the French Human Rights Commission has no mandate to handle individual complaints, there is an Ombudsperson, the “Defender of Rights” (*Défenseur des Droits*) who has relatively wide powers of investigation and intervention and can receive individual complaints against private companies, including those concerning discrimination, children’s rights, and conduct of security personnel. However, there are territoriality requirements for complaints concerning children’s rights (residence or nationality of the victim) or on conduct of security personnel (the place where acts happen) that make it unlikely that the Ombudsperson will deal with complaints concerning human rights violations abroad. In 2016, the French Development Finance Institution AFD developed an independent Environmental and Social Complaints Mechanism aimed at eventually aligning with the FMO/DEG mechanism, although this mechanism is only open if all possibilities for dialogue or finding an out-of-court solution have been exhausted.

[334] *Danish* criminal law does not provide the victim with many tools to seek remedies except for legal aid for victims in some circumstances, an access to the file and the possibility of claiming compensation within criminal proceedings (free of charge). Possibilities for criminal proceedings against corporations seem particularly small. Access to remedy is therefore easier under civil law. In substantive law, the statutory formulation relating to directors’ liability could potentially benefit victims, though no such cases have decided as yet. On the procedural side, several mechanisms facilitate access. First, legal aid can be provided by a specialised centre or, in cases of general public importance, by a court decision. In addition, a court can make an exception to the “loser pays” rule where the successful party is a major corporation. It is also possible for a lawyer to work on a “no win, no fee” basis, though other contingency fee arrangements are not admitted pursuant to professional ethics. The burden of proof can be alleviated according to the circumstances, and the court has the power to order the production of documents on the request of the opposing party, though the mechanism does not go as far as discovery mechanisms under U.S. law. Finally, collective redress is available, including in cases of damage to persons, property or the environment. Also non-judicial remedies are available, most notably through the NCP that has a considerable annual budget, and allows complaints by a relatively large percentage of people, but within relatively strict time limitations. Other specialised agencies that might provide access to remedy include the consumer ombudsman or the data protection agency or, for complaints against public authorities, the parliamentary ombudsman. There is also a number of institutions such as the Human Rights Institution or the National Council for Children that have advisory functions. Finally, Denmark’s Investment Fund for Developing Countries (IFU) also offers an internal grievance mechanism for individuals and communities and the Danish ECA aims to establish a grievance function.

[335] In the *Netherlands*, access to judicial remedies is facilitated in criminal law by the possibility for the victim to claim compensation and/or bring a civil claim in the criminal proceedings and other possibilities for the victim to participate (victim impact statement, right to a lawyer), combined with a relatively broad approach to criminal liability of corporations, as the failure of a corporation to take reasonable care to prevent a criminal act of its subsidiary can, under certain circumstances, lead to liability. In civil law, provisions providing for directors’ liability might allow access to judicial remedies in cases of clear misconduct of a director, and tort liability for subsidiaries might also be possible, depending on the knowledge and involvement of the management of the parent company. While civil procedure rules relating to costs and legal aid are rather to the disadvantage of the victim, other rules do at least have the potential to benefit the victim. Rules on the burden of proof allow for some flexibility, especially if principles of reasonableness and fairness so require, and

there is the possibility for the court to oblige a party to produce documents, though it does not go as far as the discovery proceedings in the U.S. or the UK. Finally, a recent proposal of the Dutch ministry of justice would allow a “lead representative organization” to claim damages in a representative action. Thus, Dutch law has facilitated access to judicial remedy in many regards. With regards to non-judicial remedies, the Dutch NCP seems to have sufficient resources and it adjudicates between one and four instances annually. This shows that it is a recognised, though not very frequently used, remedy mechanism. The Dutch Human Rights Institution only hears individual complaints related to the national equality legislation (which mainly concerns employment issues), though it also advises victims on other human rights violations and refers them to the competent institutions. Other institutions that might hear individual complaints are the Dutch data protection agency and the National Ombudsman – though with a limited role in the field under review (*i.e.* only as far as actions by administrative authorities are concerned). Non-judicial remedies are therefore not particularly well developed. However, both the Dutch ECA as well as the country’s DFI have established or are currently in the process of setting up / formalizing non-judicial grievance mechanisms for project- or investment-related human rights violations. Interestingly, an example shows that judicial remedies have been more promising for the victim. The (still ongoing) judicial proceedings against Royal Dutch Shell for oil spills in the Niger delta seem to have brought more satisfying results in the eyes of the victims (and the representative organisations) than the non-judicial procedure conducted by the NCP .

[336] In the *UK*, access to judicial remedies is particularly restricted under English criminal law, as victims have no possibility to directly participate in the proceedings or to receive legal aid. They do, however, have a right to information and a right to make a statement; and they do have the possibility to obtain compensation. This also applies to corporate crime. Specific provisions allow for compensation orders in the area of slavery and human trafficking. In addition, some statutes facilitate holding corporations liable for some criminal acts, others provide for liability for acts committed abroad (e.g. bribery, sexual acts with children, human trafficking). English tort law is more favourable to the victim, especially as courts have developed the possibility of parent companies owing a direct duty of care to third parties dealing with their subsidiaries under certain circumstances. In civil procedure, mainly the possibility of contingency fee and other arrangements as well as some forms of collective redress such as group litigation orders facilitate access to remedies, though they have not been as attractive as in the U.S. Also, there is no legal aid in tort and employment claims, what explains the necessity of contingency fee arrangements to a certain extent. As to non-judicial remedies, the UK NCP is perceived very positively, *inter alia* for clear information available on its website, a professional approach to mediation (implying professional mediators) and foreign complainants (possibility of mediation by phone) and its statement. It publishes about 2 to 4 decisions regarding complaints annually. The Equality and Human Rights Commission does not deal with individual complaints and has limited territorial jurisdiction, but it has carried out investigations and can intervene in legal proceedings regarding issues of public policy. In addition, there is a considerable number of sector specific ombudsmen such as the Information Commissioner’s Office, the financial ombudsman services or the Legal Ombudsman that can hear individual complaints, though their jurisdiction is generally limited to the UK. For project- or investment-related human rights violations both the UK ECA and the UK DFI have grievance mechanisms.

[337] Under *U.S.* criminal law, as is the case under *UK* law, victims’ access to remedies is more limited than in most other jurisdictions under review, as the victim does not have the right to participate in the criminal procedure. *U.S.* law does, however, provide for restitution for the victim

as well as some other rights: protection; notice and information concerning the proceedings, including plea bargains; and the possibility of not only being present at the trial but also making a statement). A corporation can be prosecuted in principle, although only exceptionally (*i.e.* where there is an explicit statutory basis), for acts committed abroad. Under U.S. civil law, the rules relating to jurisdiction, in particular, have provided a relatively broad access to remedies, although recent judicial decisions have restricted this possibility considerably. Today, the Alien Tort Claims Act only allows for jurisdiction in the event that the facts “touch and concern” the territory of the U.S. and general personal jurisdiction over the corporation only exists where it is “at home”. U.S. substantive law provides for several approaches to director’s liability in tort as well as to a parent corporation’s liability for its subsidiaries, the latter mainly if the subsidiary is deemed an instrument or agent of the parent company. As to procedural issues, while legal aid is limited (mainly provided by public interest law firms and other institutions, some of which is limited to U.S. citizens), a limited cost risk (each party bears its own costs) and contingency fee arrangements facilitate access to judicial remedies. Finally, a variety of mechanisms for collective redress (especially class actions) facilitate access to justice. With respect to non-judicial remedies, they play a much less prominent role in the U.S. than in other states. The U.S. NCP seems to see its role as mainly facilitating negotiations and mediation as between the parties and does not issue determinations or recommendations in the event that the parties do not reach an agreement. In addition, it is not clear what criteria are used by the U.S. NCP to decide which cases it will accept. Apart from ombudspersons with very limited jurisdiction, there are no non-judicial mechanisms comparable to those reported in the other jurisdictions. This is however not true for the U.S. ECA and the U.S. DFI, both having implemented grievance mechanisms.

[338] In Canada, there are several mechanisms that facilitate access to judicial remedies. Rules on jurisdiction in criminal law already allow prosecution if the offender is present in Canada for a variety offences (such as hostage-taking or offences related to terrorism and explosive devices), for others (such as sexual offences against children), citizens and permanent residents can be prosecuted. More importantly, Canada has detailed rules that allow for prosecution of corporations in case of failure of the senior management to prevent an offence. However, the victim has rather limited possibilities to act, except for claiming restitution and making a statement within the procedure. For civil remedies, different provinces have different rules of private international law. Concerning jurisdiction, they all provide for some degree of flexibility that would allow claims to be brought in Canadian courts, such as the “*for de nécessité*” in Quebec or the rules requiring a real and substantial connection with the forum, a principle applied in most other provinces. As to substantive law, despite the differences among the provinces, the threshold for director’s personal liability seems to be lower than in other jurisdictions, especially in cases of physical injury or property damage, if the director deliberately and wilfully participates in a tortious act. As to liability for subsidiaries, some Canadian courts have given indications that the legal personality of a subsidiary may be disregarded if the subsidiary acts as the agent of its controllers. This can allow for liability of the parent company. Finally, with regards to procedural aspect, Canadian provinces provide for different legal aid schemes and have quite far-reaching discovery procedures, even though more limited than those in the U.S. Finally, Canadian law also provides for collective redress in the form of class actions. As for non-judicial remedies, the Canadian NCP has a clear and transparent procedure, and non-cooperation with the NCP can have material consequences for a corporation. Nevertheless, the NCP receives relatively few instances (1 in 2015, 2 in 2014). The jurisdiction of other institutions such as the Canadian Human Rights Commission (for discrimination issues) or the Human Rights Tribunal is limited to federally regulated employers and service providers; at provincial level there are several ombudsperson offices for different areas. Also,

Canada's ECA runs an internal grievance mechanism. A potentially relevant institution, an ombudsperson for the extractive industry sector in Canada, was proposed but finally not created due to resistance in the parliament. Overall, non-judicial remedies seem to play a relatively small role, whereas there are a variety of measures facilitating access to judicial remedies.

[339] According to the overview above, there is little evidence that would support an analysis according to which access to judicial remedies determines the availability of non-judicial remedies. Jurisdictions do not necessarily and do not generally develop non-judicial remedies in a context where there are important barriers to judicial remedies, and easy access to judicial remedies does not necessarily inhibit the development of non-judicial remedies as a principle (even though this might have been the case in the US).

[340] In no jurisdiction under review are there mechanisms that would provide for coordination between judicial and non-judicial remedies, e.g. providing for a stay of judicial proceedings until non-judicial proceedings/negotiations have ended. There are, however, some cases that show that the interplay between judicial and non-judicial remedies can be difficult. As non-judicial remedies are designed to provide quick access to justice and facilitate settlement between the parties, it is problematic to draw conclusions from the non-existence of judicial decisions in an area, as has been done in some cases by NCP⁷²⁸. Another relevant issue that has not been addressed in the jurisdictions under review is the confidentiality of documents used or information obtained in non-judicial proceedings in judicial proceedings.

[341] In some jurisdictions there have been substantial efforts towards facilitating access to both, judicial and non-judicial remedies (such as in the Netherlands or in Denmark), while in others, this seems to be less of a concern. In addition, some jurisdictions seem to focus their attention more on judicial remedies (this seems to be the case for the U.S. and Germany), while in others, both types of remedies have received equal attention in the present context. In addition, it is important to note that the main non-judicial remedy in the present context for all jurisdictions, the OECD NCP, finds its roots in an international initiative.

[342] There is ample evidence to suggest that easily accessible judicial remedies often facilitate settlements under non-judicial mechanisms. This is hardly surprising, as companies that are faced with a real and substantive possibility of victims obtaining financial redress via judicial remedies may be more willing to engage in mediation or negotiations than corporations with a relatively small risk of liability. That being said, given the important barriers and uncertainties related to judicial litigation in all jurisdictions under review, reaching a non-judicial settlement may often be of mutual benefit to both parties. Results in the non-judicial mechanism might also have an impact on judicial proceedings.⁷²⁹

⁷²⁸ E.g. Korea re: POSCO; NL: Sakhalin II, NL NCP, 20.03.2013, published 2015;

⁷²⁹ Canadian NCP, Final Statement on the Request for Review regarding the Operations of China Gold International Resources Corp. Ltd., at the Copper Polymetallic Mine at the Gyama Valley, Tibet Autonomous Region, 1 April 2015. For the first time, the Canadian NCP applied the Canadian Government's CSR Strategy Doing Business the Canadian Way: A Strategy to Advance Corporate Social Responsibility in Canada's Extractive Sector Abroad (Annex 4) and its new measures for companies that do not participate in the NCP process. As a result, China Gold faces the withdrawals of Trade Commissioner Services and other Canadian advocacy support abroad unless it cooperates with the NCP.

VI. INTERNATIONAL TRENDS AND RECOMMENDATIONS FOR SWITZERLAND

1. No Uniform Trend but Important Drivers

[343] The international community has recognized the importance of affording victims of human rights abuses access to some form of remedy in order to ensure both that the individuals are compensated for any harms they have suffered and that businesses are held responsible for their conduct (and are consequently dissuaded from violating the rights in the first place). The Human Rights Council's Spring 2016 adoption of the UN High Commissioner for Human Rights' report on their Accountability and Remedy Project and the related agenda for further research as well as the recent publication of the European Union-funded project on Human Rights in Business: Removal of Barriers to Access to Justice in the European Union is evidence of how quickly interest in the area is growing. At the same time, these reports indicate that there is a substantial need for further analysis and consideration, particularly with regard to non-judicial remedies. In addition, the G20 leaders reaffirmed their commitment to the UNGP and the OECD Guidelines in the 2017 Summit Declaration by calling for sustainable global supply chains and by announcing their support for access to remedy, and, where applicable, non-judicial grievance mechanisms such as the NCP system.⁷³⁰

[344] Pillar three (access to remedy) appears in the UNGP as a necessary supplement to the state's duty to protect, and the corporation's responsibility to respect, human rights. It sets forth an obligation for states, and constitutes a strong recommendation ("should") that business enterprises make such remedies available. With judicial and non-judicial mechanisms offering the possibility for remedies, the options for implementing pillar three are numerous. Any non-judicial mechanism, however, should be "legitimate", "accessible" (including widely known), "predictable", "equitable", "transparent", "rights-compatible", "a source of continuous learning", and "based on engagement and dialogue" (Principle 31).

[345] Against this background, states' approaches to access to remedies are highly diverse both within Switzerland and across Europe and North America. This report shows that the extent to which the examined systems refer to and fulfil the requirements of the UNGP varies substantively and procedurally. As a result, there is no uniform trend throughout all systems but rather a number of elements which can be identified as potential drivers for future developments of state-based remedy mechanisms:

1. *Existing non-judicial mechanisms* are gaining importance for resolving business-related human rights grievances. Since 2011 the number of specific instances that address human rights brought before National Contact Points for the OECD Guidelines on Multinational Enterprises has substantially increased, particularly in countries where the NCP is visible and easily accessible. Whether existing NHRI will use their potential to serve as a forum for resolving business-related human rights disputes remains to be seen.
2. *Existing judicial mechanisms* are increasingly used by victims and civil society organisations to test the ground for holding companies accountable, both for their own actions as well as for actions of their subsidiaries abroad. The resulting questions have

⁷³⁰ G20, Leaders' Declaration, Shaping an interconnected world, Hamburg 7/8 July 2017, paras. 7 and 9.

so far only been addressed by a few countries, often with differing approaches and often only in specific contexts, such as business operations in conflict-affected areas.

3. None of the legal regimes explored in this study provide a clear answer on the *interplay between judicial and non-judicial remedies*. Given the increasing number of non-judicial procedures, there have been very different approaches as to their implications for, or even reliance on, judicial proceedings. In the absence of an international trend, a number of practical questions in this context must be addressed such as confidentiality or the possibility of withdrawal or temporary stay of judicial proceedings).

2. Switzerland's Current Position in the International Context

[346] In general terms, there are significant variations in scope, applicability, and procedures among the access to remedies mechanisms in all jurisdictions under review. For a victim of human rights abuse to choose a remedy mechanism currently, (s)he must invest a significant amount of time and thought to determine which one would have the competence to hear the complaint, what the procedural requirements of bringing a claim would be, and what possible relief would be offered.

2.1. Judicial Remedies

[347] In the area of *Judicial remedies*, the 2016 Report of the OHCHR offers "Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse" (OHCHR Guidance). The Guidance distinguishes between enforcement of public law offences and private law claims. It provides a framework that allows for contextualising the access to remedy framework in the two areas.

[348] In the area of corporate criminal liability, the OHCHR Guidance requires not only the existence of corporate criminal liability, but also its independence from successful conviction of individuals and its "focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees."⁷³¹ While all jurisdictions under review recognise corporate criminal liability (or, in the case of Germany, administrative liability that, to some extent, can be seen as the functional equivalent), not all jurisdictions assess it independently from conviction of individuals (e.g. Germany does not). In addition, there is a slight tendency to increase corporate liability provisions in criminal law. The focus on the quality of corporate management is only clear in Canadian and Dutch criminal law. In this respect, the Canadian legislation and recent developments in the Netherlands link liability to the failure of corporate management to take reasonable care to prevent an offence, in addition to requiring that the offence be committed by a representative of the organization. Swiss criminal law provides for criminal corporate liability, although either restricted to cases where an individual cannot be held responsible due to "organisational failure" (a concept which remains relatively unclear) or limited to specific offences (mainly bribery related and financial offences). Therefore, Swiss criminal law will not necessarily include all grave human rights violations. While the uncertainties and limitations of Swiss corporate criminal law are common features of corporate criminal liability in many jurisdictions, this does not

⁷³¹ OHCHR, Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse, 1.4.

protect it from falling short of features expressed in the OHCHR Guidance (that can be found in some jurisdictions).

[349] Other factors mentioned in the OHCHR Guidance, such as responsibility for supply chains or group operations, are generally not addressed explicitly in most legal frameworks under review. French law provides an exception to this. Swiss criminal law follows the more common pattern, as, under the current legal framework, there is no primary liability for acts of subsidiaries.

[350] Interestingly, the Guidance does not address the extent to which criminal law might apply to acts committed abroad. In this context, most legal systems under review, including the Swiss system, establish jurisdiction for some particularly grave offences (especially some offences against minors), and for other grave offences in so far as the act is also a criminal offence in the state of commission.

[351] Another feature of criminal liability is the possibility of the victim's participation in the proceedings. According to the OHCHR Guidance, the criminal sanctions should allow for an "effective remedy for the relevant loss" (Policy Objective 11), and the victim should be consulted "with respect to the design and implementation of sanctions and other remedies; (...) to matters relating to deferred prosecution agreements and the terms of any settlement" (Guidance, 11.3). In this context, there are various international instruments on several levels that require considerable protection of the victim's interests. Within Europe, the European Union Directive 2012/29/EU for victims of corporate crimes and corporate violence⁷³² provides for the right of the victim to receive information on the case (and on its complaint), to have access to victim support services, to be heard, and to ask for the review of a decision not to prosecute. The Directive also includes a right to legal aid and to a decision on compensation, as well as a right to protection from secondary or repeat victimization. Moreover, there are also several instruments elaborated by the Council of Europe that provide for victims' rights, such as the European Convention on the Compensation of Victims of Violent Crime (1983) or the Recommendation (2006) 8 of the Committee of Ministers to Member States on Assistance to Crime Victims (14 June 2006). From a comparative perspective, there are substantially different approaches to offering victims the possibility to take part in criminal proceedings. By comparison on an international plane, Swiss law generally provides a high degree of victims' participation and protection, though victims' assistance is limited for foreign victims of criminal acts committed abroad.

[352] For *private law claims* by affected individuals and communities, the OHCHR Guidance requires two basic elements: the existence of remedies for business related human rights abuses (corresponding to the varying degrees of severity and kinds of harm) and clarity on the legal obligations of companies relating to human rights abuses. More specifically, liability regimes should focus on the quality of corporate management and actions/omissions/intentions of individual employees. In addition, standards of management and supervision should be clear, both relating to groups and the supply chain. Interestingly, the Guidance does not address human rights abuses committed abroad explicitly, but only requires domestic private law regimes "to be clear as to their geographical scope" (Guidance, 12.8). Cross-border elements are only addressed by requiring the availability of legal assistance for the purpose of gathering evidence (Policy Objective 17), on the one hand, and state engagement in seeking "to improve access to information for claimants and their representation in cross-border cases arising from or connected with business related human-

⁷³² Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA

rights abuses" (Policy Objective 18). The implications of the Guidelines for corporate liability for human rights abuses committed abroad – the primary focus of the present study – are therefore rather uncertain.

[353] For *jurisdiction and applicable law* – a key issue in cross-border cases – there are relatively few differences within the European context, as the relevant EU regulations, other international instruments such as the Lugano Convention and the (remaining) domestic regimes are not fundamentally different. Even in the future, there will generally be jurisdiction against parent companies domiciled within a state. This is also the case under Swiss law. It will, however, be more difficult to find jurisdiction over subsidiaries. For companies not domiciled within a state, additional *fora* are the place where a tort was committed (such as, arguably, decisions taken), a forum resulting from joinder of actions, or, in some jurisdictions (such as Switzerland), a forum of necessity that could be construed to include cases of grave human rights violations. More notably, Switzerland does not have mechanisms that would prevent a court from exercising its jurisdiction (*forum non conveniens*), as common law jurisdictions generally have. As to applicable law, there is a general rule (valid also in Switzerland) of applying the law of the place where the "tortious act" was committed, so the law of the home state of the corporation will generally only apply to acts (including, possibly, decisions taken) in Switzerland. Many jurisdictions also allow the court to apply the law of the forum where overriding reasons of public policy (*ordre public*) of the forum so require. Swiss law is in line with international trends, though there is considerable uncertainty as to whether the courts would construe the exceptional clauses in this way. The recent French law discussed above provides an example of circumventing this issue when it comes to the human rights due diligence duties of the parent companies.

[354] In the field of corporate and tort law, it needs to be pointed out that the jurisdictions under review generally do not comply with the basic principle of the OHCHR Guidance of establishing clear rules when it comes to liability for acts of subsidiaries in the area of business and human rights. With the exception of recent statutory due diligence obligations introduced in some jurisdictions and often limited to specific issues (conflict minerals, child labour), the cases decided by several courts leave the result of any particular future case uncertain. While the current Swiss legal framework is arguably clear and restrictive, it remains possible (as cases in other jurisdictions have shown) that test cases will be brought before Swiss courts to explore the limits of the current legal framework.

[355] An important element in liability cases is the burden of proof. The OHCHR Guidance refrains from giving precise indications in this regard, only providing for the need to strike an appropriate balance. The comparative analysis shows a trend, in some jurisdictions (though not in all) such as the Netherlands or France, to reverse or slightly adjust the burden of proof (in favour of the victim) in some relevant liability cases. In Swiss law, there do not appear to be similar developments currently.

[356] The final element addressed in the Guidance is that of the financial obstacles to private law claims. According to Policy Objective 15, claimants should have access to "diversified sources of litigation funding" such as *pro bono* legal services, state funding in cases of hardship and even collective redress mechanisms as well as private funding arrangements (including contingency fee arrangements). This is an area where the jurisdictions under review vary considerably. Some provide (mainly) state funding to litigants, others provide for contingency fee arrangements. Swiss law has mechanisms similar to many European jurisdictions but radically different from those in the United States. The only common trend in this area is an increasing willingness, also within continental European jurisdictions, to introduce mechanisms of collective redress. The European

Union has adopted recommendations in this context. While Swiss law does not seem particularly reluctant, compared to other jurisdictions, it is not particularly innovative either. A proposed amendment of the CPC aims to reduce financial obstacles and introduce two possibilities for mass claims. This would be in line with the current international trend.

2.2. Non-judicial Remedies

[357] According to UNGP 27 non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. However, in contrast to judicial remedies, the OHCHR has not yet published a Guidance on non-judicial remedies but has been mandated by the Human Rights Council with respective research.⁷³³ In this context, the OHCHR published a scoping paper in February 2017.⁷³⁴ Following UNGP 27, the study identifies two key functions of non-judicial remedies: *complaint handling* and (alternative) *dispute resolution*. These key functions are complemented by a set of “other” important functions for providing effective access to remedy, such as preventative work, supervisory functions and regulatory analysis.⁷³⁵ Within the access of remedy pillar of the UNGP, non-judicial and judicial mechanisms should be coordinated with a view to offering a coherent framework for victims of corporate human rights abuses.

[358] Apart from the NCP, there is no state-based non-judicial mechanism in Switzerland specifically designed for addressing business-related human rights abuses. However, a variety of existing instruments can also be used in this context. Within the access to remedy framework, existing institutionalised non-judicial mechanisms in Switzerland serve various purposes:

- Ombudsperson offices may receive *individual and collective complaints* in areas defined by law or non-binding instruments related to existing law.⁷³⁶ Typically, ombudspersons in Switzerland can issue recommendations but not binding decisions.
- The Swiss NCP receives *complaints* and may offer mediation services. According to its mandate, it cannot provide for compensation.
- A third group of bodies in Switzerland, such as for instance the Federal Commission against Racism, does not receive complaints but offers *consultation services* for victims. In addition, arbitration and conciliation bodies may receive complaints, offer mediation or arbitration and in some cases provide compensation or reconciliation.

[359] This variety of approaches, both with regard to purposes and institutional models is not unique to Switzerland but can be found in all the reviewed jurisdictions. It raises questions about the coordination among the different mechanisms with regard to their functions and their integration into the broader legal system. A recent study conducted by the OHCR confirms this finding.⁷³⁷

⁷³³ A/HRC/Res/32/10, para. 13.

⁷³⁴ OHCHR, A scoping paper on State-based non-judicial mechanisms relevant for the respect by business enterprises for human rights: current issues, practices and challenges, Accountability and Remedy Project II, 17 February 2017 (cit.: ARP II, scoping paper).

⁷³⁵ OHCHR, ARP II, scoping paper, 47-48.

⁷³⁶ See the complaint mechanism under the ICoC for Private Security Providers, para. [66] above.

⁷³⁷ OHCHR, How State-based NJMs respond to sectors with high risks of adverse human rights impacts: Sector Study – Part 1, Accountability and Remedy Project II, May 2017, (cit.: ARP II, sector study), 18-20; see also OHCHR, ARP II, scoping study, 47.

[360] According to the OHCHR, the present system of non-judicial state-based mechanisms in high risk sectors offers a route to partial remedies in some cases, but does not provide for adequate and effective remedies as envisaged by the UNGP.⁷³⁸ The OHCHR does not however mention that several states have launched initiatives in the context of their NAP for better coordination of and/or enhancing access to non-judicial remedies. The jurisdictions reviewed for this study pursue different approaches in this regard.

[361] The German NAP mentions the NCP as the key non-judicial mechanism and emphasises the need for informing victims of human rights abuses about existing remedy mechanisms – whether judicial or non-judicial. For this purpose, the German government announced a brochure “*Zugang zu Recht und Gerichten für Betroffene in Deutschland*” which will be published in several languages.⁷³⁹

[362] France aims at establishing or further strengthening existing mechanisms in different governmental institutions and at the international level, with a strong emphasis on the NCP,⁷⁴⁰ and at the same time vests the National Human Rights Institution with the mandate for periodically evaluating progress in the implementation of the French NAP.⁷⁴¹ Thus, a somewhat fragmented approach with regard to access to non-judicial remedies is complemented with a centralised monitoring body.

[363] Similarly, Denmark’s focus is on the newly established Mediation and Complaints-Handling Institution for Responsible Business Conduct which is based on the UNGP and the OECD Guidelines and serves as the NCP.⁷⁴²

[364] In the UK, the NCP and the Equality and Human Rights Commission, which is Great Britain’s NHRI, play an important role in handling business-related human rights complaints. In addition, a variety of other ombudsmen, regulators and government complaint offices exist for different industries.⁷⁴³ In order to get a clearer picture of its access to remedy landscape, the UK government commissioned an independent expert study. Similar to the findings of the OHCHR, the results of the study identify a lack of effective remedies for victims.⁷⁴⁴

[365] The U.S. NAP follows the afore-mentioned countries to the extent that it entrusts the NCP with a key role in providing access to non-judicial remedies. In addition, the NAP provides for stakeholder consultations in order to identify potential governmental support for companies to

“address concerns about the perceived lack of available and effective remedy available to those who feel they have been negatively impacted by U.S. business conduct abroad. As part of this consultation, the United States will solicit advice on how best it could support access to remedy, including the potential development of tools or guidance related to non-government-based mechanisms that would assist U.S. businesses that wish to improve their own individual and collaborative efforts to address this challenge.”⁷⁴⁵

⁷³⁸ OHCHR, ARP II, sector study, 26.

⁷³⁹ Germany, NAP, 37-39.

⁷⁴⁰ France, NAP, *Propositions d’action nos.* 5, 15, 16.

⁷⁴¹ France, NAP, p. 6.

⁷⁴² Denmark, NAP, 20-21.

⁷⁴³ UK, NAP, 20-22.

⁷⁴⁴ McCORQUODALE, 47-48.

⁷⁴⁵ U.S., NAP, 23.

[366] In line with other countries, the Swiss NAP mentions the key role of the NCP as a forum for mediation and the settling of disputes. The Federal Council explicitly considers “the current practice of the NCP appropriate and will continue to operate it in its current form”.⁷⁴⁶ The lack of available remedies is not mentioned. With the proposal to examine the potential of representations abroad to serve as an easily accessible forum for supporting the settlement of disputes, the Swiss NAP could – depending on the outcome – cover new ground.⁷⁴⁷ Unlike other countries, the Swiss NAP does not mention existing non-judicial mechanisms which are not specifically designed for addressing business-related human rights issues but could nevertheless be used for this purpose.

[367] Overall, with its current landscape of state-based non-judicial mechanisms Switzerland positions itself somewhere in the middle of the countries reviewed for this study, thus it is neither at the forefront nor lagging behind. That being said, distinctions may be made: With the NCP playing a very important and recognised role in settling and mediating disputes – and thereby being more at the forefront than in the middle – the lack of available remedies or compensation measures has not yet received the same level of attention as in other countries or the OHCHR. Finally, like other countries, Switzerland has other less specific mechanisms which may be used for business-related human rights disputes.

3. Recommendations

3.1. Need for Conceptualisation

[368] The access to remedies system is currently highly under-conceptualised in Switzerland. This is not only true for Switzerland but for other (compared) countries as well. This finding is confirmed by the OHCHR’s recent studies in the framework of its access to remedy II project.⁷⁴⁸ While there are numerous state and non-state based non-judicial mechanisms for access to remedies in Switzerland, there is limited awareness of what these institutions do and how – if at all – they work together, e.g. how the results of non-judicial mechanisms play into judicial mechanisms. The link between non-judicial and judicial mechanisms needs to be conceptually clarified. While the UNGP include commentaries, these are insufficient to answer many of the most basic questions surrounding the theory of the system. Such conceptual vagueness leads inevitably to operational difficulties.

[369] The theory behind non-judicial access to remedy mechanisms should be investigated in order to set a foundation for a more unified approach to addressing human rights violations outside the courts. While the practical benefits of fostering non-judicial resolution of disputes are clear, the theoretical underpinnings of these mechanisms are not. Clarity would shed light on the extent to which these mechanisms do indeed foster more complete enjoyment of human rights by disadvantaged individuals.

[370] The Swiss academic literature on this topic is scarce and underdeveloped. The access to remedies framework needs interdisciplinary attention on a much wider scale. Moving the topic into law faculty and business school agendas would contribute not only to making the affected legal

⁷⁴⁶ Switzerland, NAP, PI 48, p. 39.

⁷⁴⁷ Switzerland, NAP, PI 49, p.39.

⁷⁴⁸ OHCR, ARP II, scoping study and OHCHR, ARP II, sector study.

and governmental community more knowledgeable, but also to rendering the public and the private sectors better equipped to ensure that violations of human rights can be effectively addressed.⁷⁴⁹

3.2. Policy Recommendations

[371] Before taking any further steps to improve the effectiveness of access to remedies for victims of human rights abuses in Switzerland, a *political decision* must be taken on how Switzerland wants to position itself in the context of the recent international developments and emerging trends described in this study. This is particularly relevant because, as has been discussed in this study, many of the legal foundations for remedies are framed rather broadly and need to be interpreted once a concrete case occurs. This lack of clarity has various consequences: Open or unclear procedural or substantive provisions may incentivise the filing of pilot proceedings to test the system and trigger an interpretation by a court or the respective non-judicial mechanism. Such proceedings have been launched or are currently ongoing in several countries with regard, for instance, to the corporate responsibility for actions of a subsidiary abroad,⁷⁵⁰ the qualification of sports organisations or NGOs as business enterprises,⁷⁵¹ the extent of corporate due diligence requirements, or the corporate duty of care.⁷⁵².

[372] From a legal perspective, Switzerland has three basic options, all of which come with advantages and disadvantages:

- (a) *Scenario (1)*: In a first scenario, Switzerland could opt not to take any additional measures but rather to *wait and see* how the identified trends and international developments manifest themselves and what would be their impact on Switzerland and Swiss companies. On the one hand, with such an approach, Switzerland would, avoid imposing additional regulatory and administrative burdens and responsibilities on businesses. On the other hand, Switzerland cannot ignore legal developments in relevant jurisdictions such as the EU and will – not least in the interest of the Swiss economy – need to adapt to them sooner or later. In addition, a “*wait and see approach*” may trigger pilot proceedings for clarifying the scope of existing provisions based on a concrete case. This may add to insecurity for victims and businesses alike. Overall, scenario (1) would be a *cautious, reactive* concept, rather than a pro-active or active approach as described in scenarios (2) and (3).
- (b) *Scenario (2)*: In contrast to scenario (1), Switzerland could opt for being *at the forefront* by developing a comprehensive access to remedy framework including both judicial and non-judicial remedies. The authors of this study are not aware of any country that has yet developed such a framework – a finding that is confirmed by the OHCHR. Switzerland

⁷⁴⁹ This need has partially been acknowledged in the Federal Council's CSR Position Paper, Action plan, para. 4.2., measure B.2.2.

⁷⁵⁰ See above paras. [157] *et seq.*

⁷⁵¹ Swiss NCP, Final Statement Specific Instance regarding the *Fédération Internationale de Football Association (FIFA)* submitted by the Building and Wood Workers' International (BWI), 2 May 2017; UK NCP, Initial Assessment Specific Instance regarding Formula One World Championship Ltd. submitted by Americans for Democracy & Human Rights, October 2014; Swiss NCP, Initial Assessment Specific Instance regarding the *World Wide Fund for Nature International (WWF)* submitted by Survival International Charitable Trust, 20 December 2016.

⁷⁵² *Romero v Nestlé SA*, BGer 6B_7/2014 (21.07.2014), see fn. 3 above; Specific instance submitted by the Society for Threatened Peoples Switzerland regarding Crédit Suisse and business relations with enterprises linked to the construction of the North Dakota Access Pipeline and alleged human rights violations and environmental impact, currently pending with the Swiss NCP.

would therefore be among the pioneers if it opts not only to clarify existing regulatory uncertainties but also to complement the existing fragmented access to remedy framework with an overarching concept and the missing elements for effective compensation and remedy. Such a *pro-active* approach would clearly be in line with Switzerland's constitutional commitment to protect human rights at the national and international level (Art. 54). From a legal perspective, this scenario – if fully implemented – could contribute to fostering coherence among the different remedy mechanisms and provide victims of human rights abuses in a business context with a transparent and effective access to remedy. At the same time, it would clarify expectations for business. One of the disadvantages of this scenario is the fact that Switzerland would likely end up with stricter standards for business and easier access to remedies for victims than many of the countries in which Swiss companies are operational. This might lead to unequal conditions particularly with regard to the EU. From a procedural perspective, taking a "solo lead" may – as under scenario (1) – lead to more cases being filed in Switzerland – a result which may be desirable from a victim's perspective but perhaps less so from a business and political perspective ("forum shopping").

- (c) Scenario (3): The third scenario for which Switzerland is somewhere in the middle between scenarios (1) and (2), and can be described as an *active* approach. It would entail clarifying existing uncertainties and gaps to the extent that international developments and trends can be identified. It would be a dynamic, progressive approach by attempting to be in sync with international developments. One effect of such a concept would consist in levelling the playing field and creating transparency with regard to corporate responsibility and the respective available remedy mechanisms. Obviously, such an approach would require a close monitoring of ongoing international regulatory developments and ideally imply that Switzerland take an active role in shaping these developments to the greatest extent possible.

[373] Whether Switzerland opts for scenario (1), (2) or (3) is not primarily a legal issue but, rather, a *political decision*. Therefore, this report presents the following recommendations for addressing some of the key issues identified in this study to improve access to remedy, with their implications depending on the political scenario chosen by Switzerland:

- (1) The first suggestion is that Switzerland *increase the visibility* of its access to remedies mechanisms. A conscious effort to make individuals and businesses aware of the rights and opportunities (for example, the promotional efforts of the Danish MKI or the project of the German government for a brochure outlining all available remedy mechanisms) would be a worthwhile investment. Such a measure could be envisaged under all three scenarios.
- (2) Except for scenario (1), a broadly inclusive *multi-stakeholder dialogue* which includes not only representatives of business, government and civil society but also of existing remedy mechanisms such as members of the judiciary, attorneys, the NCP, and ombudspersons, could be a good initial step towards obtaining a clearer picture of perceived obstacles for an effective and adequate access to remedy in line with the UNGP. Under scenario (2) it could serve as a basis for achieving agreement on potential next steps for complementing existing judicial and non-judicial remedy mechanisms with a view to implementing the third pillar of the UNGP. In scenario (3), such a dialogue could help identify relevant international developments and explore options for their implementation in Switzerland (binding, non-binding etc.).

- (3) With a view to coherence in the area of state-based non-judicial mechanisms it would help to *unify or align the procedures of the state-based non-judicial mechanisms* more than they are now. This does not imply that these mechanisms need to be identical. Issues to consider harmonising could include *inter alia*: whether the organs can examine violations taking place outside of Switzerland; whether individual or collective complaints can be brought or whether the examination will simply be of structural weaknesses (or both); what specific remedies can be requested (e.g. an apology or damages); admissible types of evidence. Under the first scenario, this recommendation would not go beyond the mapping of existing mechanisms as outlined in this study, but would rather bring them in a form that could be used for implementing recommendation (1). In scenario (3), the mapping would first be complemented by a categorisation according to the criteria developed by the OHCHR's access to remedy project II. The next step in this scenario (3) would then be an analysis of whether international trends and developments call for adaptations. In this regard, the results of the OHCHR's comparative analysis of non-judicial mechanisms which should be available by 2018 will be highly relevant. In scenario (2) the results of the mapping, the categorization and the analysis of the OHCHR's findings on international developments will serve as a basis for the development of a comprehensive framework for access to non-judicial remedies in Switzerland.
- (4) An alternative to establishing harmonised rules for the different non-judicial remedies would be to have a “*one-stop shop*” for complaints, from which the complainant would be directed to the most effective mechanism for the particular case. Under scenario (3), implementing this recommendation would entail providing a portal for accessing *existing* mechanisms. In line with international developments, such a guiding – not a monitoring – function could for example be part of the mandate of a future Swiss NHRI.⁷⁵³ In scenario (2), Switzerland could consider creating a body or vesting an existing institution with the coordination of existing procedures. From the authors' perspective, the key concern that existing mechanisms are not always visible for victims could be addressed with the introduction of a set of guidelines under scenario (3).
- (5) Institutionally, the comparative analysis in this study shows that *National Human Rights Institutions* and *National Contact Points* are obvious potential platforms for improving access to remedy. At this stage, NHRI are not commonly vested with a mandate for investigating business related human rights disputes. Strengthening the institutional framework for access to remedy in Switzerland could, under scenario (2), include entrusting a future Swiss NHRI based on the Paris Principles with a mandate to provide human rights remediation. As mentioned, such an approach would go beyond what can currently be considered an international trend. Among the reviewed jurisdictions, only the Dutch and the UK NRHI have a mandate to receive individual complaints. In contrast, strengthening NCP has so far been a common feature of all reviewed jurisdictions. Under scenario (3), Switzerland could therefore consider strengthening its NCP by attributing additional staff positions and further clarifying the roles of the different actors (e.g. advisory council). This would permit the NCP to play a more active role, particularly with regard to promoting the OECD guidelines and thereby also the UNGP, and increase its visibility and transparency.
- (6) For judicial remedies, scenario (1) would leave it to the courts to clarify the criminal liability of Swiss-domiciled corporations with regard to their actions abroad, and to plaintiffs to

⁷⁵³ This is not the case in the current draft law for a future NHRI.

explore how far the courts are willing to go when assessing civil liability of corporations, especially with regard to the burden of proof. Under scenario (3), legislative intervention could clarify the notion of organizational failure in corporate criminal liability, potentially inspired by examples in Canada or the Netherlands. In addition, as intended by the recently proposed amendments to the CPC, Switzerland might introduce mechanisms of collective redress as other European jurisdictions have done. Such mechanisms could be generally applicable or specifically address victims of corporate human rights abuses.

Under scenario (2), an essential measure would consist of introducing clear obligations for corporations to monitor and mitigate the potential adverse human rights impact of their activities (including through subsidiaries) abroad (human rights due diligence). Corresponding tort provisions should make it clear that proof of appropriate human rights due diligence would exonerate corporations from liability. The French legislation adopted in 2017 would provide an example of such a measure. A more limited approach (though rather atypical for the Swiss regulatory tradition) would consist in adopting legislation only with regard to a specific issue (e.g. child labour). In addition to the changes in substantive law, scenario (2) might also entail regulation of litigation funding, given the current limitations in legal aid.

- (7) The Swiss Investment Fund for Emerging Markets (SIFEM) could be encouraged to further explore the potential of establishing or participating in mechanisms allowing victims to directly raise complaints about client projects by sharing experiences with DFIs that already have such mechanisms in place. Under scenario (2), SIFEM could explore possible options to participate in the joint grievance mechanism currently established by FMO and DEG within the framework of EDFI association.⁷⁵⁴

Finally, with regard to scenarios (2) and (3), it is suggested that the Swiss Export Risk Insurance consider updating its current complaint strategy by taking into account the effectiveness criteria of UNGP 31.

⁷⁵⁴ Given the broad membership of EDFI, on the one hand, and the innovative concept of the new joint grievance mechanism, on the other, one could argue that Switzerland would position itself somewhere between scenarios (2) and (3).

ANNEX 1: NATIONAL REPORTS ON ACCESS TO JUDICIAL REMEDIES

1. Access to Judicial Remedies in Germany

1.1. Criminal Law

1.1.1. Prosecution of Criminal Acts Committed Abroad

[374] As a general rule, the German Criminal Code (*Strafgesetzbuch*) applies to acts committed on German territory.⁷⁵⁵ The Code defines the place of the offence in its § 9 as either the place where the offender acted or should have done so or the place where the result occurs or should have occurred if this result is a constituting element of the offence.⁷⁵⁶ In case of secondary participation to an offence committed abroad, the secondary participant will be tried according to German criminal law, if he or she acted on German territory. This shall also be true if the act does not constitute a criminal offence under the law of the country where the act has been committed.⁷⁵⁷

[375] There are, however, certain exceptions in which the German Criminal Code also applies to acts committed abroad. This regards both cases in which there is a specific link to Germany as well as cases of so-called universal punishment or universal jurisdiction.

[376] There are different cases in which German criminal law applies to acts committed abroad, but which have a link to Germany.

[377] First, the German Criminal Code is applicable to acts committed on specific locations outside the German territory. According to § 4 German Criminal Code, this is the case for criminal offences that have been committed on board German ships or aircrafts. The ship or aircraft has to be entitled to fly the federal flag or the national insignia of Germany. This rule is based on the so-called flag state principle in public international law, according to which a state has sovereignty on ships, airplanes and spacecrafts flying the state's flag in order to avoid extra-legal spheres outside any state's territory.⁷⁵⁸

[378] Furthermore, § 5 German Criminal Code enumerates certain specific criminal offences to which German criminal law shall apply, as they have a link to the German territory. This regards certain offences of giving false testimony in proceedings pending before a German court or authority⁷⁵⁹ as well as specific eco-crimes committed within the German Exclusive economic

⁷⁵⁵ § 3 German Criminal Code (*Strafgesetzbuch*, StGB).

⁷⁵⁶ § 9 para. 1 German Criminal Code (*Strafgesetzbuch*, StGB).

⁷⁵⁷ § 9 para. 2 s. 2 German Criminal Code. (*Strafgesetzbuch*, StGB).

⁷⁵⁸ AMBOS *et al.*, para. 26; VON HEINTSCHEL-HEINEGG, N 1.

⁷⁵⁹ § 5 No 10 German Criminal Code (*Strafgesetzbuch*, StGB): "Offences committed abroad against domestic legal interests:

[...] 10. false testimony, perjury and false sworn affidavits (Sections 153 to 156) in proceedings pending before a court or another German authority within the territory of the Federal Republic of Germany that has the authority to administer oaths or affirmations in lieu of oath;".

zone⁷⁶⁰. The Exclusive economic zone is situated off a state's coast and generally stretches from a state's baseline out to 200 nautical miles and thus further than the state's territorial waters with 12 nautical miles⁷⁶¹.

[379] Second, German criminal law shall apply to offences committed abroad against persons of German nationality and/or with another link to Germany. Most importantly, according to § 7 German Criminal Code, the Code applies to acts committed abroad if the victim is German and if the act constitutes a criminal offence under the law of the state where it has been committed. In order to prevent extra-legal spheres, the same is true if the place of the offence does not fall under the jurisdiction of any state.⁷⁶²

[380] In addition to that, § 5 German Criminal Code lists different criminal offences with a link to Germany to which German law shall apply. Several of these refer to the nationality and/or another link between the victim and Germany as for example permanent or habitual residence. They thus do not require the act to constitute a criminal offence under the law of the state in which the act has been committed. These offences include three acts against personal freedom, one against physical integrity, two against public officials, one against delegates as well as one regarding violation of business or trade secrets.⁷⁶³

⁷⁶⁰ § 5 No 11 German Criminal Code (Strafgesetzbuch, StGB): "Offences committed abroad against domestic legal interests:

[...] 11. offences against the environment under section 324 [Water pollution], section 326 [Unlawful disposal of waste], section 330 [Aggravated cases of environmental offences] and section 330a [Causing a severe danger by releasing poison] committed within Germany's exclusive economic zone, to the extent that international conventions on the protection of the sea allow for their prosecution as criminal offences;".

⁷⁶¹ Art. 57 United Nations Convention on the Law of the Sea (UNCLOS).

⁷⁶² § 7 para. 1 German Criminal Code (Strafgesetzbuch, StGB).

⁷⁶³ § 5 Nos 6, 7, 9a (b), 14, 15 (c-d), 16 (b), German Criminal Code (Strafgesetzbuch, StGB): "Offences committed abroad against domestic legal interests:

German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to the following acts committed abroad:

[...] 6. offences against personal freedom

a) under section 234a [Causing a danger of political persecution through use of force, threats or deception] and 241a [Causing the danger of political persecution by informing on a person], if the offence is directed against a person who, at the time of the offence, has is of German nationality and has his or her permanent residence or habitual residence in the inland,

b) under section 235 para. 2 No 2 [Abduction of minors from the care of their parents etc], if the offence is directed against a person who, at the time of the offence, has his or her permanent residence or habitual residence in the inland, and

c) under section 237 [Forced marriage], if [...] the offence is directed against a person who, at the time of the offence, has his or her permanent residence or habitual residence in the inland;

7. violation of business or trade secrets of a business physically located within the territory of the Federal Republic of Germany, or of an enterprise, which has its seat there, or of an enterprise with its seat abroad and which is dependent on an enterprise with its seat within the territory of the Federal Republic of Germany and which forms a group with the latter;

[...] 9a. offences against physical integrity

[...] b) under section 226a [Female genital mutilation], if [...] the offence is directed against a person who, at the time of the offence, has is of German nationality and has his or her permanent residence or habitual residence in the inland;"

[...] 14. acts committed against public officials, persons entrusted with special public service functions, or soldiers in the Armed Forces during the discharge of their duties or in connection with their duties;

15. offences committed under sections 331 to 337 [in public office]:

[381] Third, according to § 7 German Criminal Code, the Code also applies to offences committed abroad by a German offender, irrespective of whether the person already had the German nationality at the time of the offence or whether he or she became a German later. Similarly to the regulations on offences committed against a German victim, as a basic rule, the act also has to constitute a criminal offence under the law of the state in which it has been committed or has to have been committed at a place under no jurisdiction at all.⁷⁶⁴

[382] Also similarly to the regulations on offences committed against a German victim, § 5 German Criminal Code additionally lists a range of offences committed abroad to which German criminal law shall apply in case they have been committed by a German offender. Again, in these cases it is not necessary that the acts also constitute a criminal offence under the law of the state in which they have been committed. Although the list of these offences is a slightly longer than the one regarding German victims, they mostly concern comparable, if not the same, offences. They regard one offence against personal freedom, one against sexual self-determination, two against life, two against physical integrity, one against the environment, four against public officials, one against delegates as well as one against trafficking in human organs.⁷⁶⁵

[...] c) offences committed against a public official or a person entrusted with special public service functions, or soldiers in the Armed Forces or

d) offences committed against a European public official or arbitrator, who is German at the time of the offence, or against a person coequal according to section 335a [Foreign and international public servants] who is German at the time of the offence;

16. corruption and bribery [...] against delegates (§108e [Bribing delegates]), if

[...] b) the act is committed against a member of a German parliament or a person who is German at the time of the offence;"

⁷⁶⁴ § 7 para. 2 No 1 German Criminal Code (*Strafgesetzbuch*, StGB).

⁷⁶⁵ § 5 Nos 6 (c), 8, 9, 9a, 11a, 12, 13, 15 (a-b), 16 (a), 17 German Criminal Code (*Strafgesetzbuch*, StGB): "Offences committed abroad against domestic legal interests:

German criminal law shall apply, regardless of the law applicable in the locality where the act was committed, to the following acts committed abroad:

[...] 6. offences against personal freedom

[...] c) under section 237 [Forced marriage], if the offender is German;

[...] 8. offences against sexual self-determination under section § 174 paras. 1, 2 and 4 [Abuse of position of trust], sections 176 [Child abuse] to 179 [Abuse of persons who are incapable of resistance] and section 182 [Abuse of juveniles], if the offender was German at the time of the offence;

9. offences against life

a) under section 218 para. 2 s. 2 No 1 and para. 4 s. 1 [Abortion], if the offender is German at the time of the offence, and

b) under the other constellations of section 218 [Abortion], if the offender is German at the time of the offence and has his or her livelihood in the inland;

9a. offences against physical integrity

a) under section 226 para. 1 No 1 [Causing grievous bodily harm] in conjunction with para. 2 when losing the ability to procreate, if the offender is German at the time of the offence, and

b) under section 226a [Female genital mutilation], if the offender is German at the time of the offence [...];

[...] 11a. offences under section 328(2) Nos 3 and 4, (4) and (5), also in conjunction with section 330, if the offender is German at the time of the offence;

12. offences committed by a German public official or a person entrusted with special public service functions during their official stay or in connection with their official duties;

13. acts committed by a foreigner as a public official or as a person entrusted with special public service functions;

[...] 15. offences committed under sections 331 to 337 [in public office]:

[383] And finally fourth, German criminal law is also applicable to offences committed abroad in case the offender was a foreigner when committing the act and if he or she is not extradited to another state although the Extradition Act permits such an extradition. This may be the case if extradition has not been requested by any state within a reasonable period of time, if the request has been rejected or if the extradition is not realizable.⁷⁶⁶

[384] German criminal law provides for specific regulations on when universal punishment is possible. This regards two different kinds of criminal offences. On the one hand, this concerns offences that are directed against the German state itself, as listed in § 5 German Criminal Code.⁷⁶⁷ On the other hand, § 6 German Criminal Code enumerates specific offences that regard certain internationally protected legal interests.⁷⁶⁸

- a) if the offender is German at the time of the offence,
- b) if the offender is a European public official and his or her office has its seat in the inland at the time of the offence, [...];
- 16. corruption and bribery [...] against delegates (§108e [Bribing delegates]), if
- a) the offender is a member of a German parliament or German at the time of the offence, [...];
- 17. trafficking in human organs (section 18 of the Transplantation Act), if the offender is German at the time of the offence.”

⁷⁶⁶ § 7 para. 2 No 2 German Criminal Code (Strafgesetzbuch, StGB).

⁷⁶⁷ § 5 Nos 1-5 German Criminal Code (Strafgesetzbuch, StGB): “Offences committed abroad against domestic legal interests:

- [...] 1. preparation of a war of aggression (section 80);
- 2. high treason against the Federation (sections 81 [High treason against the Federation] to 83 [Preparation of an enterprise directed at high treason]);
- 3. endangering the democratic state under the rule of law
 - a) in cases under section 89 [Exerting anti-constitutional influence on the Armed Forces and public security forces] and section 90a para. 1 [Defamation of the state and its symbols], and section 90b [Anti-constitutional defamation of constitutional organs], if the offender is German and has his main livelihood in the territory of the Federal Republic of Germany; and
 - b) in cases under section 90 [Defamation of the President of the Federation] and section 90a para. 2 [Defamation of the state and its symbols];
- 4. treason and endangering external national security (sections 94 [Treason] to 100a [Treasonous forgery]);
- 5. offences against the national defence:
 - a) in cases under section 109 [Avoiding draft by mutilation] and sections 109e [Sabotage against means of defence] to 109g [Taking or drawing pictures etc endangering national security]; and
 - b) in cases under section 109a [Avoiding draft by deception], section 109d [Disruptive propaganda against the Armed Forces] and section 109h [Recruiting for foreign armed forces], if the offender is German and has his main livelihood in the territory of the Federal Republic of Germany.”

⁷⁶⁸ § 6 German Criminal Code (Strafgesetzbuch, StGB): “Offences committed abroad against internationally protected legal interests:

German criminal law shall further apply, regardless of the law of the locality where they are committed, to the following offences committed abroad:

- 1. (repealed);
- 2. offences involving nuclear energy, explosives and radiation under section 307 [Causing a nuclear explosion] and section 308 paras. 1 to 4 [Causing an explosion], section 309 para. 2 [Misuse of ionising radiation] and section 310 [Acts preparatory to causing an explosion or radiation offence];
- 3. attacks on air and maritime traffic (section 316c);
- 4. human trafficking for the purpose of sexual exploitation, for the purpose of work exploitation and assisting human trafficking (sections 232 [Human trafficking for the purpose of sexual exploitation] to 233a [Assisting in human trafficking]);
- 5. unlawful drug dealing;

1.1.2. Possibility to Prosecute Corporations

[385] Under the German Criminal Code, it is not possible to prosecute and convict companies for criminal offences. German criminal law is based on the principle of criminal culpability and guilt,⁷⁶⁹ which only natural persons can have, not legal entities.⁷⁷⁰

[386] Although in 2014 a draft for introducing culpability of legal entities in a new code (*Verbandsstrafgesetzbuch*)⁷⁷¹ was proposed in the Federal Assembly (*Bundesrat*), it has not been enacted.⁷⁷²

[387] However, the German Act on Regulatory Offences stipulates that if a natural person who is representing a legal entity commits a criminal or regulatory offence through which the legal entity's duties have been violated, a regulatory fine can be imposed on the legal entity.

[388] A regulatory offence is an unlawful and reproachable act which can be sanctioned with a regulatory fine.⁷⁷³ According to § 30 German Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*), if a legal entity's office-bearer commits a criminal or regulatory offence, a regulatory fine may be imposed on the legal entity. There is no duty to impose such a fine.⁷⁷⁴

[389] This rule applies in case, as a result of the office-bearer's offence, duties incumbent on the legal entity have been violated or if the legal entity has been enriched or was intended to be enriched.

[390] The law lists as possible office-bearers to whom this rule shall apply persons authorized to represent the legal entity or members of the representative body. Furthermore, as regards associations without legal capacity, chairmen or members of the executive committee as well as authorized representatives with full or commercial power of attorney or as procura-holder as well as other persons responsible on behalf of the management are listed. Finally, with regard to partnerships with legal capacity, the regulation names partners authorized to represent the

6. distribution of pornography under sections 184a [Distribution of pornography depicting violence or sodomy], 184b paras. 1 to 3 [Distribution, acquisition and possession of child pornography] and section 184c paras. 1 to 3 [Distribution, acquisition and possession of juvenile pornography], also in conjunction with section 184d s. 1 [Distribution of pornographic performances by broadcasting, media services or telecommunications services];

7. counterfeiting money and securities (section 146 [Counterfeiting money], section 151 [Securities] and section 152 [Foreign money, stamps and securities]), credit cards etc and blank eurocheque forms (section 152b paras. 1 to 4 [Counterfeiting of credit cards, etc, and blank eurocheque forms]) as well as the relevant preparatory acts (sections 149 [Preparatory acts], 151 [Securities], 152 [Foreign money, stamps and securities] and 152b para. 5 [Counterfeiting of credit cards, etc, and blank eurocheque forms]);

8. subsidy fraud (section 264);

9. offences which on the basis of an international agreement binding on the Federal Republic of Germany must be prosecuted even though committed abroad."

⁷⁶⁹ § 46 para. 1 s. 1 German Criminal Code (Strafgesetzbuch, StGB): "Principles of sentencing: (1) The guilt of the offender is the basis for sentencing. [...]" see also Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), judgement of 30.06.2009 – 2 BvE 2/08 *et al.*

⁷⁷⁰ MEYBERG, para. 1.

⁷⁷¹ See e.g. JAHN & PIETSCH, pp. 1 *et seq.*; HOVEN, pp. 19 *et seq.*; KREMS, pp. 5 *et seq.*

⁷⁷² RATH.

⁷⁷³ § 1 para. 1 German Act on Regulatory Offences (Ordnungswidrigkeitengesetz, OWiG).

⁷⁷⁴ § 30 para. 1 German Act on Regulatory Offences (Ordnungswidrigkeitengesetz, OWiG).

partnership as well as authorized representatives with full or commercial power of attorney or as procura-holder as well as other persons responsible on behalf of the management.⁷⁷⁵

[391] Although the German Criminal Code does not allow prosecuting and convicting companies, a fine can be imposed on legal entities, if criminal or regulatory offences committed by a person representing the entity have specific consequences on the legal entity.

[392] This fine shall be higher than the financial benefit that resulted from the offence.⁷⁷⁶ At the same time, the regulation stipulates that the fine may not exceed specific amounts: In case the person representing the legal entity committed the criminal offence with intent, a fine of up to ten million EUR can be imposed on the legal entity. Did the person act negligently, a fine of up to five million EUR can be imposed.⁷⁷⁷

[393] The legal entity can also be fined if the person representing it merely committed a regulatory offence. In this case the highest possible fine is the same as the maximum regulatory fine for the respective regulatory offence.

[394] Natural persons cannot be convicted for acts committed by the company as such.

1.1.3. Victim's Participation and Other Rights in Criminal Proceedings

[395] There are different options how the victim of a criminal offence can participate in criminal proceedings. Only those which might be of interest in the context of Business & Human Rights will be presented here.

[396] Victims of specific criminal offences as well as specific family members in case the victim is dead⁷⁷⁸ may join the proceedings as private accessory prosecutor (*Nebenkläger/in*) according to § 395 German Code of Criminal Procedure (*Strafprozessordnung*). These offences include *inter alia* certain offences against sexual self-determination, murder and homicide as well as certain offences against physical integrity.⁷⁷⁹ If there are special reasons, notably if the consequences of the act are

⁷⁷⁵ § 39 para. 1 Nos 1-5 German Act on Regulatory Offences (Ordnungswidrigkeitengesetz, OWiG).

⁷⁷⁶ § 30 para. 3 in conjunction with § 17 para. 4 German Act on Regulatory Offences (Ordnungswidrigkeitengesetz, OWiG).

⁷⁷⁷ § 30 para. 2 lit. a, b German Act on Regulatory Offences (Ordnungswidrigkeitengesetz, OWiG).

⁷⁷⁸ § 395 para. 2 No 1 German Code of Criminal Procedure (*Strafprozessordnung*, StPO): "Right to Join as a Private Accessory Prosecutor: [...] (2) The same right shall vest in persons 1. whose children, parents, siblings, spouse or civil partner were killed through an unlawful act, [...]."

⁷⁷⁹ § 395 para. 1 German Code of Criminal Procedure (*Strafprozessordnung*, StPO): "Right to Join as a Private Accessory Prosecutor: (1) Whoever is aggrieved by an unlawful act pursuant to

1. sections 174 [Abuse of position of trust] to 182 [Abuse of juveniles] of the Criminal Code,
2. sections 211 [Murder under specific aggravating circumstances] and 212 [Homicide] of the Criminal Code, that was attempted,
3. sections 221 [Abandonment], 223 [Causing bodily harm] to 226a [Female genital mutilation] and 340 [Causing bodily harm while exercising a public office] of the Criminal Code,
4. sections 232 [Human trafficking for the purpose of sexual exploitation] to 238 [Stalking], section 239 subsection (3) [Unlawful imprisonment], sections 239a [Abduction for the purpose of blackmail] and 239b [Taking hostages], and section 240 subsection (4) [Using threats or force to cause a person to do, suffer or omit an act] of the Criminal Code,
5. section 4 of the Act on Civil Law Protection against Violent Acts and Stalking,
6. section 142 of the Patent Act, section 25 of the Utility Models Act, section 10 of the Semi-Conductor Protection Act, section 39 of the Plant Variety Protection Act, sections 143 to 144 of the Trade Mark Act, sections 51 and 65 of the Designs Act, sections 106 to 108b of the Copyright and Related Rights Act, section

particularly severe, also victims of other criminal acts can join the proceedings as private accessory prosecutor.⁷⁸⁰ Through the status of private accessory prosecutor, the legislator wanted to prevent victims from having to remain in the passive role the offender put them in and to give them own rights.⁷⁸¹ Even if the victim will be called as a witness in the proceedings, he or she is allowed to be present in court during the trial⁷⁸² and even to ask questions when the accused or witnesses are being questioned or to apply for evidence to be taken⁷⁸³. The victim may hire a lawyer and be represented by him or her,⁷⁸⁴ also before joining the proceedings as private accessory prosecutor.⁷⁸⁵ For specific criminal offences⁷⁸⁶, such a lawyer will be appointed to the victim in order to guarantee that the latter has legal counsel. In case the offence in question is not in this list, the victim may also apply for legal aid, if he or she cannot afford a lawyer.⁷⁸⁷

[397] Irrespective of whether the victim joins the proceedings as private accessory prosecutor or not, he or she can claim compensation for damage suffered as a result of the criminal offence according to § 403 German Code of Criminal Procedure. Although this claim is of a private law

33 of the Act on the Copyright of Works of Fine Art and Photography, and sections 16 to 19 of the Act against Unfair Competition

may join a public prosecution or an application in proceedings for preventive detention as private accessory prosecutor."

⁷⁸⁰ § 395 para. 3 German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁸¹ WEINER, paras. 1 *et seq.*

⁷⁸² § 397 para. 1 s. 1 German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁸³ § 397 para. 1 s. 3 German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁸⁴ § 397 para. 2 s. 1 German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁸⁵ § 496h German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁸⁶ § 397a para. 1 German Code of Criminal Procedure (Strafprozessordnung, StPO): "Appointment of an Attorney as Counsel: (1) Upon application of the private accessory prosecutor an attorney shall be appointed as his counsel if he

1. has been aggrieved by a felony pursuant to sections 176a [Aggravated child abuse], 177 [Sexual assault by use of force or threats; rape], 179 [Abuse of persons who are incapable of resistance], 232 [Human trafficking for the purpose of sexual exploitation] and 233 [Human trafficking for the purpose of work exploitation] of the Criminal Code;

2. has been aggrieved by an attempted unlawful act pursuant to sections 211 [Murder under specific aggravating circumstances] and 212 [Homicide] of the Criminal Code or is a relative of a person killed through an unlawful act within the meaning of Section 395 subsection (2), number 1;

3. has been aggrieved by a felony pursuant to sections 226 [Causing grievous bodily harm], 226a [Female genital mutilation], 234 [Abduction for the purpose of abandonment or facilitating service in foreign military or para-military forces] to 235 [Abduction of minors from the care of their parents etc], 238 [Stalking] to 239b [Taking hostages], 249 [Robbery], 250 [Aggravated robbery], 252 [Theft and use of force to retain stolen goods], 255 [Blackmail and use of force or threats against life or limb] and 316a [Attacking a driver for the purpose of committing a robbery] of the Criminal Code which has caused or is expected to cause him serious physical or mental harm;

4. has been aggrieved by an unlawful act pursuant to sections 174 [Abuse of position of trust] to 182 [Abuse of juveniles] and 225 [Abuse of position of trust] of the Criminal Code and had not attained the age of 18 at the time of the act or cannot sufficiently safeguard his own interests himself; or

5. has been aggrieved by an unlawful act pursuant to sections 221 [Abandonment], 226 [Causing grievous bodily harm], 226a [Female genital mutilation], 232 [Human trafficking for the purpose of sexual exploitation] to 235 [Abduction of minors from the care of their parents etc], 237 [Forced marriage], 238 subsections (2) and (3) [Stalking], 239a [Abduction for the purpose of blackmail], 239b [Taking hostages], 240 subsection (4) [Using threats or force to cause a person to do, suffer or omit an act], 249 [Robbery], 250 [Aggravated robbery], 252 [Theft and use of force to retain stolen goods], 255 [Blackmail and use of force or threats against life or limb] and 316a [Attacking a driver for the purpose of committing a robbery] of the Criminal Code and has not attained the age of 18 at the time of his application or cannot sufficiently safeguard his own interests himself."

⁷⁸⁷ § 397a para. 2 s. 1 German Code of Criminal Procedure (Strafprozessordnung, StPO).

nature, it can be brought in criminal proceedings and the criminal judge will decide it at the same time as he or she decides the criminal matter.⁷⁸⁸ The victim can ask for legal aid in order to bring the claim, if he or she cannot afford the claim.⁷⁸⁹

[398] Finally, the German Code of Criminal Procedure contains a list of rights of the victim. According to these regulations, the victim has a right to be notified of the termination of the proceedings as well as of the outcome insofar as it relates to him or her.⁷⁹⁰ In case he or she is represented by a lawyer, the latter may also inspect the files which are available at court as well as official pieces of evidence.⁷⁹¹ The victim is allowed to be accompanied by his or her lawyer when being questioned; likewise, the victim may also request that a person he or she trusts may be present during the questioning, unless this would endanger the purpose of the investigation.⁷⁹² From January 2017 on, the victim will also be entitled to request a psychosocial court support worker who will be allowed to be present in court with the victim during the sessions.⁷⁹³ Finally, the victim shall be informed as early as possible of the just mentioned rights. This shall include information of to whom to turn to in order to exercise these rights.⁷⁹⁴ In case relatives or heirs are entitled to any of these rights, they shall be informed of them, too.⁷⁹⁵

1.1.4. Measure to Facilitate Prosecution

[399] There do not seem to be any provisions enabling or facilitating prosecution specifically in the context of Business & Human Rights.

1.2. Private International Law and International Civil Procedure

1.2.1. Jurisdiction in the State of Nationality

[400] The Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I (recast) Regulation) provides special provisions on the ground of international jurisdiction. The Regulation is applicable in civil and commercial matters, which do not deal with revenue, customs or administrative matters or the liability of the State for acts and omissions in the exercise of State authority.⁷⁹⁶ As a general rule, a person domiciled in one of the Member States of the European Union shall be sued in the courts of that State,⁷⁹⁷ regardless where the plaintiff is domiciled.⁷⁹⁸ According to Art. 63 of the said Regulation, a company or other legal person is domiciled at the place where its statutory seat,

⁷⁸⁸ § 406 para. 1 s. 1 German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁸⁹ § 404 para. 5 s. 1 German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁹⁰ § 406d German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁹¹ § 406e German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁹² § 406f German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁹³ § 406g German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁹⁴ § 406i in conjunction with § 406k German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁹⁵ § 406l German Code of Criminal Procedure (Strafprozessordnung, StPO).

⁷⁹⁶ Art. 1 para.1 Brussels I (recast) Regulation.

⁷⁹⁷ Art. 4 para. 1 Brussels I (recast) Regulation.

⁷⁹⁸ ECJ, 13 July 2000, *Group Josi*, ECLI:EU:C:2000:399, para. 57.

central administration or principal place of business is located.⁷⁹⁹ The plaintiff has a choice between the different possibilities.⁸⁰⁰ The statutory seat of a company is named in the articles of partnership.⁸⁰¹ The central administration constitutes the place where the decision-making and the management of the company is actually made.⁸⁰² The principal place of business is described as the actual focus of business.⁸⁰³ For a German company, this means that the victim would usually have to sue the company in Germany.

1.2.2. Jurisdiction to Sue the Parent Company

[401] With regard to jurisdiction, the criteria named in Art. 4 in conjunction with Art. 63 of the Brussels I (recast) Regulation apply. According to this, a company shall be sued where it has its domicile, meaning either its statutory seat or its central administration or its principal place of business. As a consequence, a parent company may be sued in Germany, if one of the three options is located in Germany.

1.2.3. Jurisdiction to Sue Controlling Company

[402] As already mentioned above, Art. 63 of the Brussels I (recast) Regulation is applicable concerning the court's jurisdiction. If the claimant sues the controlled company and the statutory seat, the central administration or the principal place of business is located in Germany, the German courts are competent.⁸⁰⁴ The same conditions apply to a claim against the controlling company. As the controlled and the controlling company are independent legal bodies, the claimant has to prove a violation of the controlling company's duty of care.

1.2.4. Law Applicable to the Right to Obtain Compensation

[403] German⁸⁰⁵ and EU law⁸⁰⁶ both provide conflict of law provisions on tort law. However, with regard to the provisions of interest in this case, German conflict of law provisions are only subsidiarily applicable.⁸⁰⁷ Art. 1 of the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations states that the provisions shall apply in all civil cases and commercial matters that deal with non-contractual obligations in conflict of law situations.⁸⁰⁸ According to this Regulation, not *lex fori*, but *lex loci* will generally be applicable. However, this general rule can be waived through mutual consent. The parties can even choose the applicable law after the event

⁷⁹⁹ Art. 63 Brussels I (recast) Regulation.

⁸⁰⁰ STADLER, para. 1.

⁸⁰¹ BRUHNS, p. 141.

⁸⁰² BRUHNS, pp. 141 *et seq.*

⁸⁰³ See KROPHOLLER & VON HEIN, Art. 60 EuGVO.

⁸⁰⁴ See BRUHNS, p. 142.

⁸⁰⁵ Art. 40 para. 1 German Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB*).

⁸⁰⁶ Rome II Regulation.

⁸⁰⁷ Art. 3 No. 1(a) German Introductory Act to the Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch, EGBGB*).

⁸⁰⁸ Art. 1 Rome II Regulation.

that caused the arisen damage.⁸⁰⁹ As a consequence, also German law may be applicable, if the parties agree to this.

[404] Art. 4 of the said Regulation (EC) No 864/2007 states that unless otherwise provided by the Regulation, the law of the country in which the damage occurred is applicable. Not of interest shall be where the event causing the damage took place or where the indirect consequences of that event occur.⁸¹⁰ If the country in which the damage occurred is the foreign country, its law has to be applied.

[405] However, in case it becomes clear that the tort in question is more closely connected to another country, then the law of this other country shall be applicable. This may for example be the case through a pre-existing contract or other legal relationship between the parties, which is closely connected to the tort in question.⁸¹¹ Yet, this rule does not apply to environmental damage or damage to persons or property caused by environmental damage. In this case, the law of the country in which the damage occurred shall be applicable, unless the victim decides to base his or her claim on the law of the country in which the event causing the damage took place.⁸¹²

[406] Apart from this general provision there are special regulations with regard to product liability,⁸¹³ unfair competition and acts restricting competition,⁸¹⁴ infringement of intellectual property,⁸¹⁵ industrial action⁸¹⁶ and *culpa in contrahendo* cases.⁸¹⁷

[407] As regards to the possible application of international human rights standards result from different sources. It depends on the nature of the norms, whether the judge will apply them. As the UNGP the courts are not obliged to apply the principles as binding law. Other human rights standards such as the European Convention on Human Rights however have been ratified by the German legislator and are thus binding and being applied in court on a level equal to that of federal law.⁸¹⁸

[408] Yet, most of the international law provisions only regulate obligations for states and do not have a direct third-party effect on enterprises.⁸¹⁹ As a result, they usually do not have a direct impact on civil proceedings against companies. International law may however have an indirect third-party effect.⁸²⁰ It may be used to interpret the national private law and be applied to certain general clauses in national law⁸²¹, which deal with equity and good faith.⁸²²

⁸⁰⁹ Art. 14 para. 1(a) Rome II Regulation.

⁸¹⁰ Art. 4 para. 1 Rome II Regulation.

⁸¹¹ Art. 4 para. 3 Rome II Regulation.

⁸¹² Art. 7 Rome II Regulation.

⁸¹³ Art. 5 Rome II Regulation.

⁸¹⁴ Art. 6 Rome II Regulation.

⁸¹⁵ Art. 8 Rome II Regulation.

⁸¹⁶ Art. 9 Rome II Regulation.

⁸¹⁷ Art. 12 Rome II Regulation.

⁸¹⁸ See e.g. German Constitutional Court (Bundesverfassungsgericht, BVerfG), judgment of 04.05. 2011 – 2 BvR 2365/09.

⁸¹⁹ See for the European Convention on Human Rights: MEYER-LADEWIG, Art. 1 para. 10.

⁸²⁰ LOOSCHELDERS, § 134 para. 37 German Civil Code (Bürgerliches Gesetzbuch, BGB).

⁸²¹ E.g. §§ 138, 157, 242, 315, 826 German Civil Code (Bürgerliches Gesetzbuch, BGB).

⁸²² LOOSCHELDERS, § 134 para. 27 German Civil Code (Bürgerliches Gesetzbuch, BGB).

1.2.5. Law Applicable to the Quantum of Damages

[409] As regards the question, which law applies to deciding the amount of compensation for damages, the same rule applies as to the right to obtain compensation for damages. In all civil cases and commercial matters, the conflict of law provisions are found in the Regulation (EC) No 864/2007.⁸²³ If German law is applicable under the Regulation, also determining the amount of compensation for damages is subject to German law.

[410] Determining the amount of compensation for damages is regulated in German civil procedure law. If the parties are in dispute about whether or not damages have occurred and the amount of money to be reimbursed, the court shall rule at its discretion based on the circumstances of the case.⁸²⁴

1.3. Corporate Law and Torts

1.3.1. Liability of the Company Director

[411] The two most important corporate structures are the limited liability company (*Gesellschaft mit beschränkter Haftung*, GmbH) and the stock corporation (*Aktiengesellschaft*, AG). Whereas the former is directed by one or more managing directors,⁸²⁵ the latter is directed by an executive board, which can also consist of one or more members.⁸²⁶ Regarding the liability of such management body members, one distinguishes between internal liability towards the company and external liability towards third parties, *i.e.* clients, employees or shareholders).⁸²⁷ Third persons can sue them only in very specific cases. These concern primarily liability due to misconduct in cases of

⁸²³ See under point 1.2.4 of this report on German law.

⁸²⁴ § 287 para. 1 s. 1 German Civil Procedure Code (Zivilprozeßordnung, ZPO).

⁸²⁵ § 35 para. 1 s. 1 in conjunction with § 6 para. 1 German Limited Liability Company Law (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG).

⁸²⁶ § 76 paras. 1, 2 s. 1 German Stock Corporation Law (Aktiengesetz, AktG).

⁸²⁷ LANGE, § 2, para. 8. The general duties and liability of a managing director of a limited liability company are set out in § 43 paras. 1, 2 German Limited Liability Company Law (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG):

- “(1) The directors shall conduct the company’s affairs with the due diligence of a prudent businessman.
- (2) Directors who breach the duties incumbent upon them shall be severally and jointly liable to the company for any damage arising.

[...]

The general duties and liability of an executive board of a stock corporation are set out in § 93 German Stock Corporation Law (Aktiengesetz, AktG):

“(1) The members of the executive board shall conduct the company’s affairs with the due diligence of a prudent and conscientious manager. There is no breach of duty, if the member was entitled to reasonably assume that, based on adequate information, he was acting in favour of the company. [...]

(2) Members of the executive board who breach the duties incumbent upon them shall be severally and jointly liable to the company for any damage arising. In case it is unclear whether they applied due diligence of a prudent and conscious manager, the burden of proof is upon them. [...]” (Translated into English by the Institute).

insolvency⁸²⁸ or tax management⁸²⁹. A personal liability of the managing director beyond insolvency is possible, notably in cases of utilisation of particular personal trust⁸³⁰, withholding of contributions of an employee to the social security system⁸³¹, non-payment of corporate taxes⁸³², violations of protective law⁸³³, unlawful interference in third parties' legally protected rights⁸³⁴ or wilful immoral damage⁸³⁵.

[412] The legal basis for a director's liability within the context of business and human rights seems to be the general provisions of tort law. According to § 823 para. 1 German Civil Code (*Bürgerliches Gesetzbuch*), "[a] person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this."⁸³⁶ Especially in cases in which a person's health or property is damaged, this general provision of tort law might apply. In order to hold a company's director personally liable based on this regulation, he or she needs to have unlawfully and single-handedly injured the other person.⁸³⁷ Our research did not show any such cases where the damage occurred abroad. Also regarding German territory, we did not find any case law within the context of business and human rights. It seems possible to base a claim against a company director due to human rights violations on § 823 para. 1 German Civil Code, if the director committed this violation him- or herself.

[413] More contested is the question to what extent the director is also liable for indirect violations, i.e. for rights violations caused by his or her employees as part of their work or by the business itself. In this constellation, the director has to have violated his or her due diligence, especially the duty of care resulting from the duty to reasonably manage the respective company.⁸³⁸ According to a part of the doctrine, external liability of the managing director pursuant to § 823 para. 1 German Civil Code for offenses committed by the company is only affirmed in cases of participation, i.e. if the managing director has knowledge of the tortious completion and does not intervene despite of the reasonableness. The opposite pole is formed by the jurisprudence⁸³⁹ and the other part of the doctrine. In their point of view, the managing director is responsible for offenses committed by the company if he or she was in charge according to the area of responsibility of the organizational

⁸²⁸ § 823 para. 2 German Civil Code (*Bürgerliches Gesetzbuch*, BGB) in conjunction with § 64 German Limited Liability Company Law (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG); § 76 para. 3 No 3 lit. a), b) German Stock Corporation Law (Aktiengesetz, AktG).

⁸²⁹ § 69 in conjunction with § 34 para. 1 German Fiscal Code (Abgabenordnung, AO).

⁸³⁰ LANGE, § 2, paras. 284 *et seq.*

⁸³¹ LANGE, § 2, paras. 286 *et seq.*

⁸³² LANGE, § 2, paras. 284 *et seq.*

⁸³³ LANGE, § 2, paras. 303 *et seq.*

⁸³⁴ LANGE, § 2, paras. 306 *et seq.*

⁸³⁵ LANGE, § 2, paras. 310 *et seq.*

⁸³⁶ § 823 para. 1 German Civil Code (*Bürgerliches Gesetzbuch*, BGB).

⁸³⁷ HAAS U., para. 327; LANGE, § 2, para. 277; KLEINDIEK, N 81.

⁸³⁸ BIERBACH, STREIFLER & PARTNER.

⁸³⁹ In 1989, the German Federal Court of Justice decided that the managing director of a limited liability company was in a so-called guarantor position (Garantenstellung) with regard to the third person whose property was hurt. The court based this guarantor position on the fact that through his position as managing director, he was able to influence and with that responsible to protect the third person's property to the extent in which their common business touched this property (German Federal Court of Justice (*Bundesgerichtshof*, BGH), judgment of 05.12.1989 – VI ZR 335/88).

area that was erroneous.⁸⁴⁰ There are intermediary views between the broad and the restrictive opinion.⁸⁴¹ As regards sources of danger in the area of activity of the company and created by it, solely the company is liable. Although the due diligence results in organizational and supervisory duties for the managing director, those duties exist towards the company and not towards third parties.⁸⁴² External liability of the managing director for due diligence must rather be established independently and comes into question in limited exceptional cases if the legal requirements of a violation of due diligence is realized in his or her person, *i.e.* if the managing director increases the sources of danger through his own activity. Considerations leading in a similar direction are that of exceptionally accepting a liability of the managing director concerning due diligence if there is a non-tolerable disparity between the hazardous situation and the intracorporate organizational structure.⁸⁴³ Crucial duties of co-ordination of the managing director towards the company are not sufficient to establish a liability of the managing director. Therefore, he or she is not liable for a violation of property rights committed by company personnel towards third parties, even if he or she was responsible for monitoring the employees. Did he or she, however, have positive awareness of the violation of third parties' legally protected rights by company employees, then he or she is obliged to intervene if he or she knew of the infringing act or he or she imminently learned of it and had the possibility to prevent it. Negligent ignorance is not sufficient to constitute a duty to act of the managing director.⁸⁴⁴ In a recent decision of 2012, the German Federal Court of Justice decided that the position as managing director or member of an executive board alone was not sufficient for attributing the responsibility of a guarantor position towards third person's property. The managing director or member of the executive board shall merely be liable towards the company.⁸⁴⁵ The court did not explicitly deviate from the already existing case law⁸⁴⁶, so it remains unclear how the courts would treat a comparable case in the future.⁸⁴⁷

[414] Furthermore, compensation for damages is generally also possible based on § 823 para. 2 German Civil Code in conjunction with the violation of a so-called protective law. This is any law that is designed to at least also protect the rights of an individual.⁸⁴⁸ There are several federal laws that could be of relevance; however they do not have effect abroad.⁸⁴⁹ A notable protective law in connection with a managing director is non-payment and misuse of wages and salaries and withholding of contributions of an employee to the social security system⁸⁵⁰ or if a managing director is not applying for insolvency when the company is factually insolvent⁸⁵¹. Also offenses like fraud⁸⁵²,

⁸⁴⁰ KLEINDIEK, N 82.

⁸⁴¹ HAAS U., N 338.

⁸⁴² KLEINDIEK, N 86.

⁸⁴³ KLEINDIEK, N 87.

⁸⁴⁴ KLEINDIEK, N 88.

⁸⁴⁵ German Federal Court of Justice, (Bundesgerichtshof, BGH), judgment of 10.07.2012 – VI ZR 341/10.

⁸⁴⁶ See above, German Federal Court of Justice (Bundesgerichtshof, BGH), judgment of 05.12.1989 – VI ZR 335/88.

⁸⁴⁷ See also BIERBACH, STREIFLER & PARTNER.

⁸⁴⁸ Well-established case law, see for example German Federal Court of Justice (Bundesgerichtshof, BGH), judgement of 18.11.2003 – VI ZR 385/02.

⁸⁴⁹ For example the German Labour Protection Law (Arbeitsschutzgesetz, ArbSchG), the German Regulation on Industrial Safety (Verordnung über Sicherheit und Gesundheitsschutz bei der Verwendung von Arbeitsmitteln, BetrSichV) or the German Regulation on the work place, (Verordnung über Arbeitsstätten, ArbStattV).

⁸⁵⁰ § 266a German Criminal Code (Strafgesetzbuch, StGB);

⁸⁵¹ § 15a para. 1 Insolvency Statute (Insolvenzordnung, InsO); KLEINDIEK, N 37.

⁸⁵² § 263 German Criminal Code (Strafgesetzbuch, StGB).

capital investment fraud⁸⁵³, abuse of trust⁸⁵⁴ or violation of book-keeping duties⁸⁵⁵ can be relevant protective laws regarding torts of the managing director.

1.3.2. Liability of the Company for Tortious Acts of its Subsidiaries

[415] Under German law, a claim against the parent company will only be successful, if the parent company is liable for the damages caused. In general, subsidiaries are independent legal entities with regard to the liability for any damages arisen from breaches of the duty to take care by the subsidiary.⁸⁵⁶ This means that the damages claimed from a breach of the subsidiary's duty are usually limited to the liability of the subsidiary. The parent company is only liable for violations based on their own duty of care. In Germany there is a specific provision concerning associated companies (*verbundene Unternehmen*). There is a difference between the contract-based group of affiliated companies formed through an inter-company agreement and the *de facto* group of actual existing influence opportunities, *i.e.* due to significant participation.⁸⁵⁷ In the case of the contract-based group, the parent company is generally allowed to issue adversary instructions via shareholders' meeting. However, there exists a comprehensive liability of the controlling company for all losses of the subsidiary company in the context of caused endangering of company assets by before mentioned adversary instructions.⁸⁵⁸ These rules find direct application for stock companies and apply by analogy to limited liability companies. In case of the *de facto* group, the executive board shall be led by the best interests of the own company regarding the implementation of instructions.⁸⁵⁹ However, the stock company has to follow adverse instruction if a compensation for the resulting disadvantages is guaranteed.⁸⁶⁰ The subsidiary limited liability company on the other side does not have an independent status; on the contrary it is bound by the instructions of the shareholders' meeting.⁸⁶¹ Moreover, the parent company can be liable if it violates the obligation of loyalty that exists towards the subsidiary company.⁸⁶² In a case before the German Federal Court of Justice, the Court saw it as a violation of the obligation of the controlling company's loyalty when it forced the subsidiary company to conclude an adverse service contract with another of their dependent companies. According to the Court, in cases like these, the obligation of loyalty reaches beyond the company.⁸⁶³ This shall also be true if the companies are domiciled abroad.⁸⁶⁴

[416] The shareholders will only be held liable in very specific cases. The possibility of a so-called piercing of corporate veil (*Durchgriffshaftung*) is acknowledged by both case law and literature, but the courts have reduced the scope of it. In case of piercing the corporate veil, the separation

⁸⁵³ § 264a German Criminal Code (Strafgesetzbuch, StGB).

⁸⁵⁴ § 266 German Criminal Code (Strafgesetzbuch, StGB).

⁸⁵⁵ § 283b German Criminal Code (Strafgesetzbuch, StGB).

⁸⁵⁶ WELLER & Bauer, pp. 6, 7.

⁸⁵⁷ §§ 291 *et seq.* German Stock Corporation Act (Aktiengesetz, AktG).

⁸⁵⁸ §§ 302 *et seq.* German Stock Corporation Act (Aktiengesetz, AktG); WELLER & BAUER, pp. 6, 15.

⁸⁵⁹ § 76 para. 1 German Stock Corporation Act (Aktiengesetz, AktG).

⁸⁶⁰ § 311 para. 1 German Stock Corporation Act (Aktiengesetz, AktG).

⁸⁶¹ § 37 para. 1 Limited Liability Companies Act (Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG).

⁸⁶² WELLER & BAUER, pp. 6, 16.

⁸⁶³ Federal Court of Justice (Bundesgerichtshof, BGH), judgement of 05.06.1975 – II ZR 23/74.

⁸⁶⁴ Federal Court of Justice (Bundesgerichtshof, BGH), judgement of 02.12.2014 – VI ZR 501/13, commented by KESSLER A., p. 32.

principle between company and shareholders is lifted and therefore the liability privilege can be lifted likewise.⁸⁶⁵ One is referring to reversing piercing the corporate veil if behaviour patterns, knowledge or features of the company are being ascribed to the shareholder. An attribution might depend on whether the direction of the company's and the managing directors' wills were aligned in the same direction, thus it is limited to shareholders with substantial participation or significant influence.⁸⁶⁶ With regard to limited liability companies, shareholders may be liable in cases of blending of property where a clear demarcation between private and company assets is no longer possible, notably due to opaque accounting.⁸⁶⁷ The courts did not identify a specific constellation in which shareholders may be liable with regard to stock corporations. Whether the concept of piercing of corporate veil applies shall be decided on a case by case basis according to the principle of good faith (*Treu und Glauben*).⁸⁶⁸

1.4. Procedural Law

1.4.1. Statute of Limitations

[417] The limitation periods in the German Civil Code vary from 2 years⁸⁶⁹ to 30 years⁸⁷⁰, depending on the different claims and their conditions of entitlement. The standard limitation period for claims for damages to person and property is 3 years.⁸⁷¹ It starts running at the end of the year in which the claim arises and in which the claimant becomes aware of the circumstances and the liable party or, in view of the circumstances, should have become aware of them.⁸⁷²

[418] If, however, the damage to person was wilful, damages can be claimed within a period of 30 years.⁸⁷³

[419] Environmental regulations are mainly found in administrative law and are therefore not relevant in conjunction with civil law claims for damages.⁸⁷⁴

[420] The German rules on the question of when limitation periods begin are subject to commentary in the legal literature in general, although a reference to business and human rights is not made. As the rules contain an objective and a subjective component, they are found to give the plaintiff a fair chance to claim the damage.⁸⁷⁵ The subjective component, the claimant's awareness of the debtor's person and of the circumstances justifying the claim, prevents the claimant from

⁸⁶⁵ MÜHLENS, p. 241; SAENGER, § 13 para. 95.

⁸⁶⁶ FOCK, para. 77.

⁸⁶⁷ SCHAEFER, § 40 para. 5; VERSE, paras. 38 et seq.

⁸⁶⁸ FISCHER, para. 29 et seq.

⁸⁶⁹ See e.g. § 438 para. 1 No 3 German Civil Code (Bürgerliches Gesetzbuch, BGB).

⁸⁷⁰ See e.g. § 197 para. 1 Nos 1-6 German Civil Code (Bürgerliches Gesetzbuch, BGB).

⁸⁷¹ § 195 German Civil Code (Bürgerliches Gesetzbuch, BGB).

⁸⁷² § 199 para. 1 German Civil Code (Bürgerliches Gesetzbuch, BGB).

⁸⁷³ § 197 para. 1 No 1 German Civil Code (Bürgerliches Gesetzbuch, BGB).

⁸⁷⁴ RUFFERT, p. 1178.

⁸⁷⁵ ELLENBERGER, para. 2.

unnoticedly losing his or her right. The rule tries to balance the claimant's interest to claim his or her right with the defendant's interest in legal concord and debtor protection.⁸⁷⁶

1.4.2. Costs and Legal Aid

[421] In general, the German Court Fees Act is based on the principle that the plaintiff pays an advance on the court fees in order to bring the action to court. The fee is dependent on the value of the subject matter at issue.⁸⁷⁷ It has to be paid before the complaint can be served upon the defendant.⁸⁷⁸ However, if the plaintiff receives legal aid to bring his action to court, he or she is exempted from this obligation.⁸⁷⁹

[422] The plaintiff can be granted legal aid under certain conditions: (1) He or she has to be considered to be in need of financial legal aid, (2) his or her claim has to have a realistic chance of success and (3) he or she is not allowed to frivolously waste the granted money.⁸⁸⁰ The judge decides whether legal aid is permitted by taking into account the income and assets of the plaintiff.⁸⁸¹ If the plaintiff receives legal aid, he or she is relieved from court costs and his or her own expenses for a lawyer. However, if the plaintiff loses the case in court, he or she is obliged to pay the opponent party's costs, which usually are the costs for the lawyer.

[423] In Germany, the losing party usually bears the court costs.⁸⁸² The costs may however be shared, where each party succeeds on some and fails on other parts of the claim.⁸⁸³ Apart from this, contingency fee arrangements with respect to court costs are not permissible. As regards contingency fee arrangements between lawyer and client, they are not allowed unless Law on the Remuneration of Attorneys states otherwise.⁸⁸⁴ The said Law allows contingency arrangements between lawyer and client in case due to his or her financial background, the plaintiff would otherwise be prevented to bring his action to court.⁸⁸⁵ According to the Committee on Legal Affairs of the German Parliament (*Bundestag*), this shall not only be the case if the plaintiff does not have any alternative. Not only the plaintiff's financial conditions shall be relevant, but also the financial risks shall be considered. As a consequence, it is for example also possible for a medium-sized enterprise to agree to contingency fees for its lawyer in case of a comprehensive lawsuit on building construction.⁸⁸⁶

[424] At the moment, German case law specific to business and human rights concerning the distribution of legal costs does not exist. A claim before the Local Court in Dortmund against a German textile firm with regard to a fire in Karachi, Pakistan, where 259 workers died, has not been

⁸⁷⁶ ELLENBERGER, paras. 7 *et seq.*

⁸⁷⁷ § 3 para. 1 German Courts Cost Act (Gerichtskostengesetz, GKG).

⁸⁷⁸ § 12 para. 1 s. 1 German Courts Cost Act (Gerichtskostengesetz, GKG).

⁸⁷⁹ STEINERT *et al.*, para 149. See paras. [401] of this report.

⁸⁸⁰ § 114 s. 1 German Civil Procedure Code (Zivilprozessordnung, ZPO).

⁸⁸¹ STEINERT *et al.*, para 4.

⁸⁸² § 91 para. 1 s.1 German Civil Procedure Code (Zivilprozessordnung, ZPO).

⁸⁸³ § 92 para. 1 s.1 German Civil Procedure Code (Zivilprozessordnung, ZPO).

⁸⁸⁴ § 49b para. 2 German Federal Code for the Legal Profession (Bundesrechtsanwaltsordnung, BRAO).

⁸⁸⁵ § 4a para. 1 s.1 German Remuneration of Lawyers Act (Rechtsanwaltsvergütungsgesetz, RVG).

⁸⁸⁶ Deutscher Bundestag, Beschlussempfehlung und Bericht des Rechtsausschusses, p. 14.

decided yet.⁸⁸⁷ However, given the German rules on legal aid, it is unlikely that the provisions on the distribution of legal costs will change in the context of human rights cases.

[425] German literature on the subject of business and human rights focuses more on the national plan of action on implementing the UN Guiding Principles. It deals usually with German enterprises and their duty of care for guaranteeing adequate working conditions in the countries producing the goods.⁸⁸⁸

[426] The literature dealing with the rules on legal aid in general states that the concept of legal aid results from the constitutional rule of law guarantee and the right to equality.⁸⁸⁹ Claimants with a low income shall have the same chances as others to bring their action to court.⁸⁹⁰ It is therefore considered to be a specific part of social welfare, which is even regarded as giving the claimant who receives legal aid an advantage in comparison to other claimants, as it includes a prior prognosis by the court on the success of the case.⁸⁹¹ Although helpful for the individual claimant, it also causes costs of approximately 500 million Euros per year to the courts.⁸⁹²

[1] The concept of legal aid and the possibility of making contingency fee arrangements show a positive approach to deal with plaintiffs who need financial support. However, the risk of losing the case still bears the burden of paying the opponent's costs. Especially in case the opponent is a big enterprise able of hiring expensive lawyers, this may hold an individual back from bringing action against the enterprise. According to our research there is no relevant jurisprudence on the topic of business and human rights yet.

1.4.3. Standard and Burden of Proof

[427] The general rule on the standard burden of proof is that burden of proof lies with the party claiming a certain fact in his or her favour.⁸⁹³ However, in certain cases burden of proof may shift to the other party. This may happen because of certain provisions shifting the burden of proof⁸⁹⁴ or because of special jurisprudence, which established a shift of the burden of proof, especially if the fact in question lies within the sphere of the opponent. This is for example the case with regard to a breach of duty of care in product liability. In these cases, it is for the company to prove that it did not neglect its duty of care.⁸⁹⁵ The reason for this is to simplify bringing action for the plaintiff as he or she usually does not know and does not have access to the company's internal production process and hence cannot prove the responsibility within the company.⁸⁹⁶ According to our

⁸⁸⁷ See the Court's Press Release "Rechtsstreit gegen KiK", available at: <http://www.lg-dortmund.nrw.de/behoerde/presse/index.php> (accessed on 08.06.2016).

⁸⁸⁸ See e.g. PASCHKE, pp.121 *et seq*; see also: GRABOSCH & SCHEPER.

⁸⁸⁹ MOTZER, para. 1.

⁸⁹⁰ MOTZER, para. 1.

⁸⁹¹ MOTZER, para. 3.

⁸⁹² MOTZER, para. 5.

⁸⁹³ REICHOLD, pre § 284 para. 23.

⁸⁹⁴ See e.g. § 280 para. 1 s. 2 German Civil Code (Bürgerliches Gesetzbuch, BGB).

⁸⁹⁵ Federal Court of Justice (Bundesgerichtshof, BGH), judgement of 26.11.1968 – VI ZR 212.

⁸⁹⁶ WAGNER, Kommentar, para. 684.

research, German courts did not decide any cases on the burden of proof with regard to business and human rights so far.⁸⁹⁷

[428] As mentioned above, according to the general burden of proof doctrine each party has to present the evidence that supports the facts its claim is built on. If the evidence is not already in possession of this particular party it can file a motion requesting this evidence pursuant to § 142 German Civil Procedure Code^{898 899} This motion must contain the facts that ought to be proven by this evidence. Ordering the submission of the evidence is only possible if the judge decides that the fact is properly specified and important for the case.⁹⁰⁰ A pure assertion that the opposite party is in possession of documents with certain content which are not identified is not sufficient.⁹⁰¹ Therefore, the bare purpose of information acquisition is not permissible.⁹⁰² Hence, the German disclosure rules can be seen as a barrier for access to justice in the way that in order to get to the evidence required, the party has to respect the judge's opinion on whether the evidence is important regarding the case.⁹⁰³ For example complex company structures can make it difficult for the claimant to substantiate his or her claim due to the requirement of prior specification of the evidence needed.⁹⁰⁴ Pursuant to our research there have not been any cases regarding the matter of obtaining evidence in connection with access to justice for victims of human rights violations in Germany.

[429] § 286 of the German Civil Procedure Code states that the court has to decide by taking into account the content of the proceedings and the results of the hearing of evidence. The court in its reasonable discretion has to be convinced that a certain fact is true. An absolute certainty is not required, but the level of certainty has to rule out reasonable doubts.⁹⁰⁵ Under specific circumstances and especially in cases of interlocutory injunction, the judge merely has to consider a fact to be most likely.⁹⁰⁶ In these cases, the court usually decides from a general summary examination and will only take a preliminary decision.⁹⁰⁷ Specific case law on the question of standard of proof in the context of business and human rights does not seem to exist so far in Germany.

[430] The rules on burden and standard of proof have not been subject to legal literature in the context of business and human rights so far. In general, a lower standard of proof is found to be contrary to the wording of the rule in § 286 German Civil Procedure Code.⁹⁰⁸ For example in cases of violation of professional obligation, the burden of proof can be shifted due to equity reasons⁹⁰⁹,

⁸⁹⁷ A successful business and human rights case was solved by an out-of-court-settlement (See: Verbraucherzentrale Hamburg./Lidl), available at: http://www.kostenlose-urteile.de/LG-Heilbronn_21-O-4210_Unlautere-Werbung-Lidl-muss-Werbung-fuer-fair-produzierte-Kleidung-zurueckziehen-Kleidung-nicht-unter-fairen-Arbeitsbedingungen-hergestellt.news9535.htm (accessed on 08.06.2016).

⁸⁹⁸ § 142 para. 1 German Civil Procedure Code (Zivilprozeßordnung, ZPO).

⁸⁹⁹ ABA, Obtaining Discovery Abroad, p. 127.

⁹⁰⁰ VON SELLE, para. 9.

⁹⁰¹ German Federal Court of Justice (Bundesgerichtshof, BGH), judgement of 14.06.2007 – VII ZR 230/06.

⁹⁰² German Federal Court of Justice (Bundesgerichtshof, BHG), judgment of 26.06.2007 – XI ZR 277/05.

⁹⁰³ ABA, Obtaining Discovery Abroad, p. 127; SKINNER et al., p. 45.

⁹⁰⁴ SAAGE-MAASS.

⁹⁰⁵ REICHOLD, § 286 para. 2.

⁹⁰⁶ REICHOLD, § 294 para. 1.

⁹⁰⁷ See e.g. § 920 para. 2 German Civil Procedure Code (Zivilprozeßordnung, ZPO).

⁹⁰⁸ PRÜTTING, para. 36.

⁹⁰⁹ See e.g. GLANZMANN, para. 21.

to give the weaker party a fair chance to claim his or her interests. This is notably the case in product liability law. As a claimant has no access to the internal management and organization of the defending company, he or she does not have to prove which duties have been neglected.⁹¹⁰ Furthermore, in tort law an express legal shifting of burden of proof can be observed in the presumption of culpability of the vehicle driver⁹¹¹ or in product liability law⁹¹² in certain cases.

1.5. Collective Redress

[431] In Germany, collective action in the form of class action suits does not exist.⁹¹³ The German legal system follows a two party approach and merely provides other forms of collective redress and this only in some specific sectors of German law.⁹¹⁴

[432] Several people may, and in some cases even must,⁹¹⁵ jointly sue or be sued as joined parties under specific circumstances according to § 59 German Code of Civil Procedure (so-called *Streitgenossenschaft*).⁹¹⁶ In this constellation, the different cases are being tried simultaneously, meaning especially that evidence will only be heard once for all cases involved. The aim of this rule is to render court proceedings more efficient and to avoid contradicting outcomes in comparable cases.⁹¹⁷ Yet, unlike collective redress, the different proceedings only take place at the same time, but they do not merge to one single case. Legal acts by one claimant are not binding on other joint parties and the court still has to decide on each case individually, even if he or she does so at the same time and in only one document.⁹¹⁸ In addition to that, the German Code of Civil Procedure allows in its § 147 consolidating different proceedings whose claims have legal ties amongst each other (so-called *Prozessverbindung*). These proceedings have to already be pending with a court and all with the same court. Depending on the circumstances of the respective cases, the different parties may become joined parties as set out in the aforementioned § 59 German Code of Civil Procedure.⁹¹⁹ Unlike collective redress however, consolidating different proceedings is only possible if proceedings are already pending. As neither the instrument of joined parties nor the instrument of consolidated proceedings leads to a merger of the different cases, both instruments do not classify as collective redress⁹²⁰ and will thus not be dealt with in this report.

[433] Furthermore, German law provides of the possibility of taking representative action, but only in very specific cases (so-called *Verbandsklage*). This can be seen as a form of collective redress.⁹²¹ The idea of this representative action is to allow certain approved associations to take action as a representative of a specific public interest. The claimant itself, i.e. the association, does

⁹¹⁰ SPINDLER, para. 709.

⁹¹¹ § 18 para. 1 s. 2 Road Traffic Law (Strassenverkehrsgesetz, StVG).

⁹¹² § 1 para 4 s. 2 Product Liability Law (Produkthaftungsgesetz, ProdHaftG).

⁹¹³ FAULMÜLLER & WIEWEL, pp. 452, 453; LEIN.

⁹¹⁴ See: KESSLER J.

⁹¹⁵ § 62 German Code of Civil Procedure (Zivilprozessordnung, ZPO).

⁹¹⁶ § 59 German Code of Civil Procedure (Zivilprozessordnung, ZPO).

⁹¹⁷ DRESSLER, para.. 1; SCHULTES, para. 1.

⁹¹⁸ See § 61 German Code of Civil Procedure (Zivilprozessordnung, ZPO). For more information on joined parties (*Streitgenossenschaft*) see e.g. DRESSLER, N 1 et seq; SCHULTES paras. 1 et seq.

⁹¹⁹ WENDTLAND, para. 12.

⁹²⁰ LEIN.

⁹²¹ See e.g. RÖTHEMEYER, Introduction para. 10.

not have any damage, but merely acts for a group whose protection the legislator deems of public interest. This is possible in favour of different matters; in the context of this study, representative action in favour of the environment⁹²² as well as of the equality of disabled people⁹²³ might be of interest.⁹²⁴ Nevertheless, the law limits usage of representative action to very specific cases. In environmental law, this concerns procedures in which certain organizations promoting the protection of the environment have a right of participation, notably planning approval procedures; in matters of equality of disabled people, this regards mainly regulations on accessibility. As a result, representative action in favour of these public interests is only possible in cases involving administrative regulations. Representative action linked to acts or conditions abroad is thus not permitted. As a consequence, German law does not provide for any possibility to take representative action in cases within the context of this study.

[434] Finally, it is also interesting to mention the Act on Model Case Proceedings in Disputes under Capital Markets Law.⁹²⁵ A first version of this act was in force from 2005 until 2012, since then the new act is in force, limited until 2020⁹²⁶⁹²⁷ This act allows model case proceedings whose outcome will be binding for similar cases;⁹²⁸ the latter will be stayed until the model case proceedings are finished.⁹²⁹ However, these model case proceedings are only possible in matters of capital markets law, namely regarding claims for compensation of damages due to false public capital markets information or for fulfilment of contract according to the Securities Acquisition and Takeover Act.⁹³⁰ It is thus not relevant in the context of this study.⁹³¹

[435] As a result, there are no instruments of collective redress under German law that can be used in the context of human rights violations abroad by German or other businesses.

1.5.1. Form of Collective Actions

[436] In some cases, representative action is possible under German law, although this does not concern cases within the context of this study. For representative action in favour of the

⁹²² § 64 para. 1 Nos 1-3 German Federal Nature Conservation Act (Bundesnaturschutzgesetz, BNatSchG); § 4 German Environment Appeal Act (Umwelt-Rechtsbehelfsgesetz, UmwRG).

⁹²³ § 13 German Equal Opportunities for People with Disabilities Act (*Behindertengleichstellungsgesetz*, BGG).

⁹²⁴ Other areas in which representative action exists are notably animal protection (up to the 16 states (Bundesländer) in Germany to enact respective laws), consumer protection (§ 4 Act on Injunctive Relief for Consumer Rights and Other Violations (Unterlassungsklagegesetz, UKlaG)) as well as protection against unfair competition (§ 8 Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG)).

⁹²⁵ § 2 para. 1 s. 1 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹²⁶ § 28 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹²⁷ WARDENBACH, p. 35.

⁹²⁸ § 22 para. 1 s. 1 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹²⁹ § 8 para. 1 s. 1 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹³⁰ § 1 para. 1 Nos 1-3 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹³¹ For more information on the model case proceedings in disputes under capital markets law see for example FAULMÜLLER & WIEWEL, pp. 452 et seq; WARDENBACH, pp. 35 et seq; WIEWEL, pp. 173 et seq; WOLF & LANGE, pp. 3751 et seq.

environment as well as in favour of equality of disabled people, the representing organization has to be a recognized association.⁹³²

[437] In matters of environmental law, this is the case if the main purpose of the association, as set out in its statutes, is to promote the aims of the German Federal Nature Conservation Act listed in its § 1. In addition to that, the association has to be recognized by the German federal state according to § 3 German Environment Appeal Act (*Umwelt-Rechtsbehelfsgesetz*) or by a state (*Bundesland*) according to the respective state law.⁹³³

[438] As regards equality of disabled people, the representing association has to be recognized by the German Federal Ministry for Labour and Social Affairs. The association has to be nominated by a member of a special advisory board for the participation of disabled people and has to fulfil five conditions: It has to promote interests of disabled people not only temporarily according to its statutes, be called to represent the interests of disabled people with view to its members and member organizations, exist and work since at least three years, guarantee an adequate fulfilment of its tasks and be exempt from corporate taxation due to its charitable purpose.⁹³⁴

[439] As to the model case proceedings in capital markets law, they can be applied for by both claimant and defendant.⁹³⁵

[440] In matters of environmental law, representative action can be used to override administrative acts, since, as already set out above, this action is applicable in cases involving administrative procedure or comparable regulations. Representative action is thus available for objection⁹³⁶ or action for rescission against an administrative act⁹³⁷ and respective interim legal protection⁹³⁸ as well as for a declaratory judgment that the act is unlawful or not enforceable.⁹³⁹ In addition to that, also compensation for the interference with the environmental balance may be possible.⁹⁴⁰

[441] Representative action in favour of equality of disabled people however is only possible as an action for a declaratory judgment within the scope of § 43 Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*).⁹⁴¹

⁹³² § 64 para. 1 Nos 1-3 German Federal Nature Conservation Act (Bundesnaturschutzgesetz, BNatSchG); § 13 German Equal Opportunities for People with Disabilities Act (Behindertengleichstellungsgesetz, BGG).

⁹³³ GELLERMANN, para. 5.

⁹³⁴ § 13 para. 3 Nos 1-5 German Equal Opportunities for People with Disabilities Act (Behindertengleichstellungsgesetz, BGG).

⁹³⁵ § 2 para. 1 s. 2 Act on Model Case Proceedings in Disputes under Capital Markets Law (*Kapitalanleger-Musterverfahrensgesetz*, KapMuG).

⁹³⁶ § 68 Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO).

⁹³⁷ § 42 para. 1 Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO).

⁹³⁸ § 80 para. 5 s. 1 Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO).

⁹³⁹ GELLERMANN, para. 6.

⁹⁴⁰ German Federal Administrative Court (Bundesverwaltungsgericht, BVerwG), judgement of 09.06.2004 – 9 A 11/03; Higher Administrative Court (Verwaltungsgerichtshof, VGH) Mannheim, judgement of 02.11.2006 – 8 S 1269/04.

⁹⁴¹ § 13 para. 1 German Equal Opportunities for People with Disabilities Act (Behindertengleichstellungsgesetz, BGG).

[442] Similarly, model case proceedings in capital markets law are only available for a declaratory decision on the existence or non-existence of conditions relevant to the case or on clarification of legal questions.⁹⁴²

1.5.2. Requirements Concerning Collectivity

[443] As regards representative action, there are no claims of individuals involved. In matters of environmental law, the representing association takes action against administrative acts that are part of a procedure in which the association has a right to participate. With respect to equality of disabled people, representative action is an objective objection procedure and not linked to individual cases or individual infringements.⁹⁴³

[444] A model case proceeding is initiated by one party of one case, either claimant or defendant.⁹⁴⁴ This petition will be registered and made public. Within six months after publication, at least nine other petitions aiming at the same declaratory decision have to be made. Every claimant or defendant decides for him- or herself whether he or she wants to petition model case proceedings. Every petition will be published in a litigation register, which is accessible to everyone free of charge.⁹⁴⁵ The name of the defendant and his or her representative, the issuer of securities or offeror of other investments as well as the facts and the aim of the declaratory decision will be published in this litigation register. Yet, the petitioner will not be mentioned there.⁹⁴⁶ The different petitions for model case proceedings have to aim at the same declaratory decision, which will be relevant for the outcome of the respective case. The Higher Regional Court will then decide whether the at least ten petitions are indeed pursuing the same declaratory decision.⁹⁴⁷ The court at which these model case proceedings will take place will then suspend *ex officio* all pending proceedings to which the outcome of the model case proceedings are relevant, irrespective of whether a petition for a model case proceeding has been made in the respective case.⁹⁴⁸

⁹⁴² § 2 para. 1 s. 1 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹⁴³ DAU, N 3.

⁹⁴⁴ § 2 para. 1 s. 2 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹⁴⁵ § 6 paras. 1, 3 and § 6 para. 1 s. 1 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹⁴⁶ § 3 para. 3 Nos 1-7 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹⁴⁷ § 6 para. 1 s. 1 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

⁹⁴⁸ § 8 para. 1 ss. 1, 2 Act on Model Case Proceedings in Disputes under Capital Markets Law (Kapitalanleger-Musterverfahrensgesetz, KapMuG).

2. Access to Judicial Remedies in France

2.1. Criminal Law

2.1.1. Jurisdiction

[445] According to French law and the principle of territoriality, French criminal law is applicable to offences committed within the French Republic.⁹⁴⁹ An offence is deemed to have been committed within the territory of the French Republic where one of its constituent elements was committed within that territory.⁹⁵⁰

[446] Furthermore, French criminal law is applicable to offences committed on board ships flying the French flag, or committed against such ships or persons on their board, wherever they may be. It is the only applicable law in relation to offences committed on board ships of the national navy, or against such ships or persons on their board, wherever they may be.⁹⁵¹ French criminal law is also applicable to offences committed on board aircraft registered in France, or committed against such aircraft or persons on their board, wherever they may be. It is the only applicable law in relation to offences committed on board French military aircraft, or against such aircraft or persons on their board, wherever they may be.⁹⁵²

[447] Finally, French criminal law is applicable to any person who, within the territory of the French Republic, is guilty as an accomplice to a felony or misdemeanour committed abroad if the felony or misdemeanour is punishable both by French law and the foreign law, and if it was established by a final decision of the foreign court^{953, 954}. In particular, this provision enables the suing of a parent company accomplice to a felony or misdemeanour committed abroad by one of its subsidiaries.⁹⁵⁵

[448] This principle of territoriality is subject to exceptions. French jurisdictions can prosecute criminal acts committed abroad, according to the principle of active personality (the author of the offence is French), the principle of passive personality (the victim of the offence is French) and the principle of universal competence (arrest in France).⁹⁵⁶

A. Jurisdiction Based on the Principles of Active and Passive Personality

[449] In applying the principles of active and passive personality, French jurisdictions are competent in the following situations.

⁹⁴⁹ Art. 113-2 para. 1 Criminal Code. Translations of the Criminal Code's provisions used in the following paragraphs are mostly from J. R. Spencer (*et al.*), translation of the Criminal Code from French to English, last amendment translated in 2005, available at: https://www.legifrance.gouv.fr/content/download/1957/13715/version/4/file/Code_33.pdf (08.06.2016). The latter translation is not binding and not up to date.

⁹⁵⁰ Art. 113-2 para. 2 Criminal Code.

⁹⁵¹ Art. 113-3 Criminal Code.

⁹⁵² Art. 113-4 Criminal Code.

⁹⁵³ Art. 113-5 Criminal Code.

⁹⁵⁴ See BOULOC, Procédure pénale, N 617-619.

⁹⁵⁵ France, CNCDH.

⁹⁵⁶ Art. 689 Criminal Procedural Code.

[450] French jurisdictions are competent if a French person is the perpetrator of a felony or a misdemeanour. If it is a misdemeanour, it has to be an offence both under the foreign law and under the French law.⁹⁵⁷ No prosecution can be initiated against a person who establishes that he was subject to a final decision abroad for the same offence and, in the event of conviction, that the sentence has been served or extinguished by limitation. The French nationality of the perpetrator of the offence can be held either at the moment of the facts leading to the offence or acquired later.⁹⁵⁸

[451] French jurisdictions are also competent if the victim of the felony or the misdemeanour is French at the moment of the infraction. If it is a misdemeanour, it has to be punishable by imprisonment.⁹⁵⁹ In the case of a misdemeanour, the prosecution can be brought only at the request of the public prosecutor, after the victim's complaint or an official denunciation by the state in which the facts have been committed.⁹⁶⁰ The facts also have to be punishable under the foreign law.⁹⁶¹ No prosecution may be initiated against a person who establishes that he/she was subject to a final decision abroad for the same offence and, in the event of conviction, that the sentence has been served or extinguished by limitation.⁹⁶²

[452] French Criminal law is also applicable to any felony or misdemeanour attracting a penalty of at least five years' imprisonment committed outside the territory of the French Republic by an alien whose extradition to the requesting State has been refused by the French authorities either because the offence for which the extradition has been requested is subject to a penalty or to a safety measure that is contrary to French public policy, or because the person in question has been tried in the aforesaid state by a court which does not respect the basic procedural guarantees and the rights of the defence, or because the matter in question shows the characteristics of a political offence. Prosecution for these offences may only be initiated at the request of the public prosecutor. It must be preceded by an official accusation, transmitted by the Minister of Justice, from the authorities in the country where the offence has been committed and which has requested the extradition.⁹⁶³

[453] French jurisdictions have competence in relation to any felony or misdemeanour defined as a violation of a fundamental interest of the nation⁹⁶⁴, counterfeiting and forgery of the state seals, coins, banknotes or public papers⁹⁶⁵, any felony or misdemeanour against French diplomatic or consular agents or premises or against French state⁹⁶⁶.

[454] French jurisdictions have competence in relation to felonies and misdemeanours committed on board or against aircraft not registered in France or against persons on board, where the perpetrator or victim is a French national, where the aircraft lands in France after the commission of the felony or misdemeanour, and where the aircraft was leased without crew to a natural or legal

⁹⁵⁷ Art. 113-6 Criminal Code.

⁹⁵⁸ Art. 113-9 Criminal Code.

⁹⁵⁹ Art. 113-7 Criminal Code.

⁹⁶⁰ Art. 113-8 Criminal Code. Court of cassation, Criminal chamber, 4 January 1996, Bulletin No. 4.

⁹⁶¹ Court of cassation, Criminal chamber, 12 November 1997, Bulletin No. 383.

⁹⁶² Art. 113-9 Criminal Code.

⁹⁶³ Art. 113-8-1 Criminal Code.

⁹⁶⁴ Book IV, Title I Criminal Code; e.g. treason.

⁹⁶⁵ Art. 442-1, 443-1 and 444-1 Criminal Code.

⁹⁶⁶ Art. 113-10 Criminal Code.

person whose main place of business, or failing this, whose permanent residence is on French territory.⁹⁶⁷

[455] French criminal law is applicable to offences committed beyond territorial waters, when international conventions and the law provide for this.⁹⁶⁸

[456] French criminal law is applicable to felonies and misdemeanours qualified as terrorist acts committed abroad by a French citizen or person habitually resident in the French territory.⁹⁶⁹

[457] French jurisdictions are competent in relation to offences committed abroad by a foreigner, when the facts of that offence are inseparable from other facts submitted before the French judge and committed in France by a foreigner^{970,971}.

B. Universal Criminal Jurisdiction

[458] In applying the principle of universal competence, French jurisdictions have competence for judging, if he/she is in France, a person guilty of committing certain types of felonies, misdemeanours or for attempting to commit them, outside the territory of the Republic, when international conventions listed in the Code of Criminal Procedure provide for it.⁹⁷²

[459] Although there is no international convention specifically dealing with company liability for human rights violations, among the international conventions providing universal competence⁹⁷³, the following conventions can be relevant for the present study:

- the Convention against torture and other cruel, inhuman or degrading treatment or punishment, adopted in New York on 10th December 1984, provides so for torture;⁹⁷⁴
- the Convention of the physical protection of nuclear material, open for signature in Vienna and New York on 3 March 1980, provides so for the possession, transfer, use or transportation outside the territory of the Republic, of nuclear material without any authorization from the competent foreign authorities⁹⁷⁵, unlawful appropriation of nuclear material⁹⁷⁶, intentional

⁹⁶⁷ Art. 113-11 Criminal Code.

⁹⁶⁸ Art. 113-12 Criminal Code.

⁹⁶⁹ Art. 113-13 Criminal Code.,

⁹⁷⁰ Court of cassation, Criminal chamber, 20 February 1990, Bulletin No. 84.

⁹⁷¹ GUINCHARD & BUISSON, N 1298, 299.

⁹⁷² Code of Criminal Procedure, Art. 689-1. Translations of the Code of Criminal Procedure's provisions used in the following paragraphs are mostly from J. R. Spencer *et al.*, translation of the Code of Criminal Procedure from French to English, last amendment translated in 2005, available at https://www.legifrance.gouv.fr/content/download/1958/13719/version/3/file/Code_34.pdf (accessed on 20.6.2016). The latter translation is not binding and not up to date.

⁹⁷³ Other international conventions' provisions providing universal competences to French jurisdictions can be found in Arts. 689-3, 689-5, 689-6, 689-7, 689-9, 689-10 of the Code of Criminal Procedure, in Loi n° 95-1 du 2 janvier 1995 portant adaptation de la législation française aux dispositions de la résolution 827 du Conseil de sécurité des Nations Unies instituant un tribunal international en vue de juger les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991, Art. 2-3 in Loi n° 96-432 du 22 mai 1996 portant adaptation de la législation française aux dispositions de la résolution 955 du Conseil de sécurité des Nations unies instituant un tribunal international en vue de juger les personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis en 1994 sur le territoire du Rwanda et, s'agissant des citoyens rwandais, sur le territoire d'Etats voisins.

⁹⁷⁴ Art. 689-2 Code of Criminal Procedure.

⁹⁷⁵ Art. L. 1333-11 Code of the defense.

⁹⁷⁶ Art. L. 1333-9 Code of the defense.

- assault against the life or physical integrity of a person, theft, extortion, blackmail, embezzlement, breach of trust, receiving stolen goods, destruction, defacement or damage or threat to commit an offence against persons or property, where the offence was committed with the use of nuclear materials or was committed in relation to these substances.⁹⁷⁷
- the Protocol to the Convention on the protection of the communities' financial interests, made in Dublin on 27 September 1996, and Protocol to the Convention on the fight against corruption involving officials of the European communities or officials of member states of the European Union, made in Brussels on 26 May 1997, provide so for corruption of civil servants of the European Community or affecting the European communities.⁹⁷⁸

2.1.2. Possibility to Prosecute Companies

[460] Since 31 December 2005⁹⁷⁹, criminal liability of legal persons has no longer been limited to criminal offences specifically providing for it. From this time, legal persons have been able to be prosecuted and convicted for any penal offence.^{980 981}

A. Conditions

[461] The Law of 9 March 2004⁹⁸², known as *Loi Perben II*, put an end to the need for specific provisions to impose criminal liability on legal persons.⁹⁸³ Criminal liability of a legal person is no longer limited to offences that specifically provide for the liability of legal persons. Since 31 December 2005, the date of the entry into force of the Law of 9 March 2004, a legal person can be prosecuted and convicted for any offence⁹⁸⁴ capable of being prosecuted by law.

[462] Art. 121-2 of the Criminal Code states that legal persons, except the state, are criminally responsible for the offences committed for their interest, by their organs or representatives.

[463] A legal person can be prosecuted for completed and attempted offences. A legal person can be a perpetrator or accomplice, whether by providing help, assistance or incitement. In short, legal persons are treated as natural persons.⁹⁸⁵

⁹⁷⁷ Art. 689-4 Code of Criminal Procedure.

⁹⁷⁸ Art. 689-8 Code of Criminal Procedure.

⁹⁷⁹ Art. 54 of Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité, initial version available (only in French) at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000249995&categorieLien=id> (accessed on 13.6.2016).

⁹⁸⁰ GUINCHARD & BUISSON, Procédure pénale, N 1262.

⁹⁸¹ Company criminal law exists (Commercial Code, legislative and regulatory parts, Books II Commercial companies, including partnerships and economic interest groupings, Titles IV Penal provisions). However, the sanctions it prevails punish violations of the constitution and functioning company rules. Thus, they are not relevant to the present study focusing on Human rights.

⁹⁸² Art. 54 of Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité.

⁹⁸³ For a presentation of the reasons of the generalisation of legal persons' criminal liability in France, see BERNARDINI, pp. 506 et seq.

⁹⁸⁴ Even so, Art. 55 of the Law of 9 March 2004 provides for an exception: Art. 121-2 of the Criminal Code is not applicable to a few offences (Art. 42 and 43 of the Law of 29 July 1881 on the liberty of the press and Art. 93-3 of the Law No. 82-652 of 29 July 1982) in the field of written and audiovisual press, mainly dealing with misdemeanours of incitation, defamation or public insult committed through written or audiovisual press.

⁹⁸⁵ BOULOC, Droit pénal, N 328.

[464] As already mentioned, an exception is provided by the aforementioned Art. 121-2 of the Criminal Code in its first paragraph: the state is excluded. According to the second paragraph of Art. 121-2 of the Criminal Code, local authorities (e.g. regions, departments and municipalities) are not excluded, but their criminal liability can be imposed only in relation to offences committed in the exercise of activities which can be delegated to other persons; that is to say activities which are not prerogatives of public power.⁹⁸⁶

[465] Any other legal person, of public or private law, can be prosecuted and convicted, no matter what their legal structure is, with or without a profit-making aim, as long as they have a legal personality.⁹⁸⁷

[466] Groups which have no legal personality cannot be prosecuted and so are not criminally liable. Thus, groups of companies, *de facto* companies⁹⁸⁸ and joint ventures (undclared partnerships provided for in Art. 1871 to 1873 of the Civil Code) are not criminally liable.⁹⁸⁹ However, according to a Law of 2010⁹⁹⁰ (although it is only applicable to environmental issues in France), parent companies are liable for the environmental debt of their insolvable subsidiaries which operate classified installations.⁹⁹¹

[467] At the time of the creation of a company, i.e. before a company registration to the Companies Register or before an association declaration to the Prefecture, the legal person does not legally exist. Therefore, only the founders are criminally liable.

[468] In the case of dissolution of a legal person, the legal person stays liable for the acts committed during the liquidation period.⁹⁹² However, at the moment the judicial dissolution is pronounced, the liquidation procedures are brought to an end by a judicial decision, and the legal person is dissolved. No prosecutions, in particular criminal prosecutions, can be initiated against this legal person, which no longer has legal personality.⁹⁹³

[469] In the case of dissolution without liquidation (e.g. merger or split), the new legal person is not criminally liable for the offences committed by the absorbed or merged legal person.⁹⁹⁴

[470] Nevertheless, the transformation of a legal person, for example, the transformation of a private limited company into a public limited company or the amendment of its status, does make its criminal liability cease⁹⁹⁵, because it is the same legal person.⁹⁹⁶

⁹⁸⁶ BOULOC, Droit pénal, N 329; GUINCHARD & BUISSON, N 1265. For further information about criminal liability of public law legal persons, see BERNARDINI, pp. 523-527; H. MATSOPOULOU, , N 12-18.

⁹⁸⁷ BOULOC, Droit pénal général, N 329; GUINCHARD & BUISSON, N 1264.

⁹⁸⁸ Even so, *de facto* companies, lawfully registered and having a legal personality, but which have been annulled by the judge are criminally liable, because the annulation has no retroactive effect (Art. 1844-15 Civil Code).

⁹⁸⁹ BERNARDINI, p. 521.

⁹⁹⁰ Loi n. 2010-788 du 12 juillet 2010 portant engagement national pour l'environnement.

⁹⁹¹ Commission nationale consultative des droits de l'homme, Entreprises et droits de l'homme, N 50; Art. L-512-17.

⁹⁹² Art. 1844-8 para. 3 Civil Code.

⁹⁹³ BERNARDINI,pp. 521-522.

⁹⁹⁴ BERNARDINI, p. 522.

⁹⁹⁵ Art. 1844-3 Civil Code.

⁹⁹⁶ BERNARDINI, p. 522.

[471] As a consequence of the principle of territoriality (explained above para. [445]), alien legal persons that have committed an offence in France, can be convicted⁹⁹⁷ in French jurisdictions.

[472] Likewise, a French legal person committing an offence abroad can be prosecuted and convicted in France, according to the rules presented in the above para. [445].

[473] The fundamental criminal principle providing that the liability must be specific to the offender⁹⁹⁸ has the effect of preventing prosecution and conviction of parent companies for offences committed by their subsidiaries. However, when a subsidiary has no decision power and has only acted on the instructions of its parent company, the parent company can be held liable for the acts of its subsidiary. In the Erika case of 2012⁹⁹⁹, the Court of cassation found that parent company, Total, had effective and full control over its alien subsidiary. The Court found the parent company liable for the acts of its subsidiary. Thus, prosecution and conviction of the French parent company by the French jurisdiction was allowed.¹⁰⁰⁰

[474] Another condition is necessary to prosecute and convict a company. Art. 121-2 of the Criminal Code states that legal persons are criminally liable for offences committed on their account by their organs or representatives. Thus, “on their account” means that the facts have to be committed in the interest or for the benefits of the legal person in order that liability is imposed on the legal person. Then, a *contrario*, if the facts are committed in the interest of the company’s director for example, the legal person is not liable. Moreover, the facts have to be committed by the legal persons’ “organs or representatives”. The “organs” are the legal representatives (president, manager, etc.) and the board of directors, the general assembly (of associates or members). The “representatives” are the natural persons who have the power, by virtue of law or the statutes, to act in the name of the legal person (e.g. the unique chief executive officer, the manager, the chairperson of the management board, the director general, the provisional administrator, the receiver). Without a provision about *de facto* organs, the latter could not impose liability on the legal person; however, the doctrine is not uniform on this issue.¹⁰⁰¹ Thus, a *contrario*, employees cannot be held liable for the acts of the legal person. Nevertheless, the Court of cassation has considered that natural persons who have received a delegation of power from legal persons’ organs are representatives.¹⁰⁰² In order to be held liable, it has to be proved that the organ or the representative has either consciously committed the offence, or had not complied with a legal or regulatory obligation, or has committed a deliberate fault.¹⁰⁰³

⁹⁹⁷ See: Cour de cassation, Criminal chamber, 1 March 2000, Bulletin des arrêts de la chambre criminelle No. 101 ; Court of Appeal of Paris, 30 March 2010 (*Erika case*). MATSOPOULOU, N 25.

⁹⁹⁸ Art. 121-1 Criminal Code.

⁹⁹⁹ Court of cassation, Criminal chamber, decision No. 3439 of 25 September 2012, available (in French only) at: https://www.courdecassation.fr/IMG///Crim_arret3439_20120925.pdf (accessed on 20.6.2016).

¹⁰⁰⁰ See e.g. OUASSINI SAHLI, pp. 341-342, available (only in French) at : <https://tel.archives-ouvertes.fr/tel-01249559/document> (accessed on 20.6.2016); Commission nationale consultative des droits de l’homme, Entreprises et droits de l’homme, N 48.

¹⁰⁰¹ See BOULOC, Droit pénal, N 331 and BERNARDINI, N 666.

¹⁰⁰² Court of cassation, Criminal chamber, 14 December 1999, Bulletin No. 252; 26 June 2001, Bulletin No. 161 ; 11 December 2012, Bulletin No. 274; 25 March 1994, Bulletin No. 94.

¹⁰⁰³ BOULOC, Droit pénal, N 331-332. See also BERNARDINI, N 666-673.

B. Sanctions

[475] The Criminal Code contains specific provisions concerning sanctions application to legal persons.¹⁰⁰⁴ It distinguishes between sanctions applicable to felonies and misdemeanours and sanctions applicable to contraventions.¹⁰⁰⁵ Only the former will be presented here, because the contraventions concern offences of lesser gravity and thus are not usually designed to protect Human rights.

[476] Art. 131-37 of the Criminal Code establishes that a fine is the main sentence for the felonies and misdemeanours of a legal person. A fine can be up to five times the fine imposed on natural persons for the same offence.¹⁰⁰⁶ For felonies not punished by a fine for natural persons, a legal person can be punished with a fine of up to 1'000'000 EUR.¹⁰⁰⁷

[477] Moreover, when the law expressly provides, other sentences can be pronounced against legal persons for felonies or misdemeanours. Those sentences are:

- dissolution, where the legal person was created or, where the felony or misdemeanour is one which carries a sentence of imprisonment of three years or more, where it was diverted from its objects in order to commit them;
- prohibition to exercise, directly or indirectly one or more social or professional activity, either permanently or for a maximum period of five years;
- placement under judicial supervision for a maximum period of five years;
- permanent closure or closure for up to five years of the establishment, or one or more of the establishments, of the enterprise that was used to commit the offences in question;
- disqualification from public tenders, either permanently or for a maximum period of five years;
- prohibition, either permanently or for a maximum period of five years, from making a public appeal for financial securities or from seeking to admit these financial securities for trading on a regulated market;
- prohibition to draw cheques, except those allowing the withdrawal of funds by the drawer from the drawee or certified cheques, and the prohibition to use payment cards, for a maximum period of five years;
- confiscation of the thing which was used or intended for the commission of the offence, or of the thing which is the product of it;¹⁰⁰⁸
- posting a public notice of the decision or disseminating the decision in the written press or using any form of communication to the public by electronic means;
- confiscation of the animal which was used for the commission of the offence or against which the offence has been committed;
- prohibition to possess an animal, either permanently or for a maximum period of five years;

¹⁰⁰⁴ Art. 131-37 to 131-49 Criminal Code.

¹⁰⁰⁵ For further information about contraventions for legal persons, see e.g. BOULOC, Procédure pénale, N 582-585 and BERNARDINI, N 676.

¹⁰⁰⁶ Art. 131-38 para 1 Criminal Code.,

¹⁰⁰⁷ Art. 131-38 para. 2 Criminal Code.

¹⁰⁰⁸ The terms of the confiscation are provided for by Art. 131-21 Criminal Code.

- prohibition to receive any public aid from the state, territorial collectivities, their establishments or their groups, and any financial aid from a private person in charge of a public service mission.¹⁰⁰⁹

[478] Even when the law does not expressly provide, the confiscation can be made as an addition to the principal penalty either the offence is a felony or is a misdemeanour punishable by a prison sentence of more than one year (except for press offences).¹⁰¹⁰

[479] The dissolution, prohibition from exercising social or professional activities and placement under judicial supervision are not applicable to public law legal persons, or to political parties or groups, or to professional syndicates. The dissolution is also not applicable to employee representative bodies.¹⁰¹¹

[480] For misdemeanours punished by a prison sentence for natural persons (transformed into a fine, for legal persons), the judge can hand down, either in addition to, or instead of a fine, a sentence of punishment-redress (*sanction-réparation*). The same also applies to misdemeanours punished with a fine as only primary penalty for natural persons. The punishment-redress refers to the obligation to compensate for the damage suffered by the victim. If the victim and the defendant agree, the redress can be in-kind. If there is a punishment-redress, the fine cannot exceed 75'000 EUR or the fine applicable to the legal person for the offence.¹⁰¹²

[481] It has to be underlined that, in French criminal law, penalties have to be personalized. Indeed, Art. 132-24 of the Criminal Code states that the judge must take into account the circumstances of the offence and the personality of the offender, on the one hand, and the effective protection of the society and the victims' interests, on the other. Thus, the above-mentioned fine amounts are only maximums and can be reduced by the judge.

C. Representatives of the Company

[482] Even if Art. 706-43 of the Code of criminal procedure provides that criminal proceedings are in principle initiated against the legal person via its legal representative at the time of the prosecution, Art. 706-44 of the Code of criminal procedure states that the representative to the legal person prosecuted may not be subjected, in this capacity, to any coercive measure other than those applicable to witnesses.¹⁰¹³ Indeed, the representative is not the subject of the proceedings. The legal person is only represented by him/her and stays the sole defendant. The representative cannot be punished in the place of the legal person.

[483] It has to be mentioned that Art. 121-2 of the Criminal Code in its last paragraph states that the criminal liability of legal persons does not exclude that of any natural person who is perpetrator or accomplice to the same act.¹⁰¹⁴ It has to be distinguished between facts committed by organs or representatives of the legal person on the legal person's behalf and the facts committed by a natural person, attributable to their personal capacity.¹⁰¹⁵ For the former, the legal person is liable, while for the latter, it is the natural person. A natural person cannot be prosecuted or convicted for facts

¹⁰⁰⁹ Art. 131-39 paras. 1, 1° to 12° Criminal Code.

¹⁰¹⁰ Art. 131-39 para. 2 Criminal Code.

¹⁰¹¹ Art. 131-39, para. 3 Criminal Code.

¹⁰¹² See BOULOC, Droit pénal, N 578-581 and BERNARDINI, N 675.

¹⁰¹³ See BOULOC, Droit pénal, N 335.

¹⁰¹⁴ See BOULOC, Droit pénal, N 336.

¹⁰¹⁵ GUINCHARD & BUISSON, N 1266, fn. 265.

committed on the legal person's behalf. However, a representative can be prosecuted for the same actions as the legal person or for connected offences.¹⁰¹⁶ The legal person's liability can be held concurrently with a natural person's liability and in particular its representatives' liability. They can be accomplices or co-authors.¹⁰¹⁷

[484] To conclude, a representative cannot be prosecuted or convicted for acts he/she did not commit personally but which were committed by the company.

2.1.3. Victim's Participation and Rights in Criminal Proceedings

[485] The victim of an offence, who personally suffered from the damage directly caused by the offence, has, according to Art. 1 para. 2 as well as to Art. 2 and 3 of the Code of Criminal procedure, the right to appear before the criminal judge. The victim becomes a civil party to the criminal proceeding (*partie civile au procès pénal*).

[2] Originally limited to direct victims of the damage caused by an offence, case law gradually opened the compensation to indirect victims (*victimes par ricochet*).¹⁰¹⁸ ¹⁰¹⁹ Thus, the victim's relatives can prove they personally suffered in relation to the act being considered by the proceedings; e.g., suffering caused by the sight of the victim's pains.

[486] The civil party participates in the public proceedings and can obtain compensation for all his/her injury caused by the offence, material, physical or moral. However, a condemnation for the offence does not necessarily mean that the victim will receive compensation; and the non-condemnation does not necessarily mean that the victim will not receive compensation.

[487] If the public proceedings have not yet begun, the victim acts by way of action (*voie d'action*), which has the effect of starting the public proceedings. If, to the contrary, public proceedings have already begun, the victim acts by way of intervention (*voie d'intervention*), which enables him/her to be associated to the proceedings.

[488] To become a civil party through the *voie d'action*, the victim has to request it in a written form. Before the examining magistrate, no other formal condition is required. If the civil party goes directly before the trial court (*citation directe*¹⁰²⁰), a few formal conditions are requested in Art. 550 of the Code of criminal procedure, e.g. to specify the facts and the legal provision which forbids them. Before the examining magistrate, the *Tribunal correctionnel* (tribunal competent for misdemeanours) or the *Tribunal de police* (tribunal competent for 5th class contraventions), the victim has to make a payment on account, in case he/she has to pay a fine if the case is dismissed or if the defendant is discharged.

[489] To become a civil party through the *voie d'intervention*, the victim can either express his/her will orally or in written form. During the investigation, the intervention can occur at any time.¹⁰²¹

¹⁰¹⁶ Situation also intended at Art. 706-43 para.1 Code of Criminal Procedure.

¹⁰¹⁷ BERNARDINI, N 674.

¹⁰¹⁸ For a presentation of the gradual evolution of case law toward compensation of indirect victims in criminal proceedings, see GUINCHARD & BUISSON, N 1220-1226.

¹⁰¹⁹ Indirect victim, like direct victim, needs to become civil party to the criminal proceeding to get compensation.

¹⁰²⁰ Possible for misdemeanours and contravention.

¹⁰²¹ Art. 87 para. 1 Code of Criminal Procedure.

Once the trial court is seized, the intervention has to be made before the public prosecutor's request on the substance (or on the sentence if the court defers sentencing).¹⁰²²

[490] Among the victim's rights in criminal proceedings¹⁰²³ are, for example:

- the right to ask for a jurisdiction to be discharged for legitimate suspicion¹⁰²⁴ or a magistrate to be recused;¹⁰²⁵
- the right to a lawyer;¹⁰²⁶
- the right to have his/her lawyer present during visits to places, hearing of a witness or another civil party or an interrogation of the person under judicial examination which may have been asked by the victim;¹⁰²⁷
- the right to access the procedure file;¹⁰²⁸
- during the investigation, the right to ask for any step to be taken which seems necessary for the discovery of the truth;¹⁰²⁹
- before the trial court, the right to participate (e.g. to call witnesses, to file written submissions)^{1030, 1031}

[491] Our research did not lead to the finding of special rules concerning victims' participation and rights in criminal proceedings in the field of business and human rights.

2.1.4. Measures to Enable and Facilitate Prosecutions

[492] While recent legislation has introduced a duty of vigilance for parent companies and contracting companies, in order to strengthen the protection of human rights abroad in particular (see below, 2.3.2.)¹⁰³², an earlier legislative draft had proposed introducing new provisions in particular in the Criminal Code, establishing liability for violations of a duty of vigilance.¹⁰³³ Criticized for its lack of precision, the proposal was transferred to the parliamentary commission on constitutional affairs (*commission des lois constitutionnelles, de la législation et de l'administration*

¹⁰²² Art. 421 Code of Criminal Procedure.

¹⁰²³ To be entitled to these rights, the victim need to participate to the criminal proceeding as a civil party.

¹⁰²⁴ Art. 662 Code of Criminal Procedure.

¹⁰²⁵ Art. 668 Code of Criminal Procedure.

¹⁰²⁶ Art. 114 Code of Criminal Procedure.

¹⁰²⁷ Art. 82-2 Code of Criminal Procedure.

¹⁰²⁸ Art. 114, 279, 284 and R. 155 Code of Criminal Procedure.

¹⁰²⁹ Art. 82-1 Code of Criminal Procedure.

¹⁰³⁰ See Art. 281, 312, 315, 329, 330, 435, 444, 454, 456, 459 Code of Criminal Procedure.

¹⁰³¹ AGOSTINI. For further information about victims' rights in criminal proceedings, see BOULOC, Procédure pénale, p. 209-350.

¹⁰³² Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, Journal Officiel, 28.03.2017.

¹⁰³³ Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, n°1519, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1519.asp> (27.07.2016); Art. 3 proposed adding the violation of a duty of vigilance to the provision that describes the possibility for liability for negligence in criminal law (Art. 121-3 Criminal Code): „Il y a également délit, lorsque la loi le prévoit, en cas de faute d'imprudence, de négligence ou de manquement à une obligation de prudence ou de sécurité [proposal: de prudence, de sécurité ou de vigilance] prévue par la loi ou le règlement, s'il est établi que l'auteur des faits n'a pas accompli les diligences normales compte tenu, le cas échéant, de la nature de ses missions ou de ses fonctions, de ses compétences ainsi que du pouvoir et des moyens dont il disposait.“

générale de la République) and has not been taken up within the debate on the recent legislation mentioned above.¹⁰³⁴

¹⁰³⁴ A follow-up of the legislative procedure is provided (only in French) at: http://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_donneurs_ordre_soceties_meres.asp (accessed on 27.07.2016).

2.2. Private International Law and International Civil Procedure

2.2.1. Jurisdiction in the State of Nationality

[493] As a European Union member state, France is legally bound by the European conflict-of-laws regulations, and in particular by the Regulation n. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters¹⁰³⁵ (hereinafter Brussels I (recast) Regulation). The latter provides special provisions on the ground of international jurisdiction. It is applicable in civil and commercial matters, which do not deal with revenue, customs or administrative matters or the liability of the state for acts and omissions in the exercise of state authority.¹⁰³⁶ It allows the courts of European Union member states to assert jurisdiction over cases against corporations which have their statutory seat, central administration or principal place of business in the European Union,¹⁰³⁷ for damages sustained in third countries.¹⁰³⁸ Therefore, victims of acts or omissions carried out by a European business company may sue such company in Europe, regardless where the plaintiff is domiciled.¹⁰³⁹

[494] The aforementioned Brussels I (recast) Regulation, in its Art. 62 para. 1, states that "in order to determine whether a party is domiciled in [a] Member State whose courts are seised of a matter, the court shall apply its internal law". Art. 63 of the Brussels I (recast) Regulation specifies that, as far as companies are concerned, the domicile is the statutory seat, the central administration, or the principal place of business. The Brussels I (recast) Regulation does not state a hierarchy between these three criteria. Art. 63 lets the choice open.

[495] The three European criteria to qualify the domicile of a company (i.e. statutory seat, central administration or principal place of business) correspond to criteria used by French jurisdictions, even before the Brussels I (recast) Regulation's entry into force. Nevertheless, French case law does not let the choice to the parties between those criteria. There are exclusively valued by the judge to decide if French jurisdictions are competent. Our research within French case law did not lead to the identification of a change after the entry into force of the Brussels I (recast) Regulation. However, a combined reading of Art. 62 para. 1 and Art. 63 of the Brussels I (recast) Regulation is, according to our interpretation, compatible with French case law.

[496] Regarding defendant legal persons, Art. 43 of the French Code of Civil Procedure focuses on the place where a legal person defendant is *established* to determine whether a jurisdiction is

¹⁰³⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial cases (Brussels I (recast) Regulation, Official Journal of the European Union L 351/1).

¹⁰³⁶ Art. 1 para.1 of the Brussels I (recast) Regulation. The Brussels I (recast) Regulation abrogated the Council regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012. The latter already permitted victims of acts carried out by a business company to sue this company in the country of its nationality: "courts of European Union member states are competent to adjudicate civil proceedings against corporations based in the European Union for acts which have taken place outside the European Union even if the damage occurred outside the European Union and the victim is not domiciled in the European Union"; source: WOUTERS & CHANET, pp. 262 *et seq.*, p. 295.

¹⁰³⁷ Art. 63 Brussels I (recast) Regulation.

¹⁰³⁸ GEORGE, pp. 253 *et seq.*, 282.

¹⁰³⁹ ECJ, 13 July 2000, *Group Josi*, ECLI:EU:C:2000:399, para. 57.

competent. To apply this criterion to companies, French case law developed the following examination mechanism. In principle, a company is established where its real seat is situated. The real seat is defined as the place from where the company is effectively managed. It is presumed to be the seat stated in the company's status.¹⁰⁴⁰ Nevertheless, this is only a presumption; it can be demonstrated that the company is managed from another place than the place of the statutory seat;¹⁰⁴¹ and the applicant is able to sue the company in France if it is the place where its real seat is.¹⁰⁴² When the real seat does not correspond to the statutory seat, the French case law uses various complementary criteria to find out where the real seat is. The doctrine identifies the *control criteria* as the principal complementary criteria used. According to our interpretation, it corresponds to the European Regulation n. 1215/2012 criteria of central administration. The doctrine also identifies the *criteria of place where the principal activity is*; but this complementary criterion is used less often.¹⁰⁴³ According to our interpretation, it corresponds to the European Regulation n. 1215/2012 criteria of principal place of business.

2.2.2. Jurisdiction to Sue the Parent Company

[497] In principle, as a parent company and its subsidiary are separate legal entities, the parent company cannot be sued for act or omission carried out by its subsidiary.

[498] Nevertheless, two exceptions to this principle are conceivable:

- the parent company established in France and its foreign subsidiary committed related acts or omissions causing the damage (*connexité*) and they are both defendants;
- the damage resulting from act or omission of a foreign subsidiary is caused by the parent company established in France.

[499] Concerning the first exception, i.e. where the parent company established in France and its foreign subsidiary are both defendants and their acts or omissions causing a damage are related, the victim can sue both legal entities before the same jurisdiction, and in particular before French jurisdiction.

[500] Concerning the legal basis of such a possibility opened to the victim, two different hypothesis have to be distinguished:

- the subsidiary is established in a state outside the European Union;
- the subsidiary is established in a member state of the European Union.

[501] In the first hypothesis (i.e. the subsidiary of a parent company established in France is established in a country not member of the European Union), French national rules are applicable.

[502] Art. 42 para. 2 of the Code of Civil Procedure states that if there are several defendants, the plaintiff may, at his choosing, bring his case before the court of the place where one of them

¹⁰⁴⁰ Court of cassation, Plenary assembly, 21.12.1990, No. 88-15744, Bulletin, available (only in French) at : <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007025796&fastReqId=1839447452&fastPos=1> (accessed on 11.07.2016).

¹⁰⁴¹ SYNVET, N 194.

¹⁰⁴² Art. L. 210-3 para. 2 (real seat) Commercial Code, and Art. 14 (foreign defendant) Civil Code.

¹⁰⁴³ See MENJUCQ, N 24.

lives.¹⁰⁴⁴ This provision is not constrained to national application and is also used for international litigation.¹⁰⁴⁵

[503] Thus, a victim can sue, before a French jurisdiction, the parent company and its subsidiary, if he/she succeeds to demonstrate the act or omission of the subsidiary causing the damage is related to act or omission of the parent company (*connexité*).¹⁰⁴⁶ It is of no consequence that among defendants there is a company which have its seat abroad.¹⁰⁴⁷

[504] A provision giving the competence to a foreign (extra-communitarian) jurisdiction does not prevent Art. 42 para. 2 from being implemented.¹⁰⁴⁸ Indeed, Art. 48 *in limine* of the Code of Civil Procedure provides that any clause that departs, directly or indirectly, from the rules of territorial jurisdiction will be deemed non-existent. Thus, a combined reading of Art. 42 and 48 of the Code of Civil Procedure leads to states that a victim can sue all the defendant before the court of the place where one of them is established, despite the existence of a clause attributing the competence to a foreign jurisdiction; it suffices that the requests against all the defendants are indivisible.

[505] Our research within French case law did not lead to the identification of decisions using Art. 42 para. 2 of the Code of Civil Procedure to enable a victim to sue in France a parent company established in France and its foreign subsidiary for related acts or omissions in Business and Human rights matters.

[506] In the second hypothesis (i.e. the subsidiary of a parent company established in France is established in a member state of the European Union), European Union law is applicable, and in particular the Brussels I (recast) Regulation. Indeed, Art. 8 (1) of the Brussels I (recast) Regulation states that “a person domiciled in a Member States may also be sued, where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”. The Court of Justice of the European Union interpreted this provision (respectively the identical provision in Art. 6 (1) of the Brussels I Regulation) as “meaning that it is not intended to apply to defendants who are not domiciled in another Member State, in the case where they are sued in proceedings brought against several defendants, some of who are also persons domiciled in the European Union”.¹⁰⁴⁹

¹⁰⁴⁴ Translations of the Code of civil procedure's provisions used in the following paragraphs are mostly from Y.-A. Tsegaye (*et al.*), translation of the Code of civil procedure from French to English, last amendment translated in 2005, available at: https://www.legifrance.gouv.fr/content/download/1962/13735/version/3/file/Code_39.pdf (accessed on 12.07.2016). The latter translation is not binding and not up to date.

¹⁰⁴⁵ DORANGE, Art. 42. See Court of cassation, Civil chamber I, 06.12.1989, No. 87-11747, and 24.02.1998, No. 95-20627, available (only in French) at: www.dalloz.fr (accessed on 12.07.2016).

¹⁰⁴⁶ DORANGE, Art. 42, 2. c).

¹⁰⁴⁷ Court of cassation, Civil chamber I, 10.03.1982, No. 81-10865, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007009182&fastReqId=652573214&fastPos=1> (accessed on 12.07.2016).

¹⁰⁴⁸ Court of cassation, Commercial chamber, 02.01.1968, No. 66-11740, Bulletin civil IV, No. 1.

¹⁰⁴⁹ ECJ, 11 April 2013, *Sapir and Others*, ECLI:EU:C:2013:228, reference for a preliminary ruling: *Bundesgerichtshof – Germany*, Art. 1(1) and 6.1 Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012.

[507] Concerning the second exception, i.e. where a damage resulting from act or omission of a foreign subsidiary is caused by the parent company established in France, the plaintiff may bring the case before the court of the place of the event causing liability, i.e. before the French jurisdiction.

[508] Concerning the legal basis of such a possibility opened to the victim, here also, two different hypothesis have to be distinguished:

- the subsidiary is established in a state outside the European Union;
- the subsidiary is established in a member state of the European Union.

[509] In the first hypothesis (i.e. the subsidiary of a parent company established in France is established in a country not member of the European Union), French national rules are applicable.

[510] Indeed, Art. 46 of the Code of Civil Procedure offers a second way to sue a parent company for acts or omissions carried out by its subsidiary established outside the European Union. It states that, in tort matters, the plaintiff may bring his/her case, at his/her choosing, besides the court of the place where the defendant lives, before the court of the place of the event causing liability or the one in whose district the damage was suffered. The second option, i.e. the place of the event causing liability, enables a victim of an act or omission of a foreign subsidiary to sue its French parent company in France, if it can be demonstrated that the act or omission is caused by the parent company. The implementation of this provision asks to resolve the issue of separate legal entities which the parent company and its subsidiary constitute and the piercing of what is known as the ‘corporate veil’.¹⁰⁵⁰

[511] Our research within French case law did not lead to the identification of decisions using Art. 46 of the Code of Civil Procedure to enable a victim to sue in France the parent company established in France for act or omission it caused through its subsidiary in Business and Human rights matters.

[512] In the second hypothesis (i.e. the subsidiary of a parent company established in France is established in a member state of the European Union), European Union law is applicable, and in particular the Brussels I (recast) Regulation.¹⁰⁵¹ Art. 7 (2) of the Brussels I (recast) Regulation states that “A person domiciled in a Member State may, in another Member State, be sued [...], in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”. The Court of justice of the European Union interpreted the expression “place where the harmful event occurred” as “being intended to cover both the place where the damage occurred and the place of the event giving rise to it”, “where the place of the happening of the event which may give rise to liability in tort, delict or quasidelict and the place where that event results in damage are not identical”. And the Court of Justice concluded that “the result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage”.¹⁰⁵² Similarly as it has been explained above concerning French national rule, the second option, i.e. the courts for the place of the event which gives rise to and is at the origin of

¹⁰⁵⁰ Being a substantive legal issue, this section on procedural law does not deal with it. See 2.3.2 below on liability of the company for tortious acts of its subsidiaries.

¹⁰⁵¹ Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012.

¹⁰⁵² ECJ, 30 November 1976, *Handelskwekerij Bier v Mines de Potasse d'Alsace*, ECLI:EU:C:1976:166, reference for a preliminary ruling: *Gerechtshof of the Hague*, Art. 5(3) Convention on jurisdiction and the enforcement of judgment.

that damage, enables a victim of an act or omission of a foreign subsidiary to sue its French parent company in France, if it can be demonstrated that the act or omission is caused by the parent company. Here as well, the implementation of this provision asks to resolve the issue of separate legal entities which the parent company and its subsidiary constitute and the piercing of what is known as the ‘corporate veil’.¹⁰⁵³

[513] At the same time, international conventions on environmental matters provides specific grounds of jurisdiction. While most of these conventions state defendant shall be sued in the courts for the place where the damage occurred,¹⁰⁵⁴ some state defendant shall be sued in the courts for the place where the happening of the event which may give rise to liability,¹⁰⁵⁵ and others state defendant may be sued in the courts for the places where the damage occurred, the happening of the event which may give rise to liability, the domicile, the centre of main interest, the seat or central administration of the defendant are.^{1056,1057}

2.2.3. Jurisdiction to Sue Controlling Company

[514] Solutions given above paras. [497] *et seq.* are also valid for local business companies operating under control of a company established in France, as Art. 42 para. 2 and Art. 46 of the Code of Civil Procedure and Art. 8 (1) and Art. 7 (3) of the Brussels I (recast) Regulation are not specific to subsidiaries.

[515] There are no specific rules related to jurisdiction for the situation described under French law.

2.2.4. Law Applicable to the Right to Obtain Compensation

[516] As a European Union member state, France is legally bound by the Regulation n. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (hereinafter “Rome II Regulation”). The latter states that, with regards to tort claims, the applicable law to a claim “shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred”.¹⁰⁵⁸ In particular, Art. 15 para. c) of the Rome II Regulation states that this principle governs “the existence, the nature and the assessment of damage or remedy claimed”.

[517] Art. 4 paras. 2 and 3 of the Rome II Regulation provide for exceptions to this principle, respectively if the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, and where it is clear

¹⁰⁵³ Being a substantive legal issue, this section on procedural law does not deal with it. See below 2.3.2 on liability of the company for tortious acts of its subsidiaries.

¹⁰⁵⁴ See International Convention on civil liability for oil pollution damage, 29.11.1969, being replaced by 1992 Protocol; International Convention on civil liability for bunkers oil pollution damage, 23.03.2001.

¹⁰⁵⁵ See Convention on third party liability in the field of nuclear energy, 29.07.1960; Vienna Convention on civil liability for nuclear damage, 21.05.1963; Joint Protocol relating to the application of the Vienna Convention and the Paris Convention, 21.09.1988.

¹⁰⁵⁶ See Protocol on civil liability and compensation for damage caused by the transboundary effects of industrial accidents on transboundary waters to the 1992 Convention on the protection and use of transboundary watercourses and international lakes and to the 1992 Convention on the transboundary effects of industrial accidents, 21.05.2003.

¹⁰⁵⁷ Boskovic, N 9-12.

¹⁰⁵⁸ Art. 4, para. 1 Rome II Regulation.

from all the circumstances of the case that the tort is manifestly more closely connected with another country. Then the law of that country shall apply.

[518] Art. 7 of the Rome II Regulation provides for an exception in the particular case of environmental damages. For damages occurring in this matter,¹⁰⁵⁹ the person seeking compensation can choose to base his/her claim on the law of the country in which the event giving rise the damage occurred, instead of the country in which the damage occurred.

[519] Art. 14 of the Rome II Regulation provides for a last exception giving the parties the possibility to agree to submit the litigation to the law of their choice, as far as such an agreement does not prejudice the rights of third parties, the application of provisions of the law of the country where the damage occurred, or the application of provisions of Community law which cannot be derogated from by agreement when the damage occurred in one or more of the member states.

[520] In conclusion, French judge applies the law of the country in which the damage occurred (*lex loci*). He/she does not apply his/her own law (*lex fori*), unless exceptions stated in Art. 4 paras. 2 and 3, Art. 7 and Art. 14 of the Rome II Regulation are relevant in a particular case and lead to the designation of French law as being applicable. The judge applies the law of the country designated in virtue of Art. 4 paras. 2 and 3, Art. 7 or Art. 14 of the Rome II Regulation where they are applicable.

[521] It has to be mentioned that Art. 16 and 26 of the Rome II Regulation state that provisions of the law of the judge in charge of the case shall be applicable (*lex fori*) respectively where they are mandatory and where the application of a provision of the law of a country is manifestly incompatible with the public policy (*ordre public*) of the forum.

[522] Fundamental rights are considered to be part of public policy (*ordre public*), enabling to dismiss a foreign law normally applicable as *lex loci*. In France, sources of fundamental rights are mostly in the block of constitutionality (composed of the Constitution of 1958, the Preamble of the Constitution of 1946, the Declaration of rights of Man and of the citizen of 1789 and the Charter of the environment of 2004)¹⁰⁶⁰ and international treaties protecting Human rights. In particular, the Charter of fundamental rights of the European Union is applicable when applying European Union norms in general, and the rules described above in particular.¹⁰⁶¹ The European Convention on Human rights is also a very important source of fundamental rights building the French *ordre public*, and, as provisions particularly relevant for the topic of this study, its Art. 6 on the right to a fair trial¹⁰⁶² and its Art. 14 on non-discrimination.

2.2.5. Law Applicable to the Quantum of Damages

[523] Art. 15 para. c) of the Rome II Regulation states that “the existence, the nature and the assessment of damage or remedy claimed” are assessed according to the law of the country designated in virtue of the rules described in the above para. 3.2.4. Thus, the same rules apply as to the right to obtain compensation for damages (see the above para. 3.2.4).

¹⁰⁵⁹ Art. 7 Rome II Regulation is applicable to preventive actions, actions for damages, actions for an injunction, pure ecological damages and consequential damages on person or property. Source: BOSKOVIC, N 44.

¹⁰⁶⁰ Available (only in French) at: <https://www.legifrance.gouv.fr/Droit-francais/Constitution> (accessed on 13.07.2016).

¹⁰⁶¹ BUREAU & MUIR WATT, N 620-60.

¹⁰⁶² ECJ, 28 March 2000, *Krombach*, ECLI:EU:C:2000:164.

2.3. Corporate Law and Torts

2.3.1. Liability of the Company Director

[524] Like any other person, company directors are liable for damages they cause to others. This liability can be engaged for damages caused to the company or to third persons. In principle, the director liability toward the company is based on corporate law, while toward third persons the director liability is tortious. Nevertheless, the company director being the company representative, it is only exceptionally that a third person will be able to sue the director and not the legal person.¹⁰⁶³

[525] Concerning corporate law, several provisions in the Commercial Code provides for directors liability. Nevertheless, they do not concern human rights and environment protection.

[526] For instance, the Commercial Code states that directors shall have responsibility to the company or to third parties¹⁰⁶⁴ for breaches of the legislative or regulatory provisions applicable to limited liability companies, of the status or for their errors of management.¹⁰⁶⁵ Those three grounds for liability do not include human rights.

[527] Art. L. 651-2 *in limine* of the Commercial Code provides that where the judicial liquidation proceedings of a legal entity reveals an excess of liability over assets, the court may in instances where management fault has contributed to the excess of liabilities over assets, decide that the debts of the legal entity will be borne, in whole or in part, by all or some of the *de jure* or *de facto* managers, or by some of them who have contributed to the management fault. If there are several managers, the court may, by way of a reasoned ruling, declare that they are liable in solidarity.¹⁰⁶⁶ Thus, where a company is condemned to pay compensation to victims of human rights violations and the company is under judicial liquidation proceeding and does not possess enough assets to pay, its director may have to pay, if his/her fault has contributed to the lack of assets of the company. However, in this case, the director would not be personally liable for human rights violations but for errors of management.

[528] Consequently, only tort law appears to be relevant for the human rights context of this report.

[529] Art. 1382 *et seq.* of the Civil Code¹⁰⁶⁷ give a legal basis for the director's liability. These are general provisions framing delicts and quasi-delicts. They are applicable to directors in contractual matters, that is to say issues between the director and the company or third parties, where he/she

¹⁰⁶³ Court of cassation, Social chamber, 10.5.1973, No. 71-12690, available (only in French) at:
<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000006990189&fastReqId=507636735&fastPos=1> (accessed on 19.07.2016); Court of cassation, Social chamber, 31.1.1980, No. 78-40327, available (only in French) at:
<https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007004925&fastReqId=683267519&fastPos=1> (accessed on 19.07.2016).

¹⁰⁶⁴ For the present report, third parties are intended as entities which have a contractual link with the company. They have to be distinguished here from third persons who are intended as persons with no contractual link with the company.

¹⁰⁶⁵ Art. L. 223-22 (*sociétés à responsabilité limitée*), Art. L. 225-251 (*société anonyme*) Commercial Code,.

¹⁰⁶⁶ Translations of the Commercial Code's provisions used in the following paragraphs are mostly from M. Fillastre *et al.*, translation of the Commercial Code from French to English, last amendment translated in 2013, available at:
https://www.legifrance.gouv.fr/content/download/8016/107146/version/5/file/code_commerce_part_L_EN_20130701.pdf (accessed on 19.07.2016). The latter translation is not binding and not up to date.

¹⁰⁶⁷ Art. 1382 *et seq.* Civil Code will be renumbered as of 01.10.2016 in Art. 1240 *et seq.* of the Civil Code.

committed a personal fault outside his/her representative activities,¹⁰⁶⁸ that is to say a fault exterior to contract conclusion or execution, and in tortious matters, where he/she caused a damage to a third person if he/she committed a fault separable from his/her functions and which is attributable to him/her personally.¹⁰⁶⁹ Thus, under the aforementioned Civil Code general provisions on delicts and quasi-delicts, a director of a company is not personally liable for acts committed *within* his functions.

[530] Insofar as liability for damage to third parties and persons is concerned, it is a general principle that a director cannot be personally liable for breaches in relation to third parties or persons where he/she is acting on behalf of a company. The company is a legal person; it protects the natural persons carrying on the company business from liability. Nevertheless, it is generally accepted that, where a company is held liable in application of the aforementioned general provisions of tort law, it has a right of recourse (*action récursoire*) against its employees, and in particular against its director, who committed the act causing the damage. However, while the victim sues the company on the ground of its tort liability, the company sues its director on the ground of its contractual liability.¹⁰⁷⁰ Consequently, the recourse of the company against the director is limited to company law breaches, and does not concern human rights violations.

[531] Our research did not reveal any material on director's liability for acts committed or damages caused within the exercise of his/her functions in breach of human rights in France or abroad.

2.3.2. Liability of the Company for Tortious Acts of its Subsidiaries

[532] Under current French law, a company is not, in principle, liable for tortious acts of its subsidiaries or affiliated companies, because they are separate legal entities. However, some exceptions to this principle exist.

[533] Firstly, voluntary undertakings to hold a company liable for tortious acts of its subsidiaries or an affiliated company exist. Concerning environmental damages, Art. L. 233-5-1 of the Commercial Code states that companies can voluntarily decide to bear responsibility, in the event of their subsidiaries or affiliated companies' failure, for all or part of the obligation to prevent and restore damage caused to the environment by that company. Even though no geographical limitation is provided for in this provision, our research did not lead to the finding of element enabling to exclude the hypothesis that this provision could be limited to damages suffered within the French territory. More generally, companies can undertake voluntarily to respect any rules they would define or which are recommended, in particular in human rights and environmental matters. Despite the voluntary basis of such commitments, once undertaken, companies are held tortiously liable if they do not respect their engagements.¹⁰⁷¹

¹⁰⁶⁸ See e.g. Court of appeal of Paris, Chamber I, Sec. A, 27.05.1997, S.A. *Edition Plan v X*, available (only in French) at: www.lexisnexis.com (accessed on 19.07.2016).

¹⁰⁶⁹ See e.g. Court of cassation, Commercial chamber, 18.12.2001, No. 97-22024, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007436834&fastReqId=1190607727&fastPos=1> (accessed on 19.07.2016).

¹⁰⁷⁰ Court of cassation, Civil chamber I, 20.03.1979, *Recueil Dalloz Sirey 1980* (1), Jurisprudence, p. 29, commentary of C. Larroumet.

¹⁰⁷¹ Court of cassation, Civil chamber II, 10.06.2004, No. 02-19600, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechExpJuriJudi&idTexte=JURITEXT000007046929&fastReqId=954487480&fastPos=1> (accessed on 20.07.2016).

[534] Secondly, French law provides for a parent company liability for its subsidiary where the judicial liquidation proceedings of the subsidiary reveals an excess of liability over assets. The court may in instances where parent company's fault has contributed to the excess of liabilities over assets, decide that the parent company will pay, in whole or in part, for the restoration of sites environmentally injured. Moreover, this provision enable to go up to three parent company levels above this subsidiary (the subsidiary's parent company's parent company's parent company): if the first level parent company cannot pay, and if the second level parent company committed a fault leading to the excess of liabilities over assets of the first level parent company, the second level parent company can be condemned to pay for the restoration. The same criteria apply to engage the third level parent company's liability.¹⁰⁷² However, considering the context of this report, this provision is only relevant from a practical point of view (i.e. victims' effective compensation), but not from a juridical point of view because parent companies are not personally liable for environmental law violations, but for fault leading to the excess of liabilities over assets. Moreover, only French local authorities can seize the judge; thus, according to our interpretation, this provision is only applicable to environmental damages suffered within the French territory.

[535] Our research did not lead to the finding of case law condemning a company for tortious acts of its subsidiaries or an affiliated company abroad on the ground of the aforementioned provisions.

[536] Although companies, their subsidiaries and other affiliated companies are separate legal entities each liable only for their own acts, the so called *corporate veil* segregating each of their liabilities could be pierced.

[537] For big companies, Art. L. 225-102-1 para. 5 of the Commercial Code provides for an obligation to submit reports that include all information concerning the way in which a company deals with social and environmental consequences of its activities, including consequences on climate change of its activities and of the use of goods and services it products, its societal commitments in favour of sustainable development, circular economy, fight against food waste, fight against discrimination and diversities promotion. The subsequent para. of this Art. states that information provided concerns the company itself, its subsidiaries and companies that it controls too. Even though our research did not lead to the finding of a use of this provision to argue for the piercing of the corporate veil, in our opinion it could be used as a first tool to demonstrate before a court that French legislator acknowledges the influence of companies over their subsidiaries and other affiliated companies, and, as a consequence, their potential liability for acts subsidiaries and affiliated companies committed in breach of human rights and environmental protection.

[538] In 2017, the French legislator has created a duty of vigilance for companies of a certain size¹⁰⁷³ established in France in order to strengthen the protection of human rights and the environment abroad in particular¹⁰⁷⁴. The new provisions require the companies to establish measures in order to identify risks and prevent grave violations of human rights and fundamental liberties, health and security of people and the environment resulting from the activities of the company, of companies under its controls, as well as those of its sub-contractors and suppliers

¹⁰⁷² Art. L. 512-17 Environmental Code.

¹⁰⁷³ Companies established in France with at least 5'000 employees (including in its branch offices); or companies with at least 10'000 employees established in France or abroad (assuming they would have at least a branch in France).

¹⁰⁷⁴ New articles L225-102-4, and L225-102-5 in the Commerical Code, introduced by the Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (publiée au Journal Officiel n° 0074 du 28 mars 2017)

with whom the company has an “established commercial relationship”.¹⁰⁷⁵ There are relatively detailed indications on the measures to be taken (e.g. risk-map, evaluation, actions to mitigate risks, follow-up procedures).¹⁰⁷⁶ A breach of this duty it can lead to liability on the ground of the general provisions on tort liability in the Civil Code,¹⁰⁷⁷ as far as the measures would have made it possible to avoid such damage.¹⁰⁷⁸ The parliament had intended to introduce important sanctions (a fine of up to 10 Million Euro), but the French Conseil constitutionnel (Constitutional Court) held these provisions unconstitutional and thereby prevented them from entering into force.¹⁰⁷⁹

2.4. Procedural Law

2.4.1. Statute of Limitations

[539] Different kinds of limitation periods exist¹⁰⁸⁰. Only one kind of limitation period is relevant in view of the civil claims studied for the purpose of the present study: the *délai de prescription extinctive*.

[540] This limitation period ends the right to bring a civil claim¹⁰⁸¹. The judge cannot raise it of his/her own motion¹⁰⁸². It can be interrupted and suspended¹⁰⁸³.

[541] The limitation period (*délai de prescription extinctive*) under the general law, i.e. concerning personal actions or movable rights of action, is of five years from the day the holder of a right knew or should have known the facts enabling him/her to exercise his/her right¹⁰⁸⁴. This starting point of the period lets a wide margin of appreciation to the judge¹⁰⁸⁵.

[542] Special periods of limitation are also regulated in the Civil Code, for example:

¹⁰⁷⁵ New Art. L225-102-4 Commercial Code.

¹⁰⁷⁶ New Art. L.225-102-4 para. 6 *et seq.* Commercial Code.

¹⁰⁷⁷ Concerned Civil Code general provisions on tort liability are Art. 1240 and 1241 (before 01.10.2016: Art. 1382 and 1383).

¹⁰⁷⁸ New Art. L.225-102-5 Commercial Code.

¹⁰⁷⁹ Decision 2017-750 of 23.3.2017.

¹⁰⁸⁰ Concerning the document initiating the proceedings, there are the *délai de prescription extinctive* and the *délai de forclusion*, also called *délai prefix*. Both have in common to end the right to bring a civil claim (Art. 122 and 125 Code of Civil Procedure). Délais de forclusion, which are of public order, can be raised by the judge on his/her own motion (Art. 125 Code of civil procedure), while he/she cannot do it for délais de prescription extinctive (Art. 2247 Civil Code). The délai de prescription extinctive can be interrupted and suspended, while the délai de forclusion can rarely be interrupted and suspended.

¹⁰⁸¹ Art. 122, 125 Code of Civil Procedure.

¹⁰⁸² Art. 2247 Civil Code.

¹⁰⁸³ For an explanation of the difference between a suspension and an interruption of a limitation period, see e.g. BANDRAC, N 140.21.

¹⁰⁸⁴ Art. 2224 Civil Code. Translations of the Civil Code's provisions used in the following paragraphs are mostly from D. W. Gruning *et al.*, translation of the Civil Code from French to English, last amendment translated in 2013, available at:

https://www.legifrance.gouv.fr/content/download/7754/105592/version/4/file/Code_civil_20130701_EN.pdf (accessed on 24.06.2016). The latter translation is not binding and not up to date.

¹⁰⁸⁵ BANDRAC, N 104.31.

- The statute of limitations for actions concerning immovables is thirty years from the day when the holder of a right knew or should have known the facts enabling him to exercise his right¹⁰⁸⁶;
- The statute of limitations for a civil action arising from an event that resulted in bodily injury, brought by the direct or indirect victim of the harm, is ten years from the date that the initial or aggravated injury is stabilized; nevertheless, for civil actions for harm caused by torture or acts of barbarism, or by violence or sexual aggression committed against a minor, the statute of limitations is twenty years¹⁰⁸⁷.

[543] Other limitation periods can be found in other fields of law. The Environmental Code, for example, states that the statute of limitations concerning financial obligations to restore environmental damages due to facilities, works, work and activities ruled by the Environmental Code is thirteen years from the event giving rise to the damage¹⁰⁸⁸.

[544] The Labour Code provides also for a specific limitation period in case of discrimination at work. The limitation period for actions for damages based on discrimination is five years from the date when the discrimination has become known^{1089, 1090}.

[545] The Social Security Code provides for a specific limitation period to introduce an action for the recognition of the inexcusable fault of an employer of two years from the date of the accident or the closure of the inquiry or the cessation of daily indemnity payments. The limitation period is tolled by a criminal procedure based on the same facts as the civil case or by an action for the recognition of the professional character of the accident that is the basis for the civil case¹⁰⁹¹.

[546] The Commercial Code provides for a general limitation period of five years.¹⁰⁹² This Code does not contain special limitation periods of interest for the present study.

[547] Our research¹⁰⁹³ revealed no case law specific to limitation periods in civil proceedings in the field of business and human rights. According to our research¹⁰⁹⁴, there are also no commentaries specific to limitation periods in civil proceedings in the field of business and human rights.

¹⁰⁸⁶ Art. 2227 Civil Code.

¹⁰⁸⁷ Art. 2226 Civil Code.

¹⁰⁸⁸ Art. L. 152-1 Environnemental Code.

¹⁰⁸⁹ Art. L. 1134-5 Labour Code.

¹⁰⁹⁰ BANDRAC, N 170-175; DESDEVISSES, N 13-26.

¹⁰⁹¹ Art. L. 431-2 Code of the social security. For more information on the inexcusable fault of an employer, see e.g. CARLOT.

¹⁰⁹² Art. L. 110-4 Commercial Code.

¹⁰⁹³ Research conducted in www.legifrance.gouv.fr, www.doctrine.fr, www.doctrinalplus.fr, www.dalloz.fr, www.lexisnexis.com, www.lamyline.lamy.fr, www.nouveau.site.lexbase.fr, www.lextenso.fr (all accessed on 27.06.2016) and BANDRAC; DESDEVISSES.

¹⁰⁹⁴ Researches conducted in www.legifrance.gouv.fr, www.doctrine.fr, www.doctrinalplus.fr, www.dalloz.fr, www.lexisnexis.com, www.lamyline.lamy.fr, www.nouveau.site.lexbase.fr, www.lextenso.fr (all accessed on 27.06.2016) and BANDRAC; DESDEVISSES.

2.4.2. Costs and Legal Aid

[548] The plaintiff does not need to pay a fee in order to bring an action in court in accordance with Art. L. 111-2 of the Code of the Judicial Organisation, which states that justice services are free within the terms of law and regulations.¹⁰⁹⁵

[549] However, in civil matters, this principle suffers from exceptions. First, all costs are not paid by the state. For example costs for translation of acts and compensation for technicians, public and ministerial officials are paid by the parties.¹⁰⁹⁶ Second, the General Tax Code provides for a 225 euros fee to lodge an appeal before courts of appeal, when the assistance of a lawyer is obligatory. This outcome is allocated to a compensation fund for lawyer before appeal courts (*avoués*) to compensate the *avoué* for the suppression of their profession.¹⁰⁹⁷ The General Tax Code also provides for a 13,04 euros tax (upgraded to 14,89 euros from 2017) for a court bailiff act. Exemptions are set, in particular for beneficiaries of legal aid.¹⁰⁹⁸ These two fees concern all kinds of civil proceedings, including tort.

[550] French law¹⁰⁹⁹ provides for the granting of legal aid in three forms:¹¹⁰⁰

[551] First of all, French law provides for the granting of *aide juridictionnelle* to persons who do not have the necessary financial resources to assert their rights in the courts.¹¹⁰¹ The *aide juridictionnelle* covers the costs, fully or partially, for the assistance of a lawyer and all public and ministerial officials who intervene in the procedure,¹¹⁰² and for all the expenditures arising from the procedure.¹¹⁰³ This aid may be requested by plaintiffs or defendants, for procedures before any court,¹¹⁰⁴ in order to obtain a settlement and after a procedure for the execution of a ruling or a writ of execution^{1105, 1106}.

[552] There are three conditions to be eligible for *aide juridictionnelle*.

[553] Firstly, to benefit from the *aide juridictionnelle*, a natural person has:

- either to be a French national;
- or to be a national from a European Union country;

¹⁰⁹⁵ GUINCHARD *et al.*, N 238.

¹⁰⁹⁶ Coût d'un procès.

¹⁰⁹⁷ Art. 1635 bis P General tax Code.

¹⁰⁹⁸ Art. 302 bis Y General tax Code.

¹⁰⁹⁹ Loi n. 91-647, 10.07.1991, relative à l'aide juridique ; Décret n. 91-1266, 19.12.1991, portant application de la loi n. 91.647 du 10.07.1991 relative à l'aide juridique ; Décret n. 2013-1280, 29.12.2013, relative à la suppression de la contribution pour l'aide juridique et à diverses dispositions relatives à l'aide juridique.

¹¹⁰⁰ Art. 1 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique.

¹¹⁰¹ Art. 2 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique. GERPHAGNON, pp. 597 *et seq*, N 181.01, 181.06.

¹¹⁰² Art. 25 para. 1 Loi n. 91-647, 10.07.1991, relative à l'aide juridique.,

¹¹⁰³ Art. 41 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique. See GERPHAGNON, N 181.220-181.348.

¹¹⁰⁴ GERPHAGNON, N 181.06.

¹¹⁰⁵ DESPAQUIS, N 7-22.

¹¹⁰⁶ Art. 10 and 11 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique.

- or to reside habitually and lawfully in France (residency conditions can exceptionally be ruled out if the defendant situation appears particularly worthwhile considering the subject of the dispute or the foreseeable costs of the procedure).¹¹⁰⁷

[554] Legal persons can only in exceptional cases benefit from *aide juridictionnelle*.¹¹⁰⁸ In any event, only non-profit corporations registered in France can ask for it.^{1109 1110}

[555] Secondly, to benefit from *aide juridictionnelle*, a person's monthly income has to be inferior to a certain threshold. The *aide juridictionnelle* can either cover all the expenses or a part of them. Thresholds are annually reassessed and adapted to each person's family situation (e.g. number of dependants).¹¹¹¹ The person's other resources (e.g. movable and immovable properties that can be sold or pawned without causing serious difficulties to the person in question) are also taken into consideration when deciding whether he/she needs *aide juridictionnelle*.¹¹¹² This condition can exceptionally be ruled out if the defendant situation appears particularly worthwhile considering the subject of the dispute or the foreseeable costs of the procedure.¹¹¹³

[556] Thirdly, to benefit from *aide juridictionnelle*, the action or settlement for which legal aid is requested by a victim must not be clearly inadmissible or devoid of merit.¹¹¹⁴ Furthermore, before the Court of cassation, without an arguable ground of appeal on points of law, *aide juridictionnelle* is not granted¹¹¹⁵. Where jurisdictional aid was not given and the judge nevertheless finally allowed the applicant's action, the plaintiff will be reimbursed.¹¹¹⁶

[557] French law also provides for a second form of legal aid: *aide à l'accès au droit*.¹¹¹⁷ It aims at furnishing information to persons on their rights and obligations and to guide them toward competent institutions to enforce their rights.¹¹¹⁸ This aid is mostly provided in local public agencies or in legal offices. *Aide à l'accès au droit* is not necessarily means-tested.¹¹¹⁹

¹¹⁰⁷ Art. 3 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique. This provision also provides for jurisdictional aid in specific situations, not relevant for the present study; see also Art. 9-4. GERPHAGNON, N 181.51.

¹¹⁰⁸ See e.g.: GERPHAGNON, N 181.52, 181.74.

¹¹⁰⁹ Art. 2 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique. DESPAQUIS, N 37.

¹¹¹⁰ Art. 3-1 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique contains provisions for cross-border litigations.

¹¹¹¹ All the incomes conditions are presented (in French only) at: <https://www.service-public.fr/particuliers/vosdroits/F18074> (accessed on 27.06.2016). In 2016, to have the full jurisdictional aid, the ceiling is of 1 000 euros per month; to have a partial jurisdictional aid, the ceiling is of 1 500 euros (Art. 4 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique).

¹¹¹² GERPHAGNON, N 181.71.

¹¹¹³ Art. 6 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique. GERPHAGNON, N 181.60.

¹¹¹⁴ Art. 7 para. 1 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique. GERPHAGNON, N 181.81.

¹¹¹⁵ Art. 7 para. 3 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique. It has been argued that this provision was in breach of Art. 6 para. 1 of the European Convention for Human rights. However, the Court of Strasbourg (19.09.2000, *Gnahore v France*, req. No. 40031/98) and the French Court of cassation (2nd Civil chamber, 21.06.2012, No. 12-40.036, Bulletin civil II, No. 109) rejected this opinion. See GERPHAGNON, N 181.81.

¹¹¹⁶ Art. 7 para. 4 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique.

¹¹¹⁷ Art. 1 para. 2 and Art. 53-61 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique.

¹¹¹⁸ Art. 53 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique.

¹¹¹⁹ See Ministère de la Justice, Aide à l'accès au droit, available (only in French) at: <http://www.vos-droits.justice.gouv.fr/aide-a-lacces-au-droit-11952/consultation-gratuite-dun-avocat-20264.html> (accessed on 28.06.2016).

[558] French law provides for a third form of legal aid: *aide à l'intervention de l'avocat dans les procédures non juridictionnelles*.¹¹²⁰ It consists in support from a lawyer in non-jurisdictional procedures. However, it is not applicable in the field of the present study.

[559] Art. 696 para. 1 of the Code of civil procedure states that “the legal cost will be borne by the losing party, unless the judge, by a reasoned decision, imposes the whole or part of it on another party”¹¹²¹. The second para. of this Article qualifies this rule for the beneficiaries of legal aid. The legal costs (*dépens*) are listed exhaustively in Art. 695 of the Code of civil procedure.¹¹²²

[560] Costs not mentioned in Art. 695 of the Code of civil procedure, as attorney's fees, transportation costs or loss of wages, can also be charged to the losing party, on the judge's decision. The latter has to take into consideration the economic situations of the parties and the equality between them.¹¹²³

[561] Contingency fee arrangements exclusively based on the trial outcome (*pactum de quota litis*) are forbidden in France.¹¹²⁴ However, a fee arrangement takes into account, among other things, the trial outcome. Thus, the fee arrangement is calculated not only according to the trial outcome, but it has also to be set according to the time the lawyer works on the case, the difficulty of the case, the interests involved, the lawyer's renown, the financial situation of the client, etc.¹¹²⁵

[562] Art. 809 para. 2 of the Code of civil procedure states that in cases where the existence of the obligation is not seriously challenged, the judge may award an interim payment to the creditor or order the mandatory performance of the obligation even when it is an obligation to do a particular thing. In other words, the judge, before he/she pronounces his/her final decision, can oblige the defendant to pay for fees the plaintiff cannot pay, if his/her liability is manifest. It is a sort of advance on the refund of legal costs and on the damage compensation, as this party will manifestly lose the trial and be condemned to pay back to the other party legal costs and to compensate his/her damage.

[563] The Court of cassation pronounced decisions concerning the application of this provision in cases of persons who asked for a company, a pharmaceutical laboratory, to pay in advance for an expertise aiming to prove that it delivered a medicine, the Mediator, which made them sick.¹¹²⁶

[564] In 2015, the Court found that, since an expertise was needed to prove the medicine caused the plaintiff's sickness, the pharmaceutical laboratory's liability can be challenged. Thus, no interim payment could be asked to the defendant to pay in advance for the expertise.¹¹²⁷

¹¹²⁰ Art. 64-64-5 of Loi n. 91-647, 10.07.1991, relative à l'aide juridique.

¹¹²¹ Art. 696 para. 1 of the Code of Civil Procedure. Translation from Y.-A. Tsegaye et al., translation of the Code of Civil Procedure from French to English, last amendment translated in 2005, available at: https://www.legifrance.gouv.fr/content/download/1962/13735/version/3/file/Code_39.pdf (27.6.2016). The latter translation is not binding and not up to date.

¹¹²² GUINCHARD et al., N 240-256.

¹¹²³ Art. 700 Code of Civil Procedure.

¹¹²⁴ Art. 11.3 Règlement intérieur national de la profession d'avocat.

¹¹²⁵ Art. 11.2 Règlement intérieur national de la profession d'avocat.

¹¹²⁶ Court of cassation, Civil chamber 2, 29 January 2015, No. 13-24.691, available (only in French) at: https://www.courdecassation.fr/IMG/pdf/bull_civ_1501.pdf (p. 16 and 17; accessed on 30.06.2016); Court of cassation, Civil chamber 1, 25 February 2016, No. 15-11.257, available (only in French) at: https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/190_25_33721.html (accessed on 30.06.2016). See also Court of cassation, Civil chamber 2, 4 June 2015, No. 14-13.405.

¹¹²⁷ Court of cassation, Civil chamber 2, 29 January 2015, No. 13-24.691.

[565] In 2016, the Court overturned its jurisprudence. The Court found that the interim payment for the expertise was justified, on the one hand, as the expertise concluded to the existence of a causal link between the medicine and the disease and, on the other hand, as the medicine was defective and withdrawn from the market in 2009.

[566] Apart from those decisions, our research did not lead to the finding of special case law concerning the distribution of legal costs in the field of business and human rights.¹¹²⁸

[567] Concerning the aforementioned interim provision, commentaries call for the interpretation of the *existence of an obligation not seriously challenged* as not concerning the merits of the claim (whether the result of the trial is predictably favourable to the party asking for the interim provision), but as concerning the necessity of the investigatory measure (whether the investigatory measure is necessary to assess the claim).¹¹²⁹

[568] A restrictive interpretation of Art. 809 para. 2 of the Code of civil procedure is a disadvantage as regards the access to justice for victims,¹¹³⁰ because the costs of investigatory measures are very high and access to legal aid is very restricted.¹¹³¹

[569] The possibility for the plaintiff to get an interim provision is not only an advance on the refund of legal costs and on the damage compensation; it is also a guarantee for the plaintiff to be able to prepare its defence on an equal footing with his/her financially stronger adversary.¹¹³²

[570] Except these commentaries, our research did not lead to the finding of special commentary concerning the rules described above in the field of business and human rights.¹¹³³

2.4.3. Standard and Burden of Proof

A. Burden of Proof

[571] Art. 1315 of the Civil Code states that a person who demands the performance of an obligation must prove it; reciprocally, a person who claims to be released from an obligation must prove the payment of the fact that caused the extinction of his/her obligation.

[572] Art. 9 of the Code of civil procedure states that each party must prove, according to the law, the facts necessary for the success of his/her claim.

[573] In other words, the burden of proof falls on the plaintiff. If the plaintiff proves the defendant's obligation or liability, the defendant can raise an exception for his/her defence; the defendant has the burden to prove this exception.¹¹³⁴

[574] However, in some areas, this rule is not applicable in order to protect the weakest party. The burden of proof falls on no party. The judge examines all the proofs brought by the parties. If there

¹¹²⁸ Research conducted in www.legifrance.gouv.fr, www.doctrine.fr, www.dalloz.fr, www.lamyline.lamy.fr, www.lexisnexis.com (all accessed on 29.06.2016).

¹¹²⁹ HOCQUET-BERG, N 2; BLOCH, N 11.

¹¹³⁰ STRICKLER, Demande, para. 2.

¹¹³¹ HOCQUET-BERG, N 5.

¹¹³² STRICKLER, Approche, pp. 2588 *et seq*, para. 11.

¹¹³³ Research conducted in www.legifrance.gouv.fr, www.doctrine.fr, www.dalloz.fr, www.lamyline.lamy.fr, www.lexisnexis.com (all accessed on 29.06.2016).

¹¹³⁴ MALAURIE & AYNES, N 173.

is a doubt, it benefits the defendant.¹¹³⁵ For example, this rule applies in labour Law to prove discriminations and mobbing.¹¹³⁶ It also applies to some victims¹¹³⁷, for example, to victims infected by hepatitis C virus due to blood transfusion.¹¹³⁸

[575] A third category of rule on burden of proof exists: the presumption of liability. It presumes the fault and the causality link with the damage. The defendant can submit evidence in rebuttal; however it is very difficult, because only the proof of a case of force majeure is admitted.¹¹³⁹ For example, liability of the employer in case of accident at work is presumed.¹¹⁴⁰

[576] In parallel, the judge can order any investigatory measures legally admissible.¹¹⁴¹ Art. 10 para. 1 of the Civil Code states that everyone is required to lend his/her aid to the court so that the truth may be revealed. Even if this provision concerns mostly third persons to a litigation, a party that does not have the burden of proof must lend his/her aid for the investigation too.¹¹⁴² The judge also has the power to order a party or any person, upon the petition of a party, to produce evidence material he/she holds, under a periodic penalty payment where necessary.¹¹⁴³ Furthermore, before any legal process, if there is a legitimate reason to preserve or to establish the evidence of the facts upon which the resolution of the dispute depends, inquiries may be ordered by the judge at the request of any interested party, by way of a petition or by way of a summary procedure.¹¹⁴⁴ However, the judge can use those powers only if evidence materials brought by the parties are insufficient to prove the facts upon which the resolution of the dispute depends, and not to address parties' deficiency to present evidence.¹¹⁴⁵ French civil procedure remains an adversarial system.¹¹⁴⁶ Even if our research did not lead to the finding of special case law concerning the provisions mentioned above in the field of business and human rights, those provisions may help victims to get evidential materials.

B. Standard of Proof

[577] Unlike contractual liability, where written pre-constituted proofs are expected to be available, and criminal liability, where strict rules are applicable to found someone guilty, in tort liability the situations are different and the standard of proof is not narrowly framed.

¹¹³⁵ MALAURIE & AYNES, N 174.

¹¹³⁶ Art. L. 1154-1 Labour Code. Originally limited to mobbing, the Court of cassation broadened the application of this provision to discrimination; see Court of cassation, Social chamber, 28 March 2000, Revue de jurisprudence sociale 5/00, No. 498 and Court of cassation, Social chamber, 10 October 2000, Revue de jurisprudence sociale 12/00, No. 1253.

¹¹³⁷ See e.g. Court of cassation, Civil chamber 1, 24 September 1999, Recueil Dalloz 2010.

¹¹³⁸ Art. 102 of Loi n° 2002-303 du 4 mars 2002 relative aux droits des malades et à la qualité du système de santé. In the particular situation provided in Art. 102, the doubt benefits the plaintiff.

¹¹³⁹ MALAURIE & AYNÈS, N 177.

¹¹⁴⁰ Art. L. 411-1 Code of the Social Security.

¹¹⁴¹ Art. 10 Code of Civil Procedure.

¹¹⁴² GUÉVEL, N 41; referring to Court of cassation, Civil chamber I, 30.03.2005.

¹¹⁴³ Art. 11 para. 2.Code of Civil Procedure.

¹¹⁴⁴ Art. 145 Code of Civil Procedure.

¹¹⁴⁵ Art. 146 Code of Civil Procedure.

¹¹⁴⁶ GUÉVEL, N 41-42.

[578] The Civil Code, in its Art. 1348 para. 1, states the principle of the liberty of the proof in tort liability. Thus, any means of proof¹¹⁴⁷ can be submitted by the parties to prove facts.¹¹⁴⁸

[579] As a consequence, in the field of tort liability, the judge assesses the probative value of a proof “with sovereign power”, according to the expression generally used.¹¹⁴⁹ In other words, the judge appreciates freely the value of a proof.¹¹⁵⁰

[580] For example, the Supreme Court stated that proofs that an infection by hepatitis C virus is due to blood transfusion are assessed with sovereign power by the trial judge.¹¹⁵¹ A person claiming a blood transfusion centre is responsible for his/her infection by hepatitis C virus has to prove it by

¹¹⁴⁷ Forms of proof can be found in Art. 1316-1369 Civil Code.

¹¹⁴⁸ See MAISTRE DU CHAMBON, N 129 *et seq.*

¹¹⁴⁹ For examples of assessments with sovereign power on: an expert not appointed by the judge, see Court of cassation, Civil chamber II, 27.03.1996, No. 94-12222, Bulletin, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007035464&fastReqId=1650134556&fastPos=1> (accessed on 07.07.2016); facts invoked as presumptions, see Court of cassation, Commercial chamber, 09.10.1990, No. 89-13438, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007025146&fastReqId=1475805143&fastPos=1> (accessed on 07.07.2016), Court of cassation, Civil chamber I, 28.03.2000, No. 98-10007, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007044036&fastReqId=460180127&fastPos=1> (accessed on 07.07.2016); a statement made without the presence of the judge, see Court of cassation, Civil chamber I, 28.10.1970, No. 68-14135, Bulletin, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006983571&fastReqId=1156861745&fastPos=1> (accessed on 07.07.2016); testimonies, see Court of cassation, Civil chamber II, 15.04.1991, No. 89-21841, Bulletin, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007026660&fastReqId=1366058255&fastPos=1> (accessed on 07.07.2016) and Court of cassation, Civil chamber II, 07.01.1970, No. 69-10148, Bulletin, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006979765&fastReqId=1768480580&fastPos=1> (accessed on 07.07.2016). For general statements on the principle of the sovereign power of the judge to assess proofs, see Court of cassation, Civil chamber I, 07.01.1997, No. 94-21869, Bulletin, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007035829&fastReqId=624614767&fastPos=22> (accessed on 07.07.2016), Court of cassation, Civil chamber I, 03.06.1997, No. 95-16628, Bulletin, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007036305&fastReqId=281075721&fastPos=1> (accessed on 07.7.2016), Court of cassation, Civil chamber II, 28.01.1999, No. 98-60058, Bulletin, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007040463&fastReqId=1237110333&fastPos=1> (accessed on 07.07.2016), Court of cassation, Civil chamber II, 06.05.1999, No. 97-12437, Bulletin, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007043662&fastReqId=568533518&fastPos=1> (accessed on 07.07.2016), Court of cassation, Civil chamber III, 21.06.2000, No. 98-12844, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007408567&fastReqId=506183310&fastPos=1> (accessed on 07.07.2016).

¹¹⁵⁰ Court of cassation, Social chamber, 13.06.1990, No. 87-44401, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007024938&fastReqId=590394821&fastPos=1> (accessed on 08.07.2016).

¹¹⁵¹ Court of cassation, Civil chamber I, 23.11.1999, No. 97-18640, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007042471&fastReqId=2101262392&fastPos=1> (accessed on 08.07.2016).

any means, even presumptions, and the assessment of the scope of these presumptions comes under the sovereign power of the judge.¹¹⁵²

[581] This principle is strengthen by the rule forbidding, in principle, the Supreme Court (*Cour de cassation*) from controlling the trial judge's (judge of first instance and court of appeal) assessment on proof of facts in tort liability, as the Supreme Court only evaluates the trial judge's assessment of law and not on facts.¹¹⁵³

[582] Our research did not lead to the finding of rules and case law specific to standard of proof in civil proceedings in the field of business and human rights. Our research did not lead to the finding of commentary specific to standard and burden of proof in civil proceedings in the field of business and human rights.

2.5. Collective Redress

[583] In France, there is currently no general collective redress mechanism.

[584] In 2014¹¹⁵⁴, the class action (*action de groupe*) was introduced in consumer and competition law matters.¹¹⁵⁵ Class action in competition law matters is irrelevant for the present study, because this action only concerns damages caused by a violation of specific provisions¹¹⁵⁶, which only forbid anti-competitive practices that have no link with Human rights violations.¹¹⁵⁷ As far as consumer law matters are concerned, a quick examination of the criteria of the class action might be needed in order to exclude it from the field of this study. An accredited national consumer representative association¹¹⁵⁸ can claim compensation before a civil court for individual damage suffered by

¹¹⁵² Court of cassation, Civil chamber I, 28.03.2000, No. 98-10007, available (only in French) at: <https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000007044036&fastReqlId=898847262&fastPos=1> (accessed on 08.07.2016).

¹¹⁵³ DORANGE, Art. 604.

¹¹⁵⁴ Loi n° 2014-344 du 17.03.2014 relative à la consommation, abrogated in order to recast the Consumer Code by Ordinance n° 2016-301 du 14.03.2016 relative à la partie législative du code de la consommation, applicable since 01.07.2016, available (only in French) at: https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=437BBE26785A5D36A93C7686AB7B4DC5.tpdila21v_3?cidTexte=JORFTEXT000032209352&dateTexte=20160316 (accessed on 12.08.2016). See also, for the regulatory part of the Consumer Code recast Décret n°2016-884 du 29.6.2016 relatif à la partie réglementaire du Code de la consommation, applicable since 01.07.2016, available (only in French) at: https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=437BBE26785A5D36A93C7686AB7B4DC5.tpdila21v_3?cidTexte=JORFTEXT000032797752&dateTexte=29990101 (accessed on 12.08.2016).

¹¹⁵⁵ Art. L. 623-1- 623-32 and R. 623-1-623-33 Consumer Code.

¹¹⁵⁶ Those provisions are Articles contained in Title II of Book IV of the French Commercial Code and Art. 101 and 102 of the Treaty on the Functioning of the European Union. Relevant provisions of the Commercial Code are available (only in French) at: https://www.legifrance.gouv.fr/affichCode.do;jsessionid=63F776DE06C3ABCC7CB378641C228C97.tpdila18v_2?idSectionTA=LEGISCTA000006133184&cidTexte=LEGITEXT000005634379&dateTexte=20160825 (accessed on 25.08.2016) and https://www.legifrance.gouv.fr/affichCode.do;jsessionid=63F776DE06C3ABCC7CB378641C228C97.tpdila18v_2?idSectionTA=LEGISCTA000006133259&cidTexte=LEGITEXT000005634379&dateTexte=20160825 (accessed on 25.08.2016). Treaty on the Functioning of the European Union is available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=FR> (accessed on 25.08.2016).

¹¹⁵⁷ Class action in competition law matters can be introduced only after a prior decision condemning a company for a violation of the specific provisions mentioned. It is reserved to consumers to sue companies for damages caused by an anti-competitive practice already condemned.

¹¹⁵⁸ Public prosecutor gives an accreditation to an association if it fulfils representativeness criteria listed in Art. R. 811-1 Consumer Code, such as for example one year of existence prior to the association's application or a minimum number of members. See Art. L. 623-1 and L. 811-1 Consumer Code.

consumers placed in similar or identical situations. The loss must result from a breach of statutory or contractual obligations by the defendant. It concerns only financial compensation for material damage to consumers' tangible assets.¹¹⁵⁹ Class actions cannot be used for losses resulting from physical or psychological harm. It may, for instance, concern a breach of an obligation to provide information, unfair commercial practices, a failure to comply with obligations linked to product safety or problems with the delivery of services.¹¹⁶⁰ The examination of these criteria leads to the conclusion that this collective action is not relevant for the topic of the present study.

[585] Two bills are currently being discussed before the French Parliament to extend class actions to health, environment¹¹⁶¹ and discrimination¹¹⁶² matters. Those three topics being relevant for the present study, the two bills will be presented in the following para., examining the content as they were proposed to Parliament. It should be emphasized that these bills might be amended or may never be adopted and that a considerable amount of necessary detail is not yet available and would necessarily be provided for by other norms, subsequent to the adoption of the bills.

[586] The bill on class actions for environmental and health issues¹¹⁶³ provides for class actions concerning health matters to address damages arising out of personal injuries suffered by the users of the health system; the loss would have to result from a breach of the statutory or contractual obligations borne by the manufacturers or suppliers of health products.¹¹⁶⁴ Concerning environmental matters, class actions would address environmental damages suffered by legal entities or natural persons.¹¹⁶⁵

[587] The bill on class actions against discrimination¹¹⁶⁶ provides for class actions to address direct and indirect discrimination.¹¹⁶⁷

¹¹⁵⁹ Art. L. 623-2 Consumer Code: „L'action de groupe ne peut porter que sur la réparation des préjudices patrimoniaux résultant des dommages matériels subis par les consommateurs“.

¹¹⁶⁰ FAIRGRIEVE & BIARD.

¹¹⁶¹ Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016). A follow up of the legislative procedure is available (only in French) at: http://www.assemblee-nationale.fr/14/dossiers/action_groupe_environnement_sante.asp (accessed on 14.07.2016).

¹¹⁶² Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016). A follow up of the legislative procedure is available (only in French) at: <http://www.senat.fr/dossier-legislatif/ppl12-811.html> (accessed on 14.07.2016).

¹¹⁶³ Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁶⁴ Art. 3 bis Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016). FAIRGRIEVE & BIARD.

¹¹⁶⁵ Art. 2 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁶⁶ Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016).

¹¹⁶⁷ Arts. 1-2 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016).

2.5.1. Form of Collective Actions

[588] The bill on class actions for environmental and health issues proposes that natural persons or legal entities introducing a class action can form an association or ask an accredited association acting in environmental or health fields to represent them.¹¹⁶⁸

[589] The bill on class actions against discrimination proposes to allow two types of actors to initiate a class action. First, the *Défenseur des droits* (an independent state institution in charge of defending persons whose rights are not respected) or an association specially empowered¹¹⁶⁹ can introduce a class action on behalf of all victims who are in a similar situation when the *Défenseur des droits* or the association deems that there is direct or indirect discrimination.¹¹⁷⁰ Second, victims can also directly initiate a class action. The victims must then designate one of them to represent them all.¹¹⁷¹

[590] The bill on class actions for environmental and health issues states that compensation for environmental damage must ordinarily be in kind. It is only when reparation in kind is not possible that financial compensation may be awarded for the benefit of the state or of a designated organisation dedicated to environmental protection. In parallel, financial compensation can be awarded to compensate for expenses that have been incurred to prevent damage, to avoid aggravating existing damage or to reduce its consequences.¹¹⁷² For environmental and health damages, the judge may impose the necessary measures to evaluate the damage, at the defendant's expense.¹¹⁷³ The defendant pays compensation for each individual damage, as decided by the judge.¹¹⁷⁴

¹¹⁶⁸ Arts. 2-3 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁶⁹ The bill does not say by whom the association would be empowered.

¹¹⁷⁰ Art. 1 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016)..

¹¹⁷¹ Art. 2 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016).

¹¹⁷² Art. 1 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁷³ Arts. 2-3 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁷⁴ Arts. 2-3 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

[591] The bill on class actions against discrimination proposes that judges decide the nature of the compensation to be awarded to individuals or to groups of individuals.¹¹⁷⁵ They can also order the publication of their decisions.¹¹⁷⁶

2.5.2. Requirements Concerning Collectivity

[592] The bill on class actions for environmental and health issues provides that victims must suffer from the same prejudice or offence caused by the same facts.¹¹⁷⁷ The bill on class action against discrimination states that the class action must concern same facts of discrimination.¹¹⁷⁸

[593] Both bills provide that, if the defendant is held liable, the court defines the group of individuals entitled to compensation by establishing the membership criteria.¹¹⁷⁹ Judges establish how the claim will be advertised to notify all potential members (the bill on class actions against discrimination states that the advertisement is made at the defendant's expense) and sets cut-off dates for joining the group.¹¹⁸⁰ After determining the liability of the defendant, the group is constituted via an opt-in system.¹¹⁸¹ Claimants must fulfil the criteria previously defined by the court. The bill on class actions against discrimination also provides for a simplified group action in situations where individuals are known and have suffered identical losses. In these cases, the judge names each of them.¹¹⁸² The bill on class actions for environmental and health issues provides that mediation is also possible. Any settlement agreement must receive judicial approval. Individuals

¹¹⁷⁵ FAIRGRIEVE & BIARD; Art. 6 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016).

¹¹⁷⁶ Art. 6 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016).

¹¹⁷⁷ Arts. 2-3 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁷⁸ Art. 2 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016).

¹¹⁷⁹ Art. 3 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016); Arts. 2-3 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁸⁰ Art. 5 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016); Arts. 2-3 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁸¹ Art. 5 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016); Arts. 2-3 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁸² Art. 3 Proposition de loi visant à instaurer un recours collectif en matière de discrimination et de lutte contre les inégalités, No. 811, registered before the Senate on 25.07.2013, available (only in French) at: <http://www.senat.fr/leg/ppl12-811.html> (accessed on 04.07.2016).

must voluntarily step forward to benefit from the terms and conditions of the settlement agreement.¹¹⁸³ ¹¹⁸⁴

3. Access to Judicial Remedies in Denmark

3.1. Criminal Law

3.1.1. Prosecution of Criminal Acts Committed Abroad

[594] The Danish legal system allows for prosecution of criminal acts committed outside the Danish territory where this is specifically provided for in a statutory provision. In 2008, the Danish rules on international criminal law were substantially amended resulting, among other things, that the Danish jurisdiction in criminal matters was enhanced. The requirements for extraterritorial jurisdiction are laid down in chapter 2 of the Danish Criminal Code (*Straffeloven*).

A. Acts With a Link To Denmark

[595] Extraterritorial jurisdiction is regulated in section 7 to 7b of the Criminal Code. Section 7 is concerned with the perpetrator's relationship to Denmark. According to section 7(1), shall acts committed outside the territory of the Danish state by a person who at the time of the charge is a Danish national or a resident in the Danish state be subject to Danish criminal jurisdiction if the act is punishable also under the law in the jurisdiction where it was committed (double criminality requirement). In certain specific cases, there is however no requirement of double criminality. Thus, p. 2 in section 7(1) states that there is Danish jurisdiction if the perpetrator was a Danish national or resident at the time of the crime and the crime comprises sexual abuse of children or circumcision of women, or if the crime is directed at other Danish nationals or residents. Finally, subsection 2 in the same provision provides that there is also Danish jurisdiction for acts committed outside the territory of any state by a person who at the time of the charge is a Danish national or resident, provided that those acts may carry a sentence of imprisonment for a term exceeding four months. Acts committed outside the territory of any state may thus only be subject to Danish jurisdiction if they are considered to be of a serious character.

[596] Section 7a is concerned with the victim's relationship to Denmark. It prescribes Danish jurisdiction if the victim at the time of the crime is a Danish national or resident and provided that the act is also punishable under the law of the foreign state (double criminality) and that imprisonment of at least six years is foreseen by the Danish law. Furthermore, the offense must comprise one of the following crimes: (1) homicide; (2) (ii)aggravated assault, deprivation of liberty or robbery; (3) offences likely to endanger life or cause serious injury to property; (4) a sexual offence or incest; or (5) female circumcision.

[597] In order to be considered a "resident" in Denmark the person in question must have settled in Denmark. There is however no indication in the provision as to the time requirement for when a

¹¹⁸³ Arts. 2-3 Proposition de loi visant à instaurer une action de groupe étendue aux questions environnementales et de santé, No. 1692, registered before the National Assembly on 14.01.2014, available (only in French) at: <http://www.assemblee-nationale.fr/14/propositions/pion1692.asp> (accessed on 14.07.2016).

¹¹⁸⁴ FAIRGRIEVE & BIARD.

person is deemed to be settled. This is instead decided on a case by case basis taking into account the relevant circumstances in the individual case. It is however clear that a person who has been granted political asylum in Denmark is considered to be resident in the Danish State.¹¹⁸⁵ Further, decisive for Danish jurisdiction is not the status of the offender at the time of the crime, but the status at the time of the prosecution, unless otherwise stated in the specific provision in question.¹¹⁸⁶

[598] Acts committed on board a Danish vessel or aircraft within the territory or another state by a person belonging to or travelling on the vessel or aircraft falls within Danish criminal jurisdiction. The same applies where the Danish vessel or aircraft is located outside the territory of any state (section 6 of the Criminal Code).

[599] As regards legal persons; section 7b in the Criminal Code provides that when Danish jurisdiction over a legal person is subject to a requirement of double criminality, it is not a prerequisite that the law in the foreign jurisdiction allows for criminal liability also for legal persons.

B. Universal Jurisdiction

[600] In certain cases, the Danish legal system provides for punishability even where neither the Danish territory nor Danish citizens or residents are involved. The criminal act must however, at least to some extent, be considered to be directed at Danish interests. Thus, section 8 of the Criminal Code provides that acts committed outside the Danish State are subject to Danish criminal jurisdiction, irrespective of the home country of the offender, where (i) the act violates the autonomy, security, Constitution or public authorities of the Danish state, or official duties to the state; (ii) the act infringes interests which are given legal protection in the Danish state on the condition of particular attachment to the country; (iii) the act breaches an obligation which the offender is required by law to observe abroad; (iv) the act breaches an official duty incumbent on the offender to a Danish vessel or aircraft; (v) the act falls within an international instrument obliging Denmark to have criminal jurisdiction; or (vi) extradition for the purpose of prosecution in another country of a person provisionally charged is refused, and the act, provided that it was committed within the territory of another state, is a criminal offence under the legislation of the country in which the act was committed (double criminality), and the act may carry a sentence under Danish legislation of at least one year in prison.

3.1.2. Punishability of Companies

[601] Under Danish criminal law, a corporation may be held criminally liable (section 306 of the Criminal Code). Section 306 of the Criminal Code provides that companies may be held criminally liable in accordance with the rules laid down in Chapter 5 (section 25-27) of the Code. Section 25 states that a legal person may be subject to punishment by a fine, if such punishment is authorized by law or by regulations issued pursuant to law. Thus, in order for a company to be criminally liable it is required that the individual provision in question states that such liability also applies to legal persons.

[602] A further condition is that an offence has been committed in the course of the legal person's activities and that the offence was caused by one or more natural persons connected to the legal

¹¹⁸⁵ ELMER, Sec. 7 No. 30.

¹¹⁸⁶ LANGSTEDT *et al.*, p. 41.

person or by the legal person as such. Generally, it is not required to attribute the act to specific natural person; acts committed anonymously are also covered.¹¹⁸⁷ However, it must be proven either that a specific natural person has acted with the necessary *mens rea* in fulfilling the *actus reus* or that the legal person as such could and should have avoided the crime in question.¹¹⁸⁸ According to legal scholars, Danish legislation as well as jurisprudence of penal law has traditionally been highly pragmatic, and philosophical considerations regarding guilt depending upon human actions and similar points of view have never gained much ground.¹¹⁸⁹ The justification for making legal persons liable to punishment is thus found in practical needs, including above all a desire to be able to sanction anonymous faults.¹¹⁹⁰

[603] Section 26 of the Criminal Code provides that unless otherwise stated, provisions on criminal liability for legal persons apply to any legal person, including public and private limited companies, cooperative societies, partnerships, associations, societies, foundations, estates and local and state authorities. Furthermore, and in accordance with subpara. two, such provisions apply to one-person businesses if, considering their size and organization, these are comparable to the companies referred to above. Agencies of the state and of municipalities may also be punished for criminal acts if the acts are committed in the course of the performance of functions comparable to functions exercised by natural or legal persons (section 27 of the Criminal Code).

[604] As mentioned above, a fine a may be imposed on a legal person if this is provided for by law or by regulations issued pursuant to law (section 25 of the Criminal Code). Provisions containing criminal sanctions for companies are laid down in specific laws (i.e. as opposed to the Criminal Code which is generally applicable), in particular the Companies Act (*Selskabsloven*)¹¹⁹¹.

[605] The amount of the fine is left to the discretion of the court; there are no maximum or minimum limits. The court shall, when fixing the fine, give special consideration, within the limits relative to the nature of the offence and the gravity of the offence, to the offender's capacity to pay the fine and to the gained or expected gained proceeds or savings resulting from the crime.¹¹⁹²

[606] Each director or manager is judged individually. In theory, managers may be held liable for negligent complicity to criminal acts and omissions by employees if they do not live up to their responsibility to issue orders and guidelines and to supervise, provided that the legal provision in question imposes obligations on the directors to this effect. For example, chapter 7 of the Companies Act lays down certain obligations on the board of directors to ensure proper organization of the company. Negligent breach of such duties is a criminal offence punishable by a fine (section 367 of the Companies Act). Hence, natural persons may be convicted for acts committed by the company, but only if the criminal acts can be linked to a breach of an obligation imposed by law.

[607] Further, culpability imposed upon a legal person does not exclude the possibility of also imposing culpability on natural persons. The president of a limited company may, for instance, be

¹¹⁸⁷ ELMER, Sec. 27 No.134.

¹¹⁸⁸ LANGSTEDT *et al.*, p. 46.

¹¹⁸⁹ *Ibid.*

¹¹⁹⁰ *Ibid.*

¹¹⁹¹ Lovbekendtgørelse 2015-09-14 nr. 1089 om aktie- og anpartsselskaber (selskabsloven).

¹¹⁹² LANGSTEDT *et al.*, p. 102.

subject to independent culpability or culpability for aiding and abetting, even where the company as such is subject to a penal culpability.¹¹⁹³

3.1.3. Victim's Participation and Rights in Criminal Proceedings

[608] The general rule is that court proceedings including criminal law proceedings are open to the public (Administration of Justice Act section 28 (*Retsplejeloven*))¹¹⁹⁴. Although traditionally not regarded as party to a criminal case, the awareness of the interest of the victim of a crime was gradually enhanced by the legislative reforms of 2005 and 2007.¹¹⁹⁵ The provisions in chapter 66a in the Administration of Justice Act prescribe in which kind of cases a victim has the right to a court-appointed counsel paid for by the state. According to sections 741a-741e, this right is granted for a number of serious crimes such as use of violence and sexual abuse and assault. In less serious cases of violence and sexual crimes, the court may refuse to appoint a counsel if it is considered clearly unnecessary. The Police shall inform victims of their rights in this respect (section 741b). The Police shall also inform victims of how to claim compensation from the offender during the criminal proceedings; how to receive compensation from the State; and how to receive counselling from the Victims Counselling Service (*Offerrådgivningen*).

[609] The rights and duties of the victim's court-appointed counsel are regulated in section 741c of the Administration of Justice Act. It provides that the counsel has the right to attend the hearings with the victim conducted by the Police and/or the court and to pose additional questions to the victim. Furthermore, the counsel may, among other things, have access to the entire case file.

[610] When a perpetrator has by the same act committed a criminal offence and caused a tort, which is generally the case, the injured party (i.e. the victim) has the option of either bringing proceedings in the civil court or presenting his claim in the criminal court. The rules governing civil claims in criminal proceedings are laid down in chapter 89 of the Administration of Justice Act. An injured party generally chooses to bring his tort claim in the criminal court as no court fees have to be paid, and the assistance of an attorney is normally unnecessary, as the prosecutor assists the injured party in presenting his claim. The judge may refuse to adjudicate a very complicated civil claim, in particular when no personal injury has occurred, and the criminal trial must not be delayed. Further, the judge can only adjudicate the civil claim, if the decision is "in the same direction" as the decision as to the criminal offence (Administration of Justice Act section 992).

3.1.4. Possibilities to Enable or Facilitate Prosecutions

[611] To our knowledge, there are no specific procedures for enabling or facilitating prosecutions in the context of business and human rights.

3.2. Private International Law and International Civil Procedure

[612] In the Danish legal order, there are no specific rules governing claims for civil law liability for companies in the case of a breach or abuse of a human right. Instead, a claim related to such

¹¹⁹³ ELMER, Sec. 306 No. 1317.

¹¹⁹⁴ Lovbekendtgørelse 2015-11-16 nr. 1255 Retsplejeloven.

¹¹⁹⁵ Cf. Lov 2005-06-24 nr. 558 om ændring af retsplejeloven and lov 2007-06-06 nr. 517 Ændring af retsplejeloven og retsafgiftsloven.

abuse is likely to be filed by the victim as a tort claim. The following responses, if not indicated otherwise, will therefore describe the situation wherein the claims are based on general tort law claims.

3.2.1. Jurisdiction in the State of Nationality

[613] Although Denmark has formally an opt-out of the Regulation (EU) No 1215/2012 (Brussels I (recast) Regulation), the country has nevertheless acceded to the Brussels I framework through a specific set of agreements. Thus the rules on jurisdiction laid down in the Regulation apply also in Denmark.¹¹⁹⁶ The Brussels I (recast) Regulation replaces the original Brussels Regulation (Regulation (EC) No 44/2001) and it applies to legal proceedings instituted on or after 10 January 2015.

[614] The general principle of the Brussels I (recast) Regulation is that individuals should be sued in their member state of domicile. Thus, domestic courts in EU Member States have *prima facie* jurisdiction over any defendant corporation that is domiciled in their state. This is true irrespective of where the harm is alleged to have occurred and of the nationality of the plaintiff. The ground for jurisdiction is thus based on a principle of “personal jurisdiction / home-state jurisdiction”. A company is domiciled where it has its statutory seat, central administration or principal place of business.¹¹⁹⁷ As regards tort specifically, it should be mentioned that a person or a company may also be sued in the Member State where the harmful event occurred.¹¹⁹⁸

3.2.2. Jurisdiction to Sue the Parent Company

[615] As described in the previous section, Danish courts have jurisdiction in accordance with the Brussels I (recast) Regulation if the defending parent company is domiciled in Denmark. Under the Danish legal regime, the point of departure is however that a parent company is not liable for acts or omissions by a subsidiary as the latter is a separate legal entity. Such liability for acts or omissions by subsidiary could nevertheless be conceivable in accordance with the doctrine of “piercing the corporate veil”.¹¹⁹⁹ This doctrine has however been relied on only in very specific circumstances by Danish judges and to our knowledge not in matters concerning tort claims for damages to persons, property or environment.¹²⁰⁰

[616] In the absence of the use of the “piercing the corporate veil” doctrine, it has rather been discussed whether the parent company may be liable independently for actions taken by the subsidiary based on a duty of care doctrine (*selvstændigt culpaansvar*).¹²⁰¹ In the Danish legal literature, reference has hereby been made to the 2012 case of *Chandler v Cape*¹²⁰² before the English courts wherein an employee established liability to him on the part of the employer’s parent

¹¹⁹⁶ Lov 2006-12-20 nr. 1563 om Bruxelles I-forordningen m.v. as amended by Lov 2013-05-28 nr. 518 om ændring af lov om Bruxelles I-forordningen m.v.

¹¹⁹⁷ Art. 60(1) Brussels I Regulation.

¹¹⁹⁸ Cf. Secs. 1 and 2 Brussels I Regulation.

¹¹⁹⁹ On the general doctrine of lifting or piercing of the corporate veil see for example VANDEKERCKHOVE.

¹²⁰⁰ ULFBECK p. 2, see also SJAFJELL & RICHARDSON, p. 139.

¹²⁰¹ ULFBECK, p. 2.

¹²⁰² *David Brian Chandler v Cape plc* [2012] England and Wales Court of Appeal Civil Division 525.

company.¹²⁰³ This duty of care theory involves various questions, for example regarding the parent company's responsibility to advice and instruct the subsidiary and to develop or co-develop its business strategy. It has been discussed in the Danish literature primarily in relation to potential liability of a parent company for its subsidiary's debts.¹²⁰⁴ Although there is no case law involving damages to persons, it cannot be ruled out that Danish courts would apply this theory of duty of care in a similar manner as the English court in the *Chandler v Cape* case.¹²⁰⁵

3.2.3. Jurisdiction to Sue the Controlling Company

[617] The point of departure also for this question is that Danish courts have jurisdiction in accordance with the Brussels I Regulation if the defending company is domiciled in Denmark. Similar to the question of a parent company's liability for the action of a subsidiary, there are no specific rules related to jurisdiction for the situation described in the present question under Danish law. It has been commented above that a parent company's potential liability for a subsidiary's actions is very limited.¹²⁰⁶ With this in mind, it is highly unlikely that a Danish company would be liable for actions taken by a business partner given that it has far less control and influence than it would have over a subsidiary. Nevertheless, the existence of such liability shall not be ruled out completely. In the legal literature, Ulfbeck envisages for example situations where an employee in a foreign subcontractor to a Danish company is injured because of unacceptable working conditions; in this situation, liability for the Danish company may be conceivable if the company on a regular basis buys products from the subcontractor and in the contract between the parties sets production targets that may not be reached without violating basic safety rules and labour standards.¹²⁰⁷ However, it should be pointed out that we are not aware of any cases dealing with this specific situation.

3.2.4. Law Applicable to the Right to Obtain Compensation

[618] The Rome II Regulation does not apply to Denmark.¹²⁰⁸ Instead, the applicable law is determined by national conflict of law rules. The conflict rules on tort claims are not laid down in statutes but follows from case law supplemented by guidance in the legal doctrine.¹²⁰⁹ The two main principles in Danish law are the (1) *lex loci delicti*, i.e. the law of the place where the tort occurs, and (2) the so called individualised method (den individualiserade metoden), i.e. the law of the place with the closest link to the tort. It could also be a combination of the two; as a point of departure *lex loci delicti* so long as it is not shown that the tort is closer linked to another country.¹²¹⁰ Although *lex loci delicti* is considered as the main rule in tort matters generally, the individualised method is widely recognized among scholars and employed by courts.¹²¹¹ The method chosen by

¹²⁰³ ULFBECK, p. 3.

¹²⁰⁴ *Ibid.*

¹²⁰⁵ *Ibid.*

¹²⁰⁶ See above para. [616].

¹²⁰⁷ *Ibid.*, p. 4.

¹²⁰⁸ Recital 40 in Rome II Regulation states that Denmark does not take part in the adoption of the Regulation, and is not bound by it or subject to its application.

¹²⁰⁹ LOOKOFSKY & HERTZ, p. 108.

¹²¹⁰ *Ibid.*

¹²¹¹ *Ibid.*

the court depends to a large extent on the type of case (e.g. product liability, shipping etc.).¹²¹² In practice, the result is often the same (the application of *lex loci delicti*) notwithstanding the method used, given that the place where the damage occurred is considered an important connecting factor when applying the individualised method.¹²¹³

[619] For the specific case of tort law claims following human rights violation abroad, *Ulfbeck* argues that Danish court is likely to rely on the individualised method, i.e. make an assessment of all the connecting factors in order to determine the applicable law.¹²¹⁴ If this method were to be used in the hypothetical case where an employee of a Danish company is injured as a result of the company's environmentally harmful activity in a *foreign* country, a court will probably apply the law in that country rather than Danish law. Thus, the court would find that *lex loci delicti* is a strong connecting factor.¹²¹⁵ However, if the damage although it occurred in the foreign country is an effect of a decision taken by the Danish company in Denmark one may argue that Danish law should be applicable.¹²¹⁶ One may also foresee a situation wherein Danish law will be applied if the foreign law violates Danish ordre public. This could be the case if the application of foreign law would undermine the protection of human rights.¹²¹⁷

3.2.5. Law Applicable to the Quantum of Damages

[620] As held under above, the conflict rules on tort claims are not laid down in statutes but follows from case law supplemented by guidance in the legal doctrine.¹²¹⁸ The general rule is that the determination of the amount of compensation for damages is governed by the law applicable to the basic question of the existence of a tort (*lex causae*). In the Danish legal literature it has been commented that there is a presumption against the use of *dépeçage*, although there appears to be limited case law where this matter has been discussed more comprehensively.¹²¹⁹

3.3. Tort Law and Corporate Law

3.3.1. Liability of the Company Director

[621] The main rules on liability for directors and other company representatives are laid down in chapter 22 of the Companies Act (*Selskabsloven*).¹²²⁰ Section 361(1) in that chapter provides that promoters and members of management who, in the performance of their duties, have intentionally or negligently caused damage to the limited liability company are liable to pay damages. Further, it states that the same applies where the damage has been caused to the shareholders or *any third*

¹²¹² *Ibid.*, p. 109.

¹²¹³ *Ibid.*, p. 110.

¹²¹⁴ ULFBECK, p. 2.

¹²¹⁵ *Ibid.*

¹²¹⁶ *Ibid.*

¹²¹⁷ *Ibid.*

¹²¹⁸ LOOKOFSKY & HERTZ, p. 108.

¹²¹⁹ *Ibid.*, p. 124.

¹²²⁰ Lovbekendtgørelse 2015-09-14 nr. 1089 om aktie- og anpartsselskaber (selskabsloven).

party. Given the human rights context for this report, the following responses, if not indicated otherwise, will part from the assumption that damages are caused to third parties.

[622] Section 361(1) of the Companies Act is a codification of the general negligence standard in Danish law as applied to liability of company representatives.¹²²¹ It is a fault-based negligence standard, which implies that a claimant has to prove, in addition to demonstrating the director's negligence, that a loss has been suffered, that a causal connection exists, and that the damage was foreseeable.¹²²² This principle of negligence is applied with regard to directors' liability for breach of specific duties regulated in statutes and with regard to a general duty of care.¹²²³ A breach of duty can consist in an unlawful act as well as an omission to act.¹²²⁴

[623] As regards the causation criteria, the courts have in more recent cases been inclined to reduce the requirements of proving causation in relation to gross contraventions.¹²²⁵ The criteria of foreseeability entails that a person is not liable for his negligent act if the damage is atypical and arbitrary in relation to the generated risk.¹²²⁶

[624] Generally, the same negligence standard applies to all members of the Board of Directors or Supervisors, including employee-elected board members.¹²²⁷ The liability of the Board members is however decided individually also where the Board make decisions as a collective.¹²²⁸ In general, a board member is not liable for decision taken at board meeting where he was not present due to illness or other excusable circumstances. However, passivity does not discharge responsibility and the board member is obliged to attempt changing a culpable decision taken in his absence.¹²²⁹

[625] Although the Danish Companies Act does not contain any minimum requirement regarding the directors' qualification, it is presumed that members of management should be aware of the duties and responsibilities laid down in the Companies Act and the Financial Statements Act, and having basic knowledge of business affairs.¹²³⁰ In their examination of the standard of care, courts take subjective elements into consideration. For example, a director will be assessed more strictly if the relevant breach is related to a field in which he holds professional qualifications.¹²³¹ The court also has discretion to reduce the amount of damages; section 363 of the Companies Act allows for such reduction if deemed reasonable, having regard to the degree of fault, the amount of the damage inflicted and the circumstances in general.

[626] Delegation of the Board of Director's duties is possible, even with regard to material and major decisions. In such case, however, the Board of Directors is required to monitor the party to whom responsibility is delegated and the standard of care would be the same. If several persons are liable for damages, the liability is jointly and severally. The court thus decides on the payable amount for

¹²²¹ CHRISTENSEN, p. 797.

¹²²² *Ibid.*

¹²²³ GERNER-BEULERLE *et al.*, p. A207.

¹²²⁴ CHRISTENSEN, p. 798.

¹²²⁵ CHRISTENSEN, p. 799 referring to case UfR 2000.2176 H which concerned liability in relation to investors for erroneous information in a stock exchange announcement regarding an issue of shares

¹²²⁶ GERNER-BEULERLE *et al.*, p. A208.

¹²²⁷ GERNER-BEULERLE *et al.*, p. A208.

¹²²⁸ See for example case Supreme Court case UfR 2001.878 H and UfR U 2007.497 H.

¹²²⁹ GERNER-BEULERLE *et al.*, p. A211.

¹²³⁰ *Ibid.*, p. A209.

¹²³¹ *Ibid.*

each individual director taking into consideration their negligence and other relevant circumstances.¹²³²

[627] Any third party claiming damages for negligence can, in principle, sue the director of a company. However, in practice such a claim is more likely to be directed against the company on whose behalf the director was acting rather than against the director himself.¹²³³ We are not aware of any cases wherein a director has been sued by a third party for damages because of personal injury, damages to property or environment. Claims aiming at directors appear to be more common in legal actions brought by the company itself or by shareholders and other investors to the company.¹²³⁴

[628] Section 361(1) of the Companies Act is a codification of the general negligence standard in Danish law as applied to liability of company representatives. The more specific duties and responsibilities of directors are found in several provisions in the Companies Act. In addition, the directors' duties and responsibilities can be derived from the company's articles of association, the company's rules of procedure and the Danish corporate governance recommendations. The recommendations published by the Danish Committee on Corporate Governance do not directly affect directors' liability, but they may influence the assessment of a breach made by a court in a pending trial to some extent if they have become widely accepted.¹²³⁵

[629] An example of a specific duty for the board of directors laid down in the Companies Act is the duty to ensure that adequate risk management and internal control procedures have been established (section 115(ii)). Pursuant to this provision the Board is required to define risks related to the company's activities and facilitate devices in order to prevent such risks. Relevant risks include, amongst others, environmental risks, exchange rate risks and political risks.¹²³⁶

3.3.2. Liability of the Company for Tortious Acts of its Subsidiaries

[630] Liability for acts or omissions by subsidiary is, in principle, possible in accordance with the doctrine of "piercing the corporate veil". This doctrine has however been relied on only in very specific circumstances by Danish judges, for example in cases where debtors commence legal actions following bankruptcy of a company in a group that has negligently mixed the respective companies' assets.¹²³⁷ To our knowledge the doctrine has not been relied on in matters concerning tort claims for damages to persons, property or environment.¹²³⁸

[631] The limited influence of the "piercing the corporate veil" doctrine has shifted the focus to the question of whether the parent company may be liable independently for actions taken by the subsidiary based on an individual duty of care principle (*selvstændigt culpaansvar*).¹²³⁹ In the Danish legal literature reference has hereby been made to the 2012 case of *Chandler v Cape* before the English courts wherein an employee established liability to him on the part of the

¹²³² Sec. 263 Companies Act.

¹²³³ GERNER-BEULERLE *et al.*, p. A202.

¹²³⁴ *Ibid*, p. 207 ff.

¹²³⁵ GERNER-BEULERLE *et al.*, p. A202.

¹²³⁶ CHRISTENSEN, p. 366.

¹²³⁷ *Ibid*, p. 101.

¹²³⁸ ULFBECK, p. 2, see also SJÅFJELL & RICHARDSON, p. 139.

¹²³⁹ ULFBECK, p. 2.

employer's parent company.¹²⁴⁰ This duty of care theory involves various questions, for example regarding the parent company's responsibility to advice and instruct the subsidiary and to develop or co-develop its business strategy. However, similar to the "piercing of the corporate veil" doctrine, it has been discussed in the Danish literature primarily in relation to potential liability of a parent company for its subsidiary's debts.¹²⁴¹ Although there is no case law involving damages to persons, it cannot be ruled out that Danish courts would apply this theory of duty of care in a similar manner as the English court in the *Chandler v Cape* case.¹²⁴²

3.4. Procedural Law

3.4.1. Statute of Limitations

[632] The rules on limitations are laid down in the Danish Limitations Act (Forældelsesloven).¹²⁴³ The general limitation period for a civil law claim is 3 years. The limitations period is triggered from the date when the damage occurred. If the claimant was unaware of the claim, the limitation period is suspended until he or she becomes (or should have become) aware of it.¹²⁴⁴

[633] There is a maximum limit for the suspension of claims. For personal injury and environmental damage claims, the absolute maximum limitation period is 30 years from the date of the act causing the injury or damage. A limitation period of maximum 10 years applies for all other tort claims.¹²⁴⁵

[634] We are not aware of any case law in the context of business and human rights. Further, to our knowledge, the rules have not been subject to commentary in the legal literature in the context of business and human rights.

3.4.2. Costs and Legal Aid

[635] The rules on court fees are laid down in the Act on Court Fees (*retsavgiftsloven*).¹²⁴⁶ According to the general rule laid down in section 1(1) in the Act, a claimant shall pay a fee of DKK 500 when filing the claim. Where the claim for compensation (excluding interest and collection costs) exceeds DKK 50'000; 1.2 percent of the value exceeding this threshold shall be paid and an additional fee of DKK 250.¹²⁴⁷ However, the total fee may not exceed DKK 75'000.¹²⁴⁸

[636] If the claim exceeds DKK 50,000 as described above, an additional listing fee shall be paid when the court fixes a date for the oral hearing of the case. The listing fee corresponds to the court

¹²⁴⁰ *David Brian Chandler v Cape plc* [2012] England and Wales Court of Appeal Civil Division 525.

¹²⁴¹ ULFBECK, p. 3.

¹²⁴² *Ibid.*

¹²⁴³ LBKG 2015-11-09 nr 1238 Forældelsesloven.

¹²⁴⁴ Chapter 3 Sec. 3 Danish Limitations Act (Forældelsesloven).

¹²⁴⁵ Chapter 3 Sec. 3 Danish Limitations Act (Forældelsesloven).

¹²⁴⁶ LBKG 2014-11-27 nr 1252 Retsavgiftsloven.

¹²⁴⁷ Sec. 1(2) Act on Court Fees (Retsavgiftsloven).

¹²⁴⁸ Sec. 1(4) Act on Court Fees (Retsavgiftsloven).

fee paid to institute legal proceedings.¹²⁴⁹ It can be considered as an economic incentive encouraging settlements between the disputing parties.¹²⁵⁰

A. Legal Aid

[637] There are several different kinds of measures and institutions making available legal aid in various forms. Although the legal aid is mostly provided by private legal aid institutions and through lawyers, the legal aid schemes are entirely publicly funded. Thus, the Danish Ministry of Justice provides funding to about 80 law centres run by lawyers (advokatvagter), where anyone can get free basic legal advice concerning any legal matter.¹²⁵¹ A person is eligible for additional legal advice, i.e. beyond the basic level, if a number of requirements are met. For example, the aid is only available to individuals with low income and no insurance coverage and the aid cannot be provided if it is clear that the aid is unlikely to lead to a resolution of the specific case.¹²⁵²

[638] The Ministry of Justice also provides financial support to institutions offering free basic legal aid and advice (*retshjælpskontorer*). These institutions may choose to also offer more elaborate legal advice and in such case charge a small fee.¹²⁵³ Free legal aid in civil proceedings may also be granted in cases of general public importance that can serve as precedents and in cases that are important to the individual's social or commercial situation.¹²⁵⁴ A party who is granted free legal aid is exempted from the obligation to pay court fees and, in case of loss of the case, the costs of the opposing party.¹²⁵⁵

[639] The legal aid schemes are supplemented by private legal expense insurances. Today, approximately 90 % of all Danish citizens have some kind of legal expense insurance coverage as part of their general insurance, e.g. as part of a home insurance. Further, there is a general obligation of administrative authorities to guide and assist individuals with their inquiries and, as regards civil proceedings in particular, courts have an obligation to guide and assist parties not represented by an attorney.¹²⁵⁶

[640] Finally, it may be mentioned that many Danish trade unions and union insurance systems offer legal aid and advice to employees and self-employed persons.¹²⁵⁷

B. Loser Pay Rule and Contingency Fee Arrangements

[641] The general rule is that the unsuccessful party shall compensate the opposing party for the costs incurred as a result of the action ("loser pays" rule).¹²⁵⁸ However, the court may in certain cases order that the unsuccessful party shall not, or only partially, compensate the opposing party.

¹²⁴⁹ Sec. 2 Act on Court Fees (Retsavgiftsloven).

¹²⁵⁰ SALUNG PETERSEN pp. 281 *et seq.*, 296.

¹²⁵¹ Sec. 323 Administration of Justice Act.

¹²⁵² Statutory Order No. 1085 of 22 November 2012 (Bekendtgørelse nr. 1085 af 22. November 2012 om offentlig retshjælp ved advokater).

¹²⁵³ SALUNG PETERSEN, pp. 281 *et seq.*, 285.

¹²⁵⁴ Sec. 329 Administration of Justice Act, see also HOJLUND CHRISTENSEN *et al.*, Sec. 329 No. 1509.

¹²⁵⁵ Sec. 331 Administration of Justice Act.

¹²⁵⁶ SALUNG PETERSEN, pp. 281 *et seq.*, 282.

¹²⁵⁷ *Ibid.*, p. 290.

¹²⁵⁸ Sec. 312 Administration of Justice Act.

The court may make such an order for example if the case concerns a question of principle character and where the successful party is a public authority or a major corporation.¹²⁵⁹

[642] Contingency fee agreements are in principle prohibited, and lawyers may in general not require higher salary than what is considered reasonable.¹²⁶⁰ However, according to current ethical rules applying to lawyers, lawyers may represent parties on a “no win no fee” basis.¹²⁶¹ Whether a fee is reasonable depends on an assessment of the case, including, among other things, the size of the case and difficulties, the time spent by the lawyer, and the nature of the case.¹²⁶²

[643] We are not aware of any case law in the context of business and human rights. Further, the rules referred to above have to our knowledge not been subject to commentary in the legal literature in the context of business and human rights.

3.4.3. Standard and Burden of Proof

[644] In Danish civil procedure the rules on burden of proof may either follow from the substantive rule/provision in question or from generally recognized principles on burden of proof in civil proceedings. As regards tort law, the point of departure is that it is the party claiming the damages who shall proof that the defendant has acted wrongfully and therefore is liable to pay compensation.¹²⁶³ However, the assessment of someone has acted negligently (*culpavurderingen*) is an overall assessment of all relevant circumstances in the particular case and there may be situations where the burden of proof in certain aspects shifts to the defendant. In some situations the very nature of an accident/damage may infer negligence on the defendant (*rep ipsa loquitur*). In such cases it is for the alleged tortfeasor to prove that he or she has not acted negligently.¹²⁶⁴ It may also be mentioned that as regards civil procedure generally, there is a general principle that the party who has reasons and possibility to secure evidence shall have the burden of proof.¹²⁶⁵

[645] If the claimant can demonstrate a sufficient level of probability that the defendant has acted negligently, the defendant is presumed liable to pay damages. In this situation it is for the defendant to demonstrate that special circumstances are at hand that shows that he has not acted negligently.¹²⁶⁶ The burden of proof may thus be said to have shifted to the defendant.

[646] Anything which is practicably possible to produce in court may be used in evidence in accordance with the principle of free admissibility and assessment of evidence.¹²⁶⁷ The Danish rules on discovery of documents (*edition*) allow for a party to make a request to the court to order the other party and/or a third party to produce a document (including electronic materials).¹²⁶⁸ When asking for discovery, the party must specify the documents in question, what he or she shall prove

¹²⁵⁹ HOJLUND CHRISTENSEN et al., Sec. 312 No. 1441.

¹²⁶⁰ Sec. 126 Administration of Justice Act.

¹²⁶¹ http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/denmark_en.pdf (accessed on 15.06.2016), p. 19.

¹²⁶² HOJLUND CHRISTENSEN et al., Sec. 126 No. 597.

¹²⁶³ BANG-PEDERSEN & CHRISTENSEN , p. 468.

¹²⁶⁴ VON EYBEN & ISAGE, p. 121.

¹²⁶⁵ *Ibid.*

¹²⁶⁶ BANG-PEDERSEN & CHRISTENSEN, p. 468.

¹²⁶⁷ LINDENCRONE PETERSEN & WERLAUFF, p. 276.

¹²⁶⁸ Sections 298-300 and 344 Administration of Justice Act.

with the documents, and demonstrate the likelihood that the other party, or a third party, has the documents in their possession.¹²⁶⁹ An order for discovery by the judge is however not enforceable. A party to the case that refuses to produce a document cannot therefore be sanctioned for the refusal. Further, the court waits until its final deliberations before considering whether the failure to comply with an order for discovery should be a procedural disadvantage for the non-complying party (*processual skadefirkning*). Here the court has discretion to assess the impact of non-compliance, for example to decide that, in absence of the documents, the facts are as alleged by the party who made the request for discovery.¹²⁷⁰

[647] It should be noted that the Danish procedural provisions on discovery (*edition*) are considerably more restrictive than for example equivalent provisions in American procedural law. Thus, in accordance with the abovementioned requirement to clearly specify the document in question, it is not possible for a party to forward a “wholesale” or go “fishing” for something to turn up.¹²⁷¹

[648] We are not aware of any cases in the context of business and human rights where the rules described above have been applied.

[649] It is difficult to provide any general description of the standard of proof in civil proceedings. The reason is that the standard, depending on the particular field of law, may vary from a low to a very high degree of probability.¹²⁷² Further, the standard of proof may follow from the substantial rule in question or from generally recognized rules and principles. In tort law, a comparably high degree of probability is generally required. The courts have however not defined the standard of proof needed, but it is clear that a probability of simply 51 % would not be sufficient.¹²⁷³

[650] To our knowledge, the rules have not been subject to commentary in the legal literature in the context of business and human rights.

3.5. Collective Redress

[651] Collective action exists in the Danish legal regime since 2008. The rules on collective action are laid down in Chapter 23a of the Administration of Justice Act (*Retsplejeloven*).¹²⁷⁴ Collective Action is available for essentially all types of civil claims provided that the general criteria for this kind of actions, for example similarity of claims, are fulfilled.¹²⁷⁵ There is a trend of an increasing number of collective actions in recent years, however, the total number of collective action taken since its introduction in the legal order in 2008 remains rather low.¹²⁷⁶ In the context of human rights violations, one may envisage collective action claims for remedies in case of damages to person, property or environment. We are however not aware of any such cases linked to Human Rights matters.

¹²⁶⁹ HOJLUND CHRISTENSEN *et al.*, Sec. 300 No. 1399.

¹²⁷⁰ LINDENCRONE PETERSEN & WERLAUFF, p. 285.

¹²⁷¹ WERLAUFF, p. 130.

¹²⁷² *Ibid*, p. 469.

¹²⁷³ VON EYBEN & ISAGER, p. 290.

¹²⁷⁴ Lovbekendtgørelse 2015-11-16 nr. 1255 Retsplejeloven.

¹²⁷⁵ The rules on collective action do however not apply to Chapters 42, 42a, 43, 43a, 43b, 44 and 88 of the Administration of Justice Act which contain rules on family law cases and other types of non-dispositive cases.

¹²⁷⁶ FELDMAN & ANDERSON, p. 29.

[652] There are no specific rules on collective action related to human rights violations by private bodies. Hence, the rules and limitations applicable generally to collective action apply. Those rules will be explored below.

3.5.1. Form of Collective Actions

[653] The rules on collective action (*gruppesøgsmål*) are laid down in chapter 23a of the Administration of Justice Act. A basic requirement is that the claims shall be similar (see question 3 below). Further, section 254b of the Administration of Justice Act sets out a number of additional conditions, for example that the legal venue of all the claims must be in Denmark and that the collective action shall be deemed to be the best way of examining the claims. The latter requirement thus entails that the collective action is subsidiary to the handling of the claims in other kinds of procedures.¹²⁷⁷ Further, the specific court must be the right venue in Denmark for at least one of the claims, both in respect of the subject-matter and the territorial jurisdiction.¹²⁷⁸

[654] A collective action is brought in the same way as other actions by lodging a writ of summons with the court. The writ may be lodged by any person who can be appointed as a group representative, and in addition to the general requirements for a writ, it must contain a description of the group, information on how the group members can be identified and notified about the case and a proposal for a group representative.¹²⁷⁹

[655] The court determines the claims that are covered by the collective action and thus defines the scope of the action. This must be done before allowing group members to opt in or out of the collective action.¹²⁸⁰ In practice, the court often discusses the scope of the case with the representative of the group and the defendant.¹²⁸¹ If the court find it necessary, it may at a later stage of the proceedings expand or limit the scope. A group member whose claim is excluded because of a limitation of the scope may carry on with his claim in accordance with the rules on individual actions.¹²⁸² Further, the court may decide to treat a collective action jointly with other collective actions brought and/or together with one or several individual claims.¹²⁸³

[656] The collective action is always led by a court-appointed representative of the group. This representative can be a member of the group, an association, private institution or other organization when the action falls within the framework of the organization's object, or a public authority authorized for the purpose by law (e.g. the consumer ombudsman).¹²⁸⁴ The representative, on behalf of the members of the collectivity, is the only claimant in the case; thus the members of the represented class are not parties to the case. However, in a number of respects the group members can be considered equal to parties, for example the court's decisions have a

¹²⁷⁷ HOJLUND CHRISTENSEN *et al.*, Sec. 254 b a No. 1219.

¹²⁷⁸ HOJLUND CHRISTENSEN *et al.*, Sec. 254 b a No. 1218.

¹²⁷⁹ Sec. 254 d Administration of Justice Act.

¹²⁸⁰ Sec. 254 e Administration of Justice Act, see also Response of the Danish Government regarding the European Commission's public consultation: Towards a Coherent European Approach to Collective Redress (SEC(2001)173 final), p. 23, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/perm_rep_denmark_en.pdf (accessed on 30.6.2016).

¹²⁸¹ FELDMAN & ANDERSON, p. 30.

¹²⁸² Sec. 254 e (4) Administration of Justice Act and HOJLUND CHRISTENSEN *et al.*, Sec. 254 e No. 1239.

¹²⁸³ HOJLUND CHRISTENSEN *et al.*, Chapter 23 a No. 1214.

¹²⁸⁴ Sec. 254 c Administration of Justice Act.

binding effect on the members and, furthermore, the members are subject to the rules applicable to parties when they give statements and in relation to discovery.¹²⁸⁵

[657] Since the adoption of the rules on class action in 2008, cases have been rather scarce and the most notable have concerned claims regarding securities.¹²⁸⁶

[658] A collective action can be brought by anyone who can be appointed as a group representative by the court. The representative can be a member of the group, an association, private institution or other organization when the action falls within the framework of the organization's object, or a public authority authorized for the purpose by law (e.g. the consumer ombudsman).¹²⁸⁷

[659] A representative must be capable of safeguarding the interests of the group members.¹²⁸⁸ In practice, the person lodging the writ of summons often suggests him- or herself as group representative and the court, in accordance with the proposal, usually appoints this person. However, the court has the possibility to appoint another representative than the person proposed and may *ex officio* examine if there are more suitable candidates.¹²⁸⁹

[660] All remedies available generally for civil law claims are also available for collective action; thus for example pecuniary damages, injunctive relief, restitution, etc. Further, the damages are calculated in the same manner as for single civil law claims. For example, a tortfeasor liable for injury to a person shall, in accordance with the rules laid down in the Liability and Compensation Act (*Erstatningsansvarsloven*), pay compensation for lost earnings, medical and rehabilitation expenses, and compensation for pain and suffering.¹²⁹⁰

3.5.2. Requirements Concerning Collectivity

[661] The requirement of similarity of claims is laid down in Section 254a and 254b of the Administration of Justice Act. Claims are considered to be similar if they arise from the same factual circumstances and they have the same legal basis. Examples of cases where this condition will often be satisfied are claims from participants in an organized travel (package tour) concerning alleged defects in for example accommodation, excursions, facilities etc., or claims from investors concerning alleged defects in the prospectus which formed the basis for their investment.¹²⁹¹

[662] The Danish Western High Court (*Vestre Landsret*) has considered the question of similarity in a case concerning investors who claimed that the information that was given in connection with their investments was insufficient and misleading.¹²⁹² Although the group of investors consisted of

¹²⁸⁵ Sec. 254 f (2) Administration of Justice Act, see also Response of the Danish Government regarding the European Commission's public consultation: Towards a Coherent European Approach to Collective Redress (SEC(2001)173 final), p. 27, available at: http://ec.europa.eu/competition/consultations/2011_collective_redress/perm_rep_denmark_en.pdf (accessed on 30.06.2016).

¹²⁸⁶ FELDMAN & ANDERSON, p. 29.

¹²⁸⁷ Sec. 254 c Administration of Justice Act.

¹²⁸⁸ Utvärdering av lagen om grupperättegång Ds 2008:74, 2008, Study commissioned by the Ministry of Justice, p. 45, available at: <http://www.regeringen.se/rattsdokument/departementsserien-och-promemorior/2008/05/ds-200874/> (accessed on 09.06.2016).

¹²⁸⁹ HOJLUND CHRISTENSEN *et al.*, Sec. 254 e No. 1232.

¹²⁹⁰ HOJLUND CHRISTENSEN *et al.*, Chapter 23 a No. 1214.

¹²⁹¹ HOJLUND CHRISTENSEN *et al.*, Sec. 254 a No. 1215.

¹²⁹² Case U 2012.1561 V and U 2011 1596 V.

different kinds of investors (both various kinds of professional investors and private person investors), the court concluded that the claims were sufficiently similar.

[663] The collective action is in principle based on an opt-in mechanism. Hence, it covers the group members who have actively joined the action.

[3] Opt-out collective action is only permitted if the action concerns claims that clearly are not expected to be made in individual actions because of their low amount (not exceeding DKK 2,000) and where it can be assumed that an opt-in collective action is not appropriate for handling the claims.¹²⁹³ An example of the latter situation is for example if the case includes a very large number of persons so that the practical administration of opt-in notices will require a disproportionate amount of resources.¹²⁹⁴ An additional requirement for opt-out action is that the class representative must be a public authority, for example the Danish Consumer Ombudsman.¹²⁹⁵

[664] To our knowledge, all collective actions to date have been opt-in actions.¹²⁹⁶

[665] The writ of summons shall contain information on how the group members can be identified and notified.¹²⁹⁷ The method of identification and notification may vary depending on the type of case, for example by means of a list with name and addresses or by indicating that the potential group members reside in a specific area and that notification will be made in the local newspaper.¹²⁹⁸ Ultimately, it is for the court to decide on how the potential members shall be notified. Generally, the court will order the group representative to inform the members by notice in the newspapers, on the internet, etc.¹²⁹⁹

[666] We are not aware if the members of the collectivity must be named publically. It is probable that this is not the case, given that only the group representative and the defendant are considered parties to the case

4. Access to Judicial Remedies in the United Kingdom

4.1. Criminal Law

4.1.1. Prosecution of Criminal Acts Committed Abroad

[667] As a general rule, criminal law only extends to acts committed within the UK's territory. English criminal law, for example, applies throughout the realm of England and Wales and over all persons who come within the realm.¹³⁰⁰ It does not ordinarily extend to things done outside the

¹²⁹³ Sec. 254 e (8) Administration of Justice Act, see also HOJLUND CHRISTENSEN *et al.*, Sec. 254 e No. 1248.

¹²⁹⁴ HOJLUND CHRISTENSEN *et al.*, Sec. 254 e No. 1249.

¹²⁹⁵ Sec. 254 c Administration of Justice Act.

¹²⁹⁶ FELDMAN & ANDERSON, p. 30.

¹²⁹⁷ Sec. 254 d Administration of Justice Act.

¹²⁹⁸ HOJLUND CHRISTENSEN *et al.*, Sec. 254 b No. 1220.

¹²⁹⁹ FELDMAN & ANDERSON, p. 30.

¹³⁰⁰ ORMEROD QC, p. 162.

realm, even when done by British citizens. A specific statutory provision is necessary before any part of English criminal law can apply to conduct abroad.¹³⁰¹

[668] Extra-territorial jurisdiction is ordinarily limited to things done or omitted by persons who hold some form of British nationality or domicile. What amounts to British status depends on the legislation itself, with modern statutes typically restricting extra-territorial application to British citizens or UK nationals, and older statutes speaking of criminal jurisdiction over 'British subjects'.¹³⁰² There is a strong presumption that a provision creating extra-territorial criminal liability will not apply to things done or omitted by foreigners abroad.¹³⁰³

[669] Statute has extended extraterritorial jurisdiction in a number of areas, such as bribery, fraud, money laundering, terrorism and sexual offences against children. An example of legislation with potential relevance to human rights is the *Bribery Act 2010*, offences under which apply to UK companies, partnerships, citizens and individuals ordinarily resident in the UK, regardless of where the act occurred. Its territorial scope is defined with reference to who the acts or omission concerned were done or made by, and where such person has a close connection with the UK, broadly defined under section 12(4) with reference to nationality and domicile, and, in the case of companies, those incorporated in any part of the UK.¹³⁰⁴

[670] English courts also have jurisdiction over any person charged with committing an offence aboard a UK ship on the high seas, "as if it had been committed on board a UK ship with the limits of its ordinary jurisdiction."¹³⁰⁵ Under the same provision, a British citizen may be prosecuted under English law for an offence committed in a foreign port or harbour or aboard a foreign ship to which he does not belong.¹³⁰⁶ Similarly, offences committed outside the UK by any master or seaman employed in a UK ship, which would be an offence under UK law, will be treated as if done within English jurisdiction.¹³⁰⁷

[671] With regard to aircraft, the *Civil Aviation Act 1982* states that any act or omission taking place on board a British-controlled aircraft or foreign aircraft while in flight elsewhere than in or over the UK will amount to an offence if it would constitute an offence under UK law. It will only amount to an offence on a foreign aircraft if the next landing of the aircraft is in the UK and if the act or omission, if taking place in the country of the aircraft, would constitute an offence under the law of that country also.¹³⁰⁸

[672] A further identified area of extra-territorial jurisdiction is that concerning offences committed in 'Convention Countries' or by Nationals of Convention Countries. *The Suppression of Terrorism Act 1978* extends the ambit of specific offences under English criminal law, such as murder,

¹³⁰¹ *Ibid.*

¹³⁰² *Ibid*, p. 169.

¹³⁰³ See *Jameson* [1896] 2 Queen's bench Division 425; *Air India v Wiggins* [1980] 2 All England Law Reports 593, as described at *ibid*, p. 169.

¹³⁰⁴ Sec. 12(4) Bribery Act 2010, available at: <http://www.legislation.gov.uk/ukpga/2010/23/section/12> (accessed on 08.06.2016). See more on the Bribery Act 2010 below, N [678].

¹³⁰⁵ Sec. 281(b) Merchant Shipping Act 1995, available at: <http://www.legislation.gov.uk/ukpga/1995/21/section/281> (accessed on 08.06.2015).

¹³⁰⁶ Sec. 281(a) Merchant Shipping Act 1995, available at: <http://www.legislation.gov.uk/ukpga/1995/21/section/281> (accessed on 08.06.2015).

¹³⁰⁷ Sec. 282 Merchant Shipping Act 1995, available at: <http://www.legislation.gov.uk/ukpga/1995/21/section/281> (accessed on 08.06.2015).

¹³⁰⁸ Sec. 92 Civil Aviation Act 1982.

manslaughter, kidnapping and false imprisonment, so that they can apply to things done in ‘Convention countries’ by persons of any nationality.¹³⁰⁹ Prosecutions need not have anything to do with terrorism. ‘Convention countries’ are those designated as parties to the 1977 *European Convention on the Suppression of Terrorism*.

[673] In exceptional cases, legislation does provide the UK with universal jurisdiction over crimes (for example, piracy, hijacking of aircraft and other offences against aviation security) permitting the assertion of jurisdiction over things done by persons in specified countries or things done elsewhere by nationals of specified countries.¹³¹⁰ These include the *Geneva Conventions Act 1957* and the *International Criminal Court Act 2001*. These do not, however, apply to business enterprises.¹³¹¹

4.1.2. Possibility to Prosecute Corporations

[674] Although a company can technically commit most offences, it is also true to say that, in reality, businesses are rarely prosecuted for criminal offences in light of the difficulty in proving the intent (*mens rea*) of a business, in contrast to that of an individual.¹³¹² Although a company could not factually be a principal offender in offences such as rape or bigamy, it could, nevertheless, like a human person, be liable as an accessory.¹³¹³

[675] Some legislation specifically provides for the criminal prosecution of a company. Conditions for prosecuting and convicting companies are generally set out in the legislation which creates the offence itself. Guidance for the national prosecutor, the *Crown Prosecution Service* (the “CPS”), on prosecuting criminal offences is set out in the legal guidance of the CPS’s own *Prosecution Policy and Guidance*, available on the internet.¹³¹⁴

[676] The main legislation concerning companies is probably that of the *Corporate Manslaughter and Corporate Homicide Act 2007*, under which a ‘corporation’ can be convicted of corporate manslaughter when someone is killed as a result of the way the business is managed or organized, and where it amounts to a gross breach of a relevant duty of care owed by the organization to the deceased, and the way in which its activities are managed or organized by its senior management is a substantial element in the breach.¹³¹⁵ Other areas of legislation that permit business enterprises to be convicted of a criminal offence in the context of potential human rights violations include conspiracy, torture, and health and safety.¹³¹⁶

[677] More recently, the *Bribery Act 2010*, the *Serious Crime Act 2007* and the *Modern Slavery Act 2015*, are examples of potentially relevant legislation which create criminal offences capable of being committed by business enterprises.

¹³⁰⁹ Sec. 4(1) The Suppression of Terrorism Act 1978.

¹³¹⁰ ORMEROD QC, p. 169.

¹³¹¹ See McCORQUODALE, p.23.

¹³¹² See *ibid*, p. 20.

¹³¹³ ORMEROD, p. 115.

¹³¹⁴ CPS, *Prosecution Policy and Guidance* .

¹³¹⁵ Sec. 1(3) Corporate Manslaughter and Corporate Homicide Act 2007, available at: http://www.legislation.gov.uk/ukpga/2007/19/pdfs/ukpga_20070019_en.pdf (13.6.2016).

¹³¹⁶ McCORQUODALE, p. 21.

[678] Offences under the *Bribery Act 2010* include the bribery of another person, being bribed and bribing a foreign official, as well as a form of strict liability¹³¹⁷ offence for failing to prevent bribery, which can be committed by any ‘relevant commercial organisation’.¹³¹⁸ Each offence may be committed by a business enterprise as well as individuals, and regardless of where the relevant act occurred. The offence for failing to prevent bribery, however, is specifically classified as a corporate offence which places a burden on corporations to ensure that their anti-corruption procedures are sufficiently robust to prevent bribery, even by third parties.¹³¹⁹ A defence is available to a corporation to prove that it had in place adequate procedures to prevent bribery.¹³²⁰

[679] The *Serious Crime Act 2007* introduced serious crime prevention orders (“SCPO”) which may be issued where a person or company has been involved in a serious crime and which contains prohibitions, restrictions of requirements which may be placed on both individuals, and specifically, on bodies corporate.¹³²¹ These are designed to protect the public by preventing, restricting or disrupting involvement in serious crime. A failure to comply with an SCPO is a criminal offence.

[680] The *Modern Slavery Act 2015*, which also has extra-territorial effect for UK nationals, is not specifically targeted at business enterprises, but does not preclude incorporated bodies from being prosecuted or from having relevant orders made against them to compensate victims of slavery.¹³²²

A. Sanctions

[681] In light of the inherent difficulties in pinning criminal responsibility on a corporation for offences with a mental element, the most relevant sanctions are those available for convictions in relation to corporate offences recognized by the legislation. The typical sanction is a monetary fine. This may be limited according to established fine scales or, for more serious offences, unlimited.¹³²³

[682] A conviction for corporate manslaughter, for example, attracts an unlimited fine under the *Corporate Manslaughter and Corporate Homicide Act 2007*.¹³²⁴ This may be accompanied by certain orders. A ‘remedial order’ specifies steps for the organization to take to remedy the breach as well as any other policies, systems or practices of relevance.¹³²⁵ A ‘publicity order’ may require an organization to publicise the fact that it has been convicted of the offence, the amount of any fine imposed and the terms of any *remedial order* made.¹³²⁶

¹³¹⁷ “Strict liability” means that a company may be convicted without evidence of fault on its part.

¹³¹⁸ Secs. 7-8 Bribery Act 2010.

¹³¹⁹ McCORQUODALE, p. 21.

¹³²⁰ Sec. 7(2) Bribery Act 2010.

¹³²¹ Sec. 5(4) Serious Crime Act 2007, available at: <http://www.legislation.gov.uk/ukpga/2007/27/contents> (accessed on 13.06.2016).

¹³²² Modern Slavery Act 2015, available at: <http://www.legislation.gov.uk/ukpga/2015/30/part/1/enacted> (accessed on 13.06.2016).

¹³²³ There is no statutory limit to the amount of fine which may be imposed by the Crown Court, the court in England and Wales which deals with more serious crimes.

¹³²⁴ Sec. 1(6) Corporate Manslaughter and Corporate Homicide Act 2007.

¹³²⁵ Sec. 9 Corporate Manslaughter and Corporate Homicide Act 2007.

¹³²⁶ Sec. 10 Corporate Manslaughter and Corporate Homicide Act 2007.

[683] Similarly, conviction for companies of corporate offences under the *Health and Safety at Work Act 1974*¹³²⁷ can lead to an unlimited fine, as can those under the *Bribery Act 2010*.¹³²⁸

[684] Where a company fails to comply with a SCPO under the *Serious Crime Act 2007*, not only may it be subjected to a fine, but it will also be open to the Director of Public Prosecutions or relevant prosecuting agency to petition for the dissolution of the company.¹³²⁹

[685] Other orders may be made by the relevant court in addition to, or as an alternative to, the principal sanction. Criminal courts have a general power to make the convicted party pay compensation to the victim for any personal injury, loss or damage resulting from the offence or to make payments for funeral or bereavement expenses in respect of a death resulting from such offence.¹³³⁰ Unique to the *Slavery Act 2015*, a person or business enterprise convicted of an offence under the Act may be subjected to a *slavery and trafficking reparation order*, requiring the convicted party to pay compensation to the victim of the relevant offence.¹³³¹

B. Natural Persons

[686] There is no concept under UK law of a natural person being prosecuted, as representative of a company, for acts committed by the company. A company is a legal person, capable of being prosecuted and is not to be treated differently because of its artificial personality.¹³³² It is effectively a separate person from its officers, and the officers will not necessarily be guilty of a crime just because the company is.¹³³³ Nevertheless, since a company may be fixed with criminal liability through the acts or omissions of its ‘directing mind’, the way for criminal liability to be proved may, depending on the relevant rule of attribution, be by identifying the criminal acts of one of its officers; in such a case, both the individual officer and the company may be guilty.¹³³⁴

4.1.3. Victim's Participation and Other Rights in Criminal Proceedings

[687] There are no known provisions for victims' rights in criminal proceedings specific to the context of this study. General rights include the right of the victim to be informed during a police investigation, a right to make a ‘victim personal statement’ which may be used when the court decides on punishment following conviction and particular rights to privacy for victims of sexual assaults.¹³³⁵ A Code of Practice for victims of crime was introduced in 2006,¹³³⁶ and sets out the minimum levels of service which victims can expect from agencies that are signatories to it. The

¹³²⁷ Schedule 3A Health and Safety at Work Act 1974, available at: <http://www.legislation.gov.uk/ukpga/1974/37/contents> (accessed on 13.06.2016).

¹³²⁸ Sec. 11 Bribery Act 2010.

¹³²⁹ Sec. 27 Serious Crime Act 2007.

¹³³⁰ Sec. 130 Powers of Criminal Courts (Sentencing) Act 2000.

¹³³¹ Sec. 8-9 Slavery Act 2015.

¹³³² CPS, Corporate Prosecutions.

¹³³³ ORMEROD QC, p. 124.

¹³³⁴ *Ibid.*

¹³³⁵ See After a crime: your rights, updated 30 December 2015, available at: <https://www.gov.uk/your-rights-after-crime> (accessed on 13.06.2016).

¹³³⁶ Ministry of Justice, Code of Practice for Victims of Crime.

Code is the main mechanism used to transpose the *EU Victims' Directive 2012/29/EU*¹³³⁷ into domestic legislation, and was revised in 2013 to reflect the commitments in the Directive, and again in October 2015. There is no specific mechanism enabling a victim to obtain legal representation,¹³³⁸ but a range of public organization are identified by the Code as being required to provide services to victims of crime where requested.¹³³⁹

[688] Where someone is convicted of a crime, the court may order them to pay the victim compensation. In all cases, a criminal court must consider making a compensation order where it is empowered to do so, and to give reasons where it does not make such an order.¹³⁴⁰ Although sentencing of offenders is the responsibility of the court, the national prosecutor, the *Crown Prosecution Service* (the "CPS"), is, according to its own internal guidance, called on to assist the court in awarding compensation to victims. CPS guidance, entitled "*Casework Quality Standards*,"¹³⁴¹ states in its overarching principles that the CPS is responsible for making decisions and dealing with work in a way that is fair to victims and witnesses. Although courts' powers to award compensation are wide, the High Court has stated that compensation orders should only be made in simple straightforward cases.¹³⁴²

[689] There is also the possibility for victims of violent crime in Great Britain, independently of criminal proceedings, to apply for compensation from the *Criminal Injuries Compensation Scheme*.¹³⁴³ This is a government-funded scheme administered by the *Criminal Injuries Compensation Authority*, an executive agency sponsored by the Ministry of Justice. However, this does not apply to victims of crime who were injured outside of the UK.

4.1.4. Measures to Facilitate Prosecution

[690] There are no measures to facilitate or enable prosecution in the context of business and human rights.

4.2. Private International Law and International Civil Procedure

[691] In the absence of a self-standing 'human rights violation' claim against private bodies¹³⁴⁴ under UK law, the principal cause of action for abuse of a human right by a business enterprise is

¹³³⁷ European Parliament and European Council, Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, 14.11.2012.

¹³³⁸ Although legal aid may be available in certain cases for victims of domestic violence in family law civil proceedings under the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹³³⁹ Sects 8-9 Ministry of Justice, Code of Practice for Victims of Crime.

¹³⁴⁰ Sects 130-133 Powers of Criminal Courts (Sentencing) Act 2000and Sec. 63 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹³⁴¹ CPS, Casework Quality Standards.

¹³⁴² See CPS, Sentencing and Ancillary Orders.

¹³⁴³ This was devised pursuant to Sec. 11(1) Criminal Injuries Compensation Act 1995. See Ministry of Justice, The Criminal Injuries Compensation Scheme 2012.

¹³⁴⁴ Claims in respect of a breach of the UK's Human Rights Act 1998 can, according to Sec. 6, only be brought against a 'public authority'. This includes, "any person certain of whose functions are functions of a public nature." Human Rights Act 1998 available at: <http://www.legislation.gov.uk/ukpga/1998/42/contents> (accessed on 20.06.2016).

likely to arise under the tort of negligence. Such a claim would need to be drafted in terms of the tort rather than in the language of a ‘human rights’ claim.¹³⁴⁵ It is also acknowledged that cross-border contractual actions against businesses based on an abuse of human rights may be possible, particularly in the employment context. It is nevertheless unusual for a contract term to include the direct protection of human right giving rise to a breach of contract claim by the victim.¹³⁴⁶ The following responses will therefore assume that potential claims are based on tort law claims.

4.2.1. Jurisdiction in the State of Nationality

[692] Under the *Brussels I Regulation* (now *Brussels I (recast) Regulation*),¹³⁴⁷ the UK has civil and commercial jurisdiction over all legal persons domiciled in the EU. A defendant shall, under Art. 2(1), be sued in the courts of his domicile. A company is domiciled where it has its statutory seat, central administration or principal place of business.¹³⁴⁸

[693] Accordingly, regardless of the nationality of the victim claimant and regardless of where the acts or omissions took place, the defendant UK-domiciled company may be sued in UK courts.

4.2.2. Jurisdiction to Sue the Parent Company

[694] A UK court would have jurisdiction, under the *Brussels I (recast) Regulation*, in relation to any claim made against a UK-domiciled parent company. Such an action, however, based on the acts or omissions of its foreign subsidiary, is on the face of it, unlikely to proceed, as this would require imposing liability on a parent company, despite the fact it is a legal entity separate from that of its subsidiary.

[695] Recent case law has shown, however, that questions over jurisdiction can be avoided altogether where the parent company can be said to owe a direct duty of care to the claimant in accordance with ordinary tort law principles of foreseeability, proximity and fairness. This is addressed in more detail in section 5.3. of this report, below.

4.2.3. Jurisdiction to Sue the Controlling Company

[696] As stated above,¹³⁴⁹ the principle of separate legal personality and the limited occasions on which the ‘corporate veil’ may be pierced mean that a UK-domiciled company is unlikely to be held responsible for the acts or omissions of another company, notwithstanding that there may be, under the *Brussels I (recast) Regulation*, jurisdiction to bring a claim. The UK courts may nevertheless have jurisdiction to entertain an action against the overseas company with links to the UK, alleged to have carried out the acts or omissions; this is explored below.

¹³⁴⁵ McCORQUODALE, pp. 14, 16.

¹³⁴⁶ See *ibid*, pp. 19-20.

¹³⁴⁷ Art. 2(1) Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Official Journal L 012 (Brussels I Regulation); Art. 4 Brussels I (recast) Regulation.

¹³⁴⁸ Art. 60(1) Brussels I Regulation; Art. 63 Brussels I (recast) Regulation.

¹³⁴⁹ See para. [713].

[697] Where the local business company with links to the UK is domiciled in a Member State, jurisdiction of the UK courts is to be established in accordance with the *Brussels I (recast) Regulation*. For companies without a seat in a Member State however, and for which the *Brussels I (recast) Regulation* does not apply, the general principle is that jurisdiction is established by service of process, or what is known as service ‘as of right’. When process cannot legally be served upon a defendant, the court can exercise no jurisdiction over him. The converse of this statement is also true, such that whenever a defendant can be legally served with process, then the court, on service being effected, has jurisdiction to entertain a claim against him.¹³⁵⁰

[698] For a company or other legal person not domiciled in the UK¹³⁵¹ to be served upon, a means for service and jurisdiction may be established in the following ways:

[699] Under the *Companies Act 2006*,¹³⁵² a foreign company which establishes a place of business in England is required to register names and addresses of its officers on which it can be served. The foreign company can then be served by post at the registered address of an officer.

[700] If the foreign company has not registered, the claimant may rely on the *Civil Rules of Procedure* (“CPR”).¹³⁵³ Under CPR rule 6.9, a foreign company can be served at, “any place within the jurisdiction where the corporation carries on its activities or any place of business of the company within the jurisdiction.” There is no statutory definition of establishing a place of business, although case law has indicated that in order to establish a place of business there must be a fixed and reasonably permanent place, at which the company’s business is done and an agent of the company at that place who can bind the company contractually.¹³⁵⁴

[701] There is therefore no particular rule establishing jurisdiction where a defendant foreign company is in some way controlled from or associated with England. However, jurisdiction may arise where the claimant is able to serve his or her claim under the rules discussed above on a place of business said to have been established in England by the foreign company, even if the claim has no connection with the place of business in England.

[702] This is not to say however, that the court will not find that proceedings against the defendant company be stayed in favour of a more appropriate forum. The principle of *forum non conveniens* (that the court hearing the case was not the appropriate forum for it to be heard as it has no real or substantial connection with the case) may be accepted by the court where the defendant shows that there is another available forum (such as the country where the act or omission took place or country of domicile of the defendant company), “in which the case may be tried more suitably for the interests of all the parties and the ends of justice.”¹³⁵⁵ Although the court will initially attempt to identify the natural forum for the case to be heard, many cases turn on the second step taken by the courts: namely where the claimant shows that substantial justice would not be done abroad. There are various examples of where an English court has found itself to be the proper forum by

¹³⁵⁰ LORD COLLINS OF MAPESBURY *et al.*, para. 11-003.

¹³⁵¹ For present purposes, the following refers to the jurisdiction of England & Wales.

¹³⁵² Sec. 1046 Companies Act 2006.

¹³⁵³ Civil Rules of Procedure (introduced pursuant to secondary legislation in the form of The Civil Procedure Rules 1998 (Statutory Instrument 1998, No. 3132) are the rules of civil procedure used by the Court of Appeal, High Court of Justice and County Courts in civil cases in England and Wales. Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules#part1> (accessed on 20.06.2016).

¹³⁵⁴ See ROGERSON, pp.144-145.

¹³⁵⁵ *Spiliada Maritime Corp. v Cansulex Ltd (The Spiliada)* [1987] Law Reports Appeal Cases 460 at 476.

ruling that although the natural forum was a foreign jurisdiction, substantial justice could not be done there.¹³⁵⁶

4.2.4. Law Applicable to the Right to Obtain Compensation

[703] With regards to tort claims brought before UK courts, it is the *Rome II Regulation*¹³⁵⁷ which applies, irrespective of the location of the events or the residence of the parties. According to this, the applicable law of a claim shall be the law of the country in which the damage occurs (or *lex loci damni*) – namely the law of the State where the damage occurred, although there are limited exceptions to this rule.¹³⁵⁸

4.2.5. Law Applicable to the Quantum of Damages

[704] As with *an debeatu*, determination of amount of compensation for damages with regard to non-contractual obligations is also covered by the *Rome II Regulation*. This demands that the existence, nature and assessment of damage be governed by the law of the State in which the harm occurred.¹³⁵⁹

4.3. Tort Law and Corporate Law

4.3.1. Liability of the Company Director

[705] Under English law, directors' duties are various, and include acting in good faith to promote the success of the company for the benefit of shareholders,¹³⁶⁰ avoiding conflicts of interest,¹³⁶¹ having regard to the interests of employees, suppliers, customers, the environment and the community¹³⁶² and showing care, skill and diligence.¹³⁶³ The *Companies Act 2006* aims to codify these directors' duties, many of which derive from common law principles, by setting them out in statutory provisions.

[706] The general rule is that directors' duties are owed to the company¹³⁶⁴ and not to individual shareholders nor to a company's creditors.¹³⁶⁵ Accordingly, any loss resulting from breaches are presumed to be losses to the company, and it will be the company which is the party primarily entitled to bring an action against a director who acts in breach of his duties. Where the company cannot or will not sue (such as where the wrongdoer controls it), it is possible for one or more shareholders to bring what is known as a 'derivative' action in their own name, but on behalf of the

¹³⁵⁶ See *ibid* and *Lubbe v Cape plc* [2000] UK House of Lords 41 by way of example.

¹³⁵⁷ Rome II Regulation.

¹³⁵⁸ Art. 4(1) Rome II Regulation. Exceptions are set out in Arts. 4(2) and 4(3).

¹³⁵⁹ Arts. 4 and 15(c) Rome II Regulation. Subject to the exceptions set out in Arts. 4(2) and 4(3).

¹³⁶⁰ Sects 156, 172(1) Companies Act 2006.

¹³⁶¹ Sec. 175(1) Companies Act 2006.

¹³⁶² Sec. 172(1) Companies Act 2006.

¹³⁶³ Sec. 174 Companies Act 2006.

¹³⁶⁴ Sec. 171(1) Companies Act 2006.

¹³⁶⁵ See LOOSE *et al.*, paras. 6.12.

company.¹³⁶⁶ Such a shareholder remedy requires the permission of a court and is subject to various limitations.¹³⁶⁷

[707] Insofar as liability for damage to third parties is concerned, it is also a general principle that a director cannot be, alone, personally liable for breaches in relation to third parties where he or she is acting on behalf of a company. A principal purpose of incorporating a company with limited liability is to avoid the personal liability that otherwise attaches to an individual if he or she carries on business without the protection of the corporate form.¹³⁶⁸

[708] In the context of contract law, where a director enters into a contract on behalf of his or her company with proper authority to do so, he or she will incur no liability to the other party since he or she will be acting as the company's agent. There are, nevertheless, circumstances in which a director will risk personal liability, such as where he or she purports to make a contract which fails to bind the company and which the company repudiates. This may lead to liability to the third party on the ground of a breach of warranty of authority: namely, where the director has impliedly warranted to the third party that he or she has the authority to enter into the contract.¹³⁶⁹

[709] Similarly, with regard to tortious liability, the basic principle of separate corporate entity means that it is generally the company alone which can be sued for torts alleged to have been committed by it.¹³⁷⁰ This does not mean however, that there can be no circumstances in which a director may also be found liable for torts committed whilst a director of the company.

[710] There is no specific legal provision establishing when a director may potentially be held liable for acts or omissions committed in the course of exercising his or her functions. Instead, as part of a third party claim in tort law, the courts will examine whether the tort is properly one to be attributed to the company alone or whether the tort was also committed by the director personally. It can be inferred from jurisprudence that a director will be personally liable in three circumstances where events occur in relation to the company:¹³⁷¹

- A director will be personally liable for his or her own torts committed in relation to the company's affairs, whilst acting as a director or employee of the company. The company will also be vicariously liable for the director's torts in such circumstances.¹³⁷² By way of example, a director will be personally liable in tort if, when driving on company business, he causes personal injury to another person in an accident caused by his negligent or dangerous driving. Case law has shown that a director will also be responsible, for example, for the tort of deceit, that he commits personally, and that he may not absolve himself of liability by claiming that he was acting on behalf of the company.¹³⁷³

¹³⁶⁶ *Ibid*, para. 7.3.

¹³⁶⁷ Sec. 261(1) Companies Act 2006.

¹³⁶⁸ MORTIMORE QC, para. 24.01.

¹³⁶⁹ See *ibid*, p. 574 and LOOSE *et al.*, paras. 7.83-7.88.

¹³⁷⁰ *Williams v Natural Life Health Foods* [1998] 1 Weekly Law Reports 830 House of Lords, at p. 835, per Lord Steyn.

¹³⁷¹ MORTIMORE QC, para. 24.22.

¹³⁷² *Dubai Aluminium Co Ltd v Salaam* [2003] 2 Law Reports, Appeal Cases 366.

¹³⁷³ *Standard Chartered Bank v Pakistan National Shipping* (Nos 2 and 4) [2003] 1 Law Reports, Appeal Cases 959, House of Lords.

- A director can be jointly liable with the company where he or she assumes personal responsibility for the acts or omissions of the company which render the company liable in tort.¹³⁷⁴
- A director can be jointly liable with the company where he or she procures or directs the wrongful act or omission. The fact that a person is a director of a limited liability company does not, by itself, render him or her liable for torts committed by the company during the period of his or her directorship. Evidence is generally required that the director expressly procured or directed the wrongful act that caused the damage. Accordingly, a director of a company in the business of manufacturing high explosives will not be liable for procuring the tort of nuisance by his or her company merely because he or she had control of the business which resulted in the tort¹³⁷⁵

[711] In each case, the director may potentially be held liable alongside the company itself. It is only where the tort was not committed in the course of the person carrying out his duties as a director that it may avoid being held vicariously liable for the tort of its director. It may also avoid primary liability where it is established that the company was in fact the agent of the director for the purposes of committing the tort, such that the company was merely a sham under cover of which the tort was committed by the director.¹³⁷⁶

[712] There is no known debate or jurisprudence specifically concerning tortious liability of directors in cross-border cases.

4.3.2. Liability of the Company for Tortious Acts of Its Subsidiaries

[713] The doctrine of separate legal personality means under English law that a UK-domiciled parent company will not be held liable for the tortious acts or omissions of its subsidiary – whether based at home or abroad. To impose liability on a parent company despite the fact it is a legal entity separate from that of its subsidiary, would, in effect, involve piercing what is known as the ‘corporate veil’: namely, the idea that the rights and duties of a corporation are, as a general principle, the responsibility of that company alone, and that attributing legal accountability for its conduct or obligations to its owners, managers and employees – or, in this context, the parent company – would require a court to ‘lift’ the corporate veil.¹³⁷⁷ According to a 1990 Court of Appeal case, *Adams v Cape Industries plc*,¹³⁷⁸ piercing the corporate veil may only take place when a company is established for fraudulent purposes, or where it is set up to avoid an existing obligation.

¹³⁷⁴ This is rarely to be the case in tort. See *Williams v Natural Life Health Foods* [1998] 1 Weekly Law Reports 830 House of Lords, at p. 835, per Lord Steyn.

¹³⁷⁵ *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 Law Reports, Appeal Cases 465. Similarly, a director of a theatre company will not be liable where without his knowledge and in his absence from the theatrical premises, works are performed by independent contractors in breach of copyright: *Performing Right Society v Cyril Theatrical Syndicate* [1924] 1 Law Reports, King's Bench 1, Court of Appeal. However, a director could be held liable where his or her company violates a third party's copyright and where the evidence shows that the director instructed the company's employees to carry out the infringing acts, but the employees themselves did not know that the acts were tortious: *C Evans Ltd v Spritebrand Ltd* [1985] 1 Weekly Law Reports 317, Court of Appeal. Cases as reported in MORTIMORE QC, paras. 24.32-24.35.

¹³⁷⁶ MORTIMORE QC, para. 24.27 with reference to *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 Law Reports, Appeal Cases 465.

¹³⁷⁷ See *Salomon v A Salomon & Co Ltd* [1897] Law Reports Appeal Cases 22

¹³⁷⁸ *Adams v Cape Industries plc* [1990] Chancery 433. In particular, it was stated that, “Our law for better or worse, recognises the creation of subsidiary companies, which though in one sense are the creatures of their parent

[714] As referred to in section 4.2. of this report however, recent case law has shown that it may not be necessary to lift the corporate veil in order to find a parent company liable for the acts of its subsidiary. The 2012 case of *Chandler v Cape*¹³⁷⁹ is said to have opened up avenues of recourse against UK parent companies in relation to acts of subsidiaries, whether domestic or foreign. The claimant, Mr Chandler, was employed for a short time in the 1950s and early 1960s by a UK-subsidiary of Cape plc, during which time he was exposed to asbestos fibres. Mr Chandler was diagnosed with asbestosis in 2007 and began proceedings against Cape plc due to the subsidiary no longer being in existence. The Court of Appeal ruled that in appropriate circumstances, the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. This, the court stressed, is not because the parent company in some way assumed the liability of its subsidiary, but, in accordance with established tort-law principles, the parent company owed a duty of care instead of (or in addition to) the local subsidiary.¹³⁸⁰ The circumstances in which responsibility may be imposed on a [UK] parent company are: (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection.¹³⁸¹

[715] This case was described by the court as “*one of the first cases in which an employee has established at trial liability to him on the part of his employer's parent company.*”¹³⁸² Here, however, both parent and subsidiary were UK-based, and the victims were limited to employees of the subsidiary. It is still therefore not clear whether this principle of a parent company duty of care will extend, first, to other third party victims of the tortious acts or omissions of the subsidiary and, secondly, to such acts and omissions of foreign subsidiaries.

[716] Some commentators suggest that the duty of care of the parent company does indeed extend to third parties.¹³⁸³ In *Chandler*, the duty of care derived from the relationship between the subsidiary and its parent company rather than from any relationship between the parent company and the employees. The examination of the control relationship is limited to that between the parent company and its subsidiary; on this basis, there should be nothing to prevent a court from finding that the parent company would also have a direct duty of care towards third party victims. This, says one commentator,¹³⁸⁴ is supported by the case of *Lubbe v Cape plc*.¹³⁸⁵ Although this was a case which did not treat the substantive corporate law question but instead was decided on jurisdiction grounds, some of the claimants were not employees, but third party victims of asbestos

companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.” (p. 536).

¹³⁷⁹ *David Brian Chandler v Cape plc* [2012] England and Wales Court of Appeal Civil Division 525.

¹³⁸⁰ Such principles for determining that a duty of care exists were confirmed in the case of *Caparo Industries plc v Dickman* [1990] 2 Law Reports Appeal Cases 605, namely that the damage should be foreseeable, “*that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of “proximity” or “neighbourhood” and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other.*” Per Lord Bridge, p. 618.

¹³⁸¹ *David Brian Chandler v Cape plc* [2012] England and Wales Court of Appeal Civil Division 525, para. 80.

¹³⁸² *David Brian Chandler v Cape plc* [2012] England and Wales Court of Appeal Civil Division 525, para. 2.

¹³⁸³ See SANGER, pp. 478-481 and PALOMBO, pp. 467-468.

¹³⁸⁴ PALOMBO, pp.467-468.

¹³⁸⁵ *Lubbe v Cape plc* [2000] 1 Weekly Law Reports 1545.

poisoning alleged to have been caused by a subsidiary of *Cape*, a UK holding company. Here, the UK's highest court at the time, the *House of Lords*, acknowledged that in certain circumstances,¹³⁸⁶ a holding company may have a direct duty of care toward its subsidiary's tort victims, including both employees and third parties, without making any distinction among the claimants.

[717] It is also supposed that the notion in *Chandler* of ascribing liability to a parent company for harm caused by certain acts and omissions of its subsidiary would apply equally in a multinational context. Although the *Chandler* case concerned entirely domestic entities and acts, there was no specific indication that UK companies with subsidiaries abroad would not also be liable for torts committed by those subsidiaries. The case of *Lubbe v Cape plc*¹³⁸⁷ again provides supporting evidence: in a case in which the court recognized a direct duty of care by a UK-parent company towards its subsidiary's employees and other third parties, the relevant subsidiary was based in South Africa. As one commentator points out however,¹³⁸⁸ a case that a UK-domiciled parent company owes a duty of care to the employees of a foreign subsidiary is not an argument that could be made easily: under the *Rome II Regulation* (discussed in section 4.2. of this report above), it is generally the case that the courts apply the law of the country in which the damage occurred. For English law on tort liability to apply, the case would, since January 2007, need to be brought within one of the exceptions to the *Rome II Regulation*.

4.4. Procedural Law

[718] As with other UK country reports, this section will focus on tort law claims,¹³⁸⁹ these presenting the most likely cause of action under civil law for abuse of a human right by a business enterprise.¹³⁹⁰

4.4.1. Statute of Limitations

[719] Proceedings for breach by a public authority of a person's rights under the *European Convention on Human Rights*, as incorporated into UK law under the *Human Rights Act 1998* must be brought within one year from the date on which the act complained of took place or such longer

¹³⁸⁶ Although the exact circumstances were not specified, Lord Bingham, at *ibid*, p. 1555, referred to what he describes as a first segment of issues being, "*the responsibility of the defendant as parent company for ensuring the observance of proper standards of health and safety by its overseas subsidiaries.*" Resolution of this issue, he says will be likely to involve an investigation into what part the defendant played in controlling the operations of the group, what its directors and employees knew or should have known, what action was taken and, "*whether the defendant owed a duty of care to employees of group companies overseas, and whether, if so that duty was broken.*" The second "segment" of the issues involves the personal injury issues relevant to each individual, with evidence and medical of each plaintiff and an inquiry into the conditions in which that plaintiff worked or lived.

¹³⁸⁷ *Ibid.*

¹³⁸⁸ SANGER, p. 481.

¹³⁸⁹ Such as claims relating to trespass to the person, such as battery, assault, false imprisonment and torture, the tort of intimidation and the tort of negligence. In particular, in the absence, under English law, of specific access to remedy provisions for victims of criminal acts which constitute a breach of human rights (see Sec. 4.1.3 of this report, above), criminal law procedures are not treated here.

¹³⁹⁰ The Human Rights Act 1998, *op. cit.*, does not provide a direct cause of action against a business enterprise, as it only applies, under Sec. 6, to the actions of public authorities. It will therefore not be explored further here. Actions may also be possible under contract law, but these are most likely to be in the employment context or where, unusually, a contract term provides for the direct protection of a human right.

period as the court considers equitable having regard to all the circumstances.¹³⁹¹ It is however unlikely that this will have relevance to a business enterprise unless it can be established that such an organisation was carrying out functions of a public nature.

[720] The limitation periods applying to tort claims, these representing the most likely cause of action in relation to abuse of human rights by a business enterprise, depend on the nature of the claim. The basic rule is that a tort action must be brought within 6 years of the accrual of the cause of action.¹³⁹² ‘Accrual of the cause of action’ refers to when the limitation period starts to run. Where the tort is actionable *per se* (without proof of damage), time starts to run from the date of the defendant’s act. Where the tort is actionable only on proof of damage, the cause of action accrues when the damage is sustained.¹³⁹³

[721] Where, however, the damages claimed by the claimant consist of or include a tort law claim for damages for personal injuries, the limitation period is three years.¹³⁹⁴

[722] It should also be noted that the *Foreign Limitation Periods Act 1984* provides that the law governing the substantive issues applies to the limitation period.¹³⁹⁵ This means that in cross-border cases, the UK court must apply the foreign law on limitation periods in relation to the claim before them where this is the law governing the substantive issues. There is an exception to this principle, based on public policy, where its application would result in undue hardship for a person who is or who might be made a party to the proceedings.¹³⁹⁶

[723] There is no known relevant case law in the context of business and human rights. There is also little known commentary in legal literature concerning this particular issue. In a 2009 submission to a Parliamentary joint committee on human rights, it was indicated that strict time limits of this kind may present a significant obstacle to victims of human rights violations in foreign countries in particular, who must first discover whether they have legal recourse through the UK courts, and who then face difficulties such as identifying lawyers and finding funds to cover costs.¹³⁹⁷

4.4.2. Costs and Legal Aid

[724] The plaintiff needs to pay a fee in order to bring an action in court. Civil court fees are determined, in the case of money claims, by the amount being claimed by the claimant. These increase on a sliding scale from a fee of £35 for amounts claimed up to £300 to a fee of £10,000 for claims of over £200,000.¹³⁹⁸

¹³⁹¹ Sec. 7(5) Human Rights Act 1998.

¹³⁹² Sec. 2 Limitation Act 1980 (available at: <http://www.legislation.gov.uk/ukpga/1980/58> (accessed on 24.08.2017)).

¹³⁹³ COOKE, pp. 528 *et seq.*

¹³⁹⁴ Sec. 11(4) Limitation Act 1980.

¹³⁹⁵ Foreign Limitation Periods Act 1984, available at: <http://www.legislation.gov.uk/ukpga/1984/16/contents> (accessed on 21.06.2016).

¹³⁹⁶ Sec. 2(2) Foreign Limitation Periods Act 1984.

¹³⁹⁷ See HERMER QC & CHAMBERS.

¹³⁹⁸ HM Courts & Tribunals Service, Civil and Family Court Fees.

[725] A reduction in the court fee is potentially available to those with limited income or in receipt of certain social security benefits and with limited savings.¹³⁹⁹

[726] As to legal aid in civil cases, only those types of cases falling within the scope of those identified in the relevant Schedule of the *Legal Aid, Sentencing and Punishment of Offenders Act 2012*¹⁴⁰⁰ (the “*LASPO Act 2012*”) will be eligible for legal aid. If a case does not fall within these parameters, and cannot be treated as an exceptional case, the net effect is that such matter will be outside the scope of civil legal aid.

[727] Crucially, tort and other general claims, like employment claims, are not identified in the list and will therefore not be eligible for legal aid. It is possible that such cases may be included as an exceptional case¹⁴⁰¹ at the discretion of the *Director of Legal Aid Casework*,¹⁴⁰² but the applicant and his or her case will still be subjected to tests of means and merits.¹⁴⁰³

[728] The two main principles in civil cases when it comes to deciding which party should pay the costs of an application or of the whole proceedings are:

- the costs payable by one party to another are at the discretion of the court;¹⁴⁰⁴ and
- as a general rule, confirmed in the *Civil Procedure Rules*, the unsuccessful party will be ordered to pay the costs of the successful party.¹⁴⁰⁵

[729] The use of contingency fee agreements (“CFA”) have been widespread since their use in most civil court cases was extended under the *Access to Justice Act 1999*.¹⁴⁰⁶ These usually permitted a legal representative to charge a success fee of up to 100% of his or her base costs upon a successful outcome.¹⁴⁰⁷ Previously, a successful party benefiting from a CFA could not only recover his or her costs from the losing party, but could also recover the success fee. Since April 2013, the *LASPO Act 2012* has prevented this however.¹⁴⁰⁸ The inability to recover this cost from the other side was expected to make CFAs significantly less attractive.

[730] It should furthermore be noted that also since April 2013, the *LASPO Act 2012*,¹⁴⁰⁹ in conjunction with secondary legislation in the form of the *Damages-Based Agreements Regulations 2013*,¹⁴¹⁰ now permits arrangements in most civil cases which allow a lawyer’s agreed fee to be

¹³⁹⁹ See HM Courts & Tribunals Service, Guide.

¹⁴⁰⁰ Sec. 9 Legal Aid, Sentencing and Punishment of Offenders Act 2012, available at: <http://www.legislation.gov.uk/ukpga/2012/10/contents/enacted> (accessed on 21.06.2016).

¹⁴⁰¹ For these purposes, this is a determination that it is necessary to make the services available to the individual, because a failure to do so would be a breach of the individual’s rights under the European Convention on Human Rights or enforceable EU rights on the provision of legal services: Sec. 10(3) Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁴⁰² Sec. 10 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁴⁰³ Sec. 11 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁴⁰⁴ Rule 44.3(1) Civil Procedure Rules 1998, and Sec. 51 Supreme Court Act 1981.

¹⁴⁰⁵ Rule 44.3(2) Civil Procedure Rules 1998.

¹⁴⁰⁶ Access to Justice Act 1999, available at: <http://www.legislation.gov.uk/ukpga/1999/22/contents> (accessed on 21.06.2016).

¹⁴⁰⁷ Although it should be noted that, under new rules, a success fee in personal injury cases of up to 100% must not exceed 25% of the recovered damages, excluding damages for future care and loss. This is designed to protect claimants’ damages in personal injury cases:

¹⁴⁰⁸ Sec. 44 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁴⁰⁹ Sec. 45 Legal Aid, Sentencing and Punishment of Offenders Act 2012.

¹⁴¹⁰ Damages-Based Agreements Regulations 2013, Statutory Instrument 2013, No. 609, available at: <http://www.legislation.gov.uk/ksi/2013/609/contents/made> (accessed on 22.06.2016).

determined as a percentage of the compensation received by the client. The maximum payment that the lawyer may receive from the client's damages is: in personal injury cases, 25% of the damages; and in all other civil litigation, 50% of the damages.¹⁴¹¹

[731] There are no known cases dealing specifically with the distribution of legal costs in the context of business and human rights.

[732] One case which examined, albeit indirectly, the question of financial support and which is often cited in the context of business and human rights is *Lubbe v Cape plc*.¹⁴¹² Here, the claimants' difficulties in funding their case in South Africa in relation to personal injuries suffered there partly as a result of acts of the UK-based *Cape plc*, was one of the factors relied on by English judges in rejecting an application by *Cape plc* that South Africa, and not England, was the more appropriate forum for the case. The claims, which principally concerned injuries said to have been caused by exposure to asbestos while the claimants were working for South African branches of the defendant company, would not have been funded by the South African Legal Aid Board, which, from 1999, had excluded personal injury claims from the South African legal aid scheme (unlike the English scheme in place at the time). Moreover, the contingency fees regime in South Africa was not, unlike in England, one which South African legal experts were prepared to rely on for conducting proceedings on a contingency fee basis. Although South Africa was deemed to be the natural forum, the claimants succeeded in showing that a stay of proceedings on the ground of *forum non conveniens* would be substantially unjust as a result of the lack of adequate financial support available in South Africa compared to that in England.¹⁴¹³

[733] To our knowledge, the rules described above have not been subject to commentary in legal literature in the context of business and human rights.

4.4.3. Standard and Burden of Proof

[734] In the English adversarial system, judicial responsibility for ascertaining the facts is limited to reaching a decision on the basis of the evidence presented by the parties. The court cannot find facts beyond what the evidence called by the parties has proved. The burden of proof has two aspects: which party will lose if the court fails to be persuaded of the existence of a fact in issue (the “*burden of persuasion*”); and which party has to come forward to adduce evidence in support of a fact in issue (the “*burden of adducing evidence*”).¹⁴¹⁴

[735] The *burden of persuasion* requires the party who carries it to prove his case to the appropriate standard of proof. In civil cases, it is usually the claimant who carries this burden on all the issues, but there may be distinct issues for which the defendant bears the burden of persuasion (such as a defendant who wishes to plead frustration of contract). The *burden of adducing evidence*, on the other hand, is about adducing some evidence capable of supporting the existence of a fact in issue. This normally also falls on the claimant, and often coincides with the *burden of persuasion*, but not always.¹⁴¹⁵ Where a defendant wishes to raise a fact to support an allegation, he has to adduce

¹⁴¹¹ Regulations 4(2) and (3) Damages-Based Agreements Regulations 2013.

¹⁴¹² *Lubbe v Cape plc* [2000] 1 Weekly Law Reports 1545.

¹⁴¹³ It might also be noted that the defendant company, having lost on appeal, was required at the final stage before the House of Lords, to bear the costs of the proceedings: *ibid*, at para. 35, *per* Lord Bingham of Cornhill.

¹⁴¹⁴ ZUCKERMAN, para. 21.32.

¹⁴¹⁵ *Ibid*, paras. 21.33-21.35.

evidence of that fact, even if it is up to the claimant to disprove the allegation because it is he who bears the burden of persuasion on the legal issue.

[736] Neither the burden of persuasion nor the evidential burden shifts during the course of the court proceedings.¹⁴¹⁶ The common law or legislation may nevertheless allocate the burden of proof between the parties in specific cases, although there are no general rules about this.¹⁴¹⁷ For example, the *Employment Rights Act 1996*, section 98, establishes that in an action for unfair dismissal, the employee bears the burden of persuasion to establish he was dismissed, but it is for the employer to prove that the dismissal was in accordance with the legislative criteria for fair dismissal.

[737] In civil cases, proof on the balance of probabilities is all that is required in order to discharge the burden of persuasion. In other words, the standard of proof that a proponent must meet is simply that it is more likely than not that his or her version of the facts is right.¹⁴¹⁸

[738] There is no particular jurisprudence containing specific commentary on these rules in the field of business and human rights. However, one related issue – that of obtaining evidence to support a legal claim – has received some judicial and academic attention given its particular significance to actions against large corporations, especially in a cross-border context.

[739] It is reported that some of the main barriers to access to a remedy by victims of human rights abuse by business enterprises are in relation to disclosure of evidence.¹⁴¹⁹ In one case in which the claimants requested specific disclosure of documents concerning the location of the defendant business's "central administration" to help determine the correct jurisdiction for the claim, the High Court stated that without disclosure of documents, there was a, "*very great risk that the claimants will be contesting jurisdiction at an unfair disadvantage.*"¹⁴²⁰

[740] First, notwithstanding that the *Civil Procedure Rules* allow for general and specific disclosure of relevant documents¹⁴²¹ by parties to litigation as well as answers to be given on oath to a request for information,¹⁴²² such a framework has limitations. This does not detract from the fact that the court will generally only order disclosure on the basis of the claimant's requests; this supposes that the claimant is aware of the existence of relevant documents and that the court will indeed exercise its discretion to order disclosure.

[741] Secondly, in the context of business and human rights litigation, the corporate structure of business enterprises, particularly multination companies, can make it difficult to identify the correct defendant; moreover, documentary evidence, such as letter, reports and emails, will usually be in the sole possession of the business, and these may be located in various countries.¹⁴²³ In *Lubbe v Cape*, the court noted:

¹⁴¹⁶ *Ibid*, para. 21.38.

¹⁴¹⁷ *Ibid*, para. 21.42.

¹⁴¹⁸ *Ibid*, para. 21.44.

¹⁴¹⁹ See SKINNER *et al.*

¹⁴²⁰ *Vava v Anglo American South Africa Ltd* [2012] England and Wales High Court 1969 (Queen's Bench Division), para. 69.

¹⁴²¹ Rule 31(12) Civil Procedure Rules 1998.

¹⁴²² Rule 18 Civil Procedure Rules 1998.

¹⁴²³ McCORQUODALE, p.18.

*"Resolution of this issue [of a duty of care] will be likely to involve an inquiry into what part the defendant played in controlling the operations of the group, what its directors and employees knew or ought to have known, what action was taken and not taken, whether the defendant owed a duty of care to employees of group companies overseas and whether, if so, that duty was broken. Much of the evidence material to this inquiry would, in the ordinary way, be documentary and much of it would be found in the offices of the parent corporation, including minutes of meetings, reports by directors and employees on visits overseas and correspondence."*¹⁴²⁴

4.5. Collective Redress

[742] There is no specific legal mechanism in the UK for bringing class actions or for collective redress in civil law cases. Instead, court procedural rules, such as the *Civil Procedure Rules* ("CPRs") in England and Wales, provide for special procedures which may be applied to achieve more efficient case management of multi-party proceedings. There are two principal routes: representative action and the Group Litigation Order ("GLO"). Courts also have the power, under the CPRs, to combine existing related claims or defences in the interests of efficiency.

[743] Finally, it should be noted that a new class action regime was introduced in the UK on 1st October 2015. However, this only applies in relation to breaches of competition law.¹⁴²⁵

4.5.1. Form of Collective Actions

[744] Applying to all proceedings before the civil courts¹⁴²⁶ in England and Wales, the CPRs also apply to claims in relation to human rights violations by public authorities. As referred to above however, a self-standing 'human rights violation' claim against private bodies¹⁴²⁷ does not exist under UK law. Instead, the principal cause of action for abuse of a human right by a business enterprise is likely to be one arising under tort law, in particular negligence, but also other tort claims such as nuisance or trespass to the person. Such claims will be civil law proceedings and could therefore potentially be subjected to the case management rules of the CPRs.

[745] In the absence, under UK law, of the recognition of any self-standing claim of human rights violations by private bodies, there are no specific rules on collective actions in this regard. General limitations, which may potentially apply to multi-party tort-law proceedings raising human rights violations, are discussed below.

¹⁴²⁴ Lubbe v Cape plc [2000] 1 Weekly Law Reports 1545. p.1546.

¹⁴²⁵ Under the Consumer Rights Act 2015, available at: <http://www.legislation.gov.uk/ukpga/2015/15/contents/enacted> (accessed on 28.06.2016). In light of its lack of relevance to business and human rights, this will not be addressed further here.

¹⁴²⁶ These being county courts, the High Court and the Civil Division of the Court of Appeal. Certain types of proceedings are specifically excluded (e.g., insolvency proceedings, family proceedings): Rule 2.1 Civil Procedure Rules 1998.

¹⁴²⁷ Claims in respect of a breach of the UK's Human Rights Act 1998 can, according to Sec. 6, only be brought against a 'public authority'. This includes, "any person certain of whose functions are functions of a public nature." Human Rights Act 1998.

[746] Relatively uncommon in England, a *representative action* is a claim or defence, recognized by CPR rule 19.6, launched by one or more claimants or defendants, on their own behalf or on behalf of others:¹⁴²⁸

- “(1) *Where more than one person has the same interest in a claim –*
- (a) *the claim may be begun; or*
- (b) *the court may order that the claim be continued, by or against one or more of the persons who have the same interest as representatives of any other persons who have that interest.”*

[747] All those concerned have to share a single common interest. The representative claimant is the only claimant, and members of the represented class are not parties to the action. The procedure assumes that no individual treatment or separate assessment of represented persons' claims is necessary. Such proceedings are particularly relied on as a means of gaining 'closure' of a dispute affecting a host of persons or for obtaining effective injunctive relief. They are rarely used for proceedings in which pecuniary relief is sought, particularly given that the representative must bear the entire cost of the litigation if the case is lost.

[748] In proceedings in which a representative has been appointed, the only condition on a representative, arguably, is that the interest which underlies his or her claim or defence must be the same as that of the represented parties.¹⁴²⁹ In the case of claimants therefore, a representative cannot use this procedure to make a claim, if he does not have a cause of action in his or her own right. The action is brought directly by the claimant.¹⁴³⁰

[749] Unlike GLOs, representative proceedings can begin without the court's permission. A party may therefore appoint him or herself as representative (whether of claimants or defendants), regardless of whether those represented have authorized the representative to represent them.¹⁴³¹ He or she does not need to be appointed or elected by the relevant group. On the other hand, the court may refuse to allow such a party to continue in a representative capacity of its own volition or on the application of a party to the proceedings.¹⁴³² Although any judgment given in representative proceedings is binding on all persons represented in the claim, it is only with the court's permission that the judgment may be *enforced* by or against a person who was not a party to the proceedings.¹⁴³³

[750] A *Group Litigation Order* (“GLO”) is made under CPR rule 19.11.¹⁴³⁴ This is an order issued at the court's discretion which provides for the case management of claims giving rise to common or related issues of fact or law. Each individual must 'opt-in' and court orders and directions are binding on all cases registered as part of the group claim.

[751] In proceedings subject to a GLO, such group action is described as including,

¹⁴²⁸ Rule 19.6 Civil Procedure Rules 1988.

¹⁴²⁹ Rule 19.6(1) Civil Procedure Rules 1988.

¹⁴³⁰ ANDREWS, Multi-party proceedings, p. 251.

¹⁴³¹ *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] England and Wales High Court 470, Chancery Division.

¹⁴³² Rule 19.6(2) Civil Procedure Rules 1988.

¹⁴³³ Rule 19.6(4) Civil Procedure Rules 1988.

¹⁴³⁴ All GLOs are listed on the Gov.uk webpages. There have been 94 such orders as at 24.07.2015: <https://www.gov.uk/guidance/group-litigation-orders> (accessed on 30.06.2016).

*"...a set of parties (normally claimants, but they might be defendants) shepherded into a single flock, travelling the long road to settlement without the separate consideration of a multiplicity of identical or similar issues."*¹⁴³⁵

[752] There must first be an application to a specified judge for a *GLO* or the court may itself make such an order of its own initiative. It is recommended that the solicitors of the claimants form a solicitors' group and choose one of their number to take the lead in applying for the *GLO* and in litigating the *GLO* issues. Defining the relationship between the members of the solicitors group, it is then anticipated that the claimants are represented by one solicitor, as legal representative.

[753] Claims must, "give rise to common or related issues of fact or law."¹⁴³⁶ Inclusion as a group member is therefore not as strict as in representative actions. Unlike representative proceedings or US-style class actions, *GLO* claims remain separate claims but are dealt together under case management proceedings. The inclusion of claims in the proceedings is at the court's discretion and without any particular criteria.

[754] Upon issuing a *GLO*, a court must specify the issues which will identify the claims to be managed as a group under the *GLO* and make directions about the establishment of a *Group Register* on which the claims managed under the *GLO* will be entered. Cases will then qualify to be entered on the *Group Register* if they give rise to at least one of the *GLO* issues.¹⁴³⁷ The managing court's orders will be binding on all cases on the *Group Register* with regard to the common issues.

[755] For parties which have not issued claims prior to the making of the *GLO*, accompanying *Practice Directions ("PD")*¹⁴³⁸ require that the solicitor acting for a proposed party to a group litigation case consult the Law Society's *Multi-Party Action Information Service* and obtain information about other cases which might give rise to the proposed *GLO* issues.

[756] Finally, in addition to representative and *GLO* proceedings, a court has the power under *CPR* rule 3.1(2)(g) to combine claims or defences in the interests of efficiency. This is simply a process of joinder of actions which was may still be used in appropriate cases, but which was more heavily relied on before the introduction of *GLOs* in 2000.

[757] The process of joinder of actions as a multi-party procedure does not envisage any particular role for a representative as such, and claims continue to be claimant-led, subject to individual legal representation.

[758] Three types of remedy are available in collective redress cases in the English courts:

- Damages
- Injunction¹⁴³⁹
- Declaration

[759] Damages represent the most frequently claimed remedy, particularly in *GLO* proceedings. Unlike under United States law however, damages cannot be awarded at large or globally without

¹⁴³⁵ ANDREWS, Multi-party proceedings, p. 258.

¹⁴³⁶ Rule 19.10 Civil Procedure Rules 1988.

¹⁴³⁷ ZUCKERMAN, para. 12.40, 12.44 and 12.45.

¹⁴³⁸ Issued by the Lord Chief Justice, to accompany the Civil Procedure Rules 1988. See PD 19(2).

¹⁴³⁹ Injunctions normally *prohibit* specific actions by the respondent and will normally also provide a remedy for other potential applicants in a similar situation to the main applicant. An order of a mandatory (*positive*) injunction, requiring the respondent to do something is rare: SMITH & MOEIRI-FARSI.

reference to the particular loss suffered by members of the relevant class of interested persons. Moreover, it is generally the case the compensation cannot be punitive and that non-compensatory damages are not available for breach of contract or for the tort of negligence.¹⁴⁴⁰

[760] In a representative action, in which all represented parties must have the same interest in the claim, it has been ruled that not only must the court be able to determine the total amount of damages to be awarded in favour of the represented class, but must also be able to determine the value of an individual represented person's entitlement to damages.¹⁴⁴¹

[761] It is reported that representative proceedings have not typically been relied on for obtaining damages. This is said to be for two reasons.¹⁴⁴² First, a representative must bear the entire cost of the litigation if the case is lost and may furthermore not succeed in recovering all his costs from the losing opponent even if he wins. Secondly, courts have traditionally adopted a narrow interpretation of the need to have the, "*same interest in the claim*," under CPR rule 19.6, which has resulted in the rejection of actions sought to be brought on a representative basis. A more flexible approach towards this condition appears to have been taken in recent years however.¹⁴⁴³

[762] Representative proceedings are however recognized as providing an efficient means of gaining 'closure' of a dispute affecting many people by way of a declaration,¹⁴⁴⁴ and for obtaining injunctive relief.¹⁴⁴⁵

[763] Unlike in representative proceedings, actions brought under GLOs remain separate proceedings. They are simply managed in a coordinated fashion, and it is expected that after the common issues have been resolved, each group member must then proceed to establish his entitlement to relief separately.¹⁴⁴⁶

4.5.2. Requirements Concerning Collectivity

[764] In representative proceedings, courts have traditionally taken a narrow interpretation of the requirement that the interests of the representatives and those of the represented are, in accordance with CPR rule 19.6, "*the same*." In particular, the prevailing view has been that for proceedings to be conducted on a representative basis, it is neither enough that the suggested class of claimants is suing in the respect of the same cause of action, nor that the claims raise very similar factual issues, perhaps even arising from the same incident.¹⁴⁴⁷ Moreover, courts have appeared reluctant to allow the use of the procedure where it would, in effect, prevent a defendant from raising a defence which he has against only some of the persons represented.¹⁴⁴⁸ Instead,

¹⁴⁴⁰ ANDREWS, Multi-party proceedings, p. 253.

¹⁴⁴¹ *Millharbour Management Ltd v Weston Homes* [2011] 3 All England Law Reports 1027, as discussed in ANDREWS, Multi-party litigation, p. 7.

¹⁴⁴² See ANDREWS, Multi-party litigation, pp.6-7.

¹⁴⁴³ See para. [764].

¹⁴⁴⁴ *Equitable Life Assurance Society v Hyman* [2002] 1 Appeal Court 408, House of Lords.

¹⁴⁴⁵ ANDREWS, Multi-party litigation, p. 5.

¹⁴⁴⁶ ZUCKERMAN, para. 12.37.

¹⁴⁴⁷ ANDREWS, Multi-party litigation, with reference to *Markt & Co v Knight SS Co Ltd* [1910] 2 King's Bench Division 1021., p. 6.

¹⁴⁴⁸ *Ibid*, para. 12.27.

issues of law and fact must be identical, as part of proceedings in which no individual treatment or separate assessment of represented persons' claims is necessary.¹⁴⁴⁹

[765] It is suggested that in recent case law, a more liberal interpretation has been adopted particularly in cases where compensation is easily identifiable. In a claim for damages, where the court is able to determine the total amount of damages to be awarded in favour of the represented class and is also able to determine the value of an individual represented person's entitlement to damages, representative proceedings can be an acceptable way of achieving procedural efficiency.¹⁴⁵⁰

[766] Representative proceedings can be considered as opt-out proceedings. Members of the represented class will receive the benefits of a *res judicata* decision. A represented person may apply to be excluded from the represented class under CPR rule 19.6(1).

[767] The represented persons need not be informed of the representative party's intention to bring the action nor need they be informed of its progress. Indeed, the representative claimant or defendant is *dominus litis* (Latin for "the one who calls the procedural shots") and so the representative can therefore compromise the claim or defence.¹⁴⁵¹

[768] All persons represented in the claim must be identified as part of the proceedings. There is no known rule that such persons be named publicly, but civil cases generally involve hearings in open court which the public may attend.

[769] Proceedings subject to a *GLO* are opt-in proceedings, whereby each individual must opt in by registering their claim on the *Group Register*, normally maintained by the court. A claimant can be entered in the *Group Register* only if he has issued a claim form.

[770] As stated above, claims must give rise to common or related issues of fact or law. Case management orders issued by the court typically set cut-off dates for joining the proceedings and also provide for the making of the *GLO* to be advertised in order that potential claimants can join the collective action. There is no guidance in the *CPR* or the accompanying practice directions on what constitutes appropriate advertising or who should pay for it.

[771] In proceedings subject to a *GLO*, registration of a claim on the *Group Register* is crucial, as it will only be claims that have been entered on the register that will benefit from the results of the group litigation. Such register will either be kept and administered at the court, or may be kept and administered by the solicitors for one of the parties to a claim entered on the register. Where a solicitor maintains the register, any person may inspect it during normal business hours and upon giving reasonable notice to the solicitor.¹⁴⁵²

[772] Consolidated proceedings may also be considered as 'opt-in' given that the relevant *CPR* rule¹⁴⁵³ indicates that a positive action on the part of the court is required before claims can be treated as part of the same proceedings.

¹⁴⁴⁹ *Independiente Ltd v Music Trading On-Line (HK) Ltd* [2003] England and Wales High Court 470, Chancery Division.

¹⁴⁵⁰ *Millharbour Management Ltd v Weston Homes* [2011] 3 All England Law Reports 1027.

¹⁴⁵¹ ANDREWS, Multi-party litigation, p.5.

¹⁴⁵² Practice Direction 19B(6.5) Civil Procedure Rules Practice Directions.

¹⁴⁵³ Rule 3.1(2)(g) Civil Procedure Rules.

5. Access to Judicial Remedies in the United States

5.1. Criminal Law

[773] U.S. law in general and U.S. criminal law in particular, is not governed by an overarching structure, as is the case in civil law systems. Most U.S. criminal law is state law, the majority of which grew out of the Common Law. Each crime or type of crime is defined separately, with its own *actus reus* and *mens rea* elements as well as the relevant sanctions, limitations and exceptions. The answers to each of the questions posed, then, will depend on the specific crime charged.

5.1.1. Prosecution of Criminal Acts Committed Abroad

[774] There is a general presumption against extra-territorial application of U.S. law.¹⁴⁵⁴ As such, unless there is clear evidence that Congress intended for a law to apply to acts committed outside of the U.S., the law will only be applicable to acts committed within the U.S. There are, however, some criminal statutes that specifically apply to foreign behaviour. 18 U.S. Code §2423, for example, provides that any U.S. citizen or permanent resident who travels abroad with the intent to commit a sexual act with a minor, or who commits such an act abroad, as well as anyone facilitating or arranging such a trip for profit is punishable by a fine and/or imprisonment for up to 30 years.

5.1.2. Possibility to Prosecute Corporations

[775] US Federal Law allows for criminal liability of corporations or most other legal entities for the crimes of their employees and agents.¹⁴⁵⁵ Whether or not a legal entity may be subject to liability depends on the crime in question. For example, the racketeering statute provides that its proscriptions apply to "persons" defined as "any individual or entity capable of holding a legal or beneficial interest in property,"¹⁴⁵⁶ whereas for tax crimes, the definition is more detailed:

When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—(1) Person.—The term “person” shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation. (2) Partnership and partner.—The term “partnership” includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term “partner” includes a member in such a

¹⁴⁵⁴ *American Banana Co. v United Fruit Co.*, 213 U.S. 347 (1909).

¹⁴⁵⁵ DOYLE, citing: *United States v Agosto-Vega*, 617 F.3d 541, 552-53 (1st Cir. 2010); *United States v Philip Morris USA, Inc.*, 566 F.3d 1095, 1118-119 (D.C.Cir. 2009); *United States v Singh*, 518 F.3d 236, 249 (4th Cir. 2008); accord, *United States v Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998); *United States v Investment Enterprises, Inc.*, 10 F.3d 263, 266 (5th Cir. 1994); *United States v Twentieth Century Fox Film Corp.*, 882 F.2d 656, 660 (2d Cir. 1989); *United States v Gold*, 743 F.2d 800, 822-23 (11th Cir. 1984); *United States v Beusch*, 596 F.2d 871, 877-78 (9th Cir. 1979); *United States v Carter*, 311 F.2d 934, 941-42 (6th Cir. 1963).

¹⁴⁵⁶ 18 U.S.C. 1961(3).

*syndicate, group, pool, joint venture, or organization. (3) Corporation.-The term “corporation” includes associations, joint-stock companies, and insurance companies.*¹⁴⁵⁷

[776] Corporate federal criminal liability is ordinarily limited to offenses (a) committed by the corporation's officers, employees, or agents; (b) within the scope of their employment; and (c) at least in part for the benefit of the corporation.¹⁴⁵⁸ The test for whether an activity falls within the individual's scope of authority is whether the individual engages in activities on behalf of the corporation in performance of the employee's general line of work, i.e. its acts are motivated, at least in part, by an intent to benefit the corporation.¹⁴⁵⁹ If the standard is met, the corporation will be liable even in cases where it has expressly directed its agent, employee, or officer not to commit the offense in question.¹⁴⁶⁰

[777] Under the law of many states¹⁴⁶¹, corporate criminal liability may be based on misconduct of senior management officials, whereas the acts of lower level employees may not be enough, even when they act within the scope of authority for the corporation's benefit.¹⁴⁶² The general rule is that statutes holding corporations criminally liable for the acts of officers, employees or agents do not protect such persons from individual criminal liability.¹⁴⁶³

[778] Corporations cannot be imprisoned or sentenced to death, although government action, public protest or a combination of the two can result in a corporation ceasing to exist.¹⁴⁶⁴ Otherwise,

¹⁴⁵⁷ 26 U.S.C. 7701(a)(1)-(3).

¹⁴⁵⁸ DOYLE, citing: *United United States v Singh*, 518 F.3d 236, 249-50 (4th Cir. 2008) (“a corporation accused is liable for the criminal acts of its employees and agents acting within the scope of their employment for the benefit of the corporation and such liability arises if the employee or agent acted for his own benefit as well as that of his employer”); *United States v Potter*, 463 F.3d 9, 25 (1st Cir. 2006); *United States v Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998); *United States v Sun Diamond Growers*, 138 F.3d 961 (D.C.Cir. 1998).

¹⁴⁵⁹ *United States v Agosto-Vega*, 617 F.3d 541, 25 (1st Cir. 2010) (“[t]he test is whether the agent is performing acts of the kind which he is authorized to perform and those acts are motivated—at least in part—by an intent to benefit the corporation”); *United States v Singh*, 518 F.3d at 250-51; *United States v Gold*, 743 F.2d 800, 823 (11th Cir. 1984) (“the servant's conduct is within the scope of his employment if it is of the kind he is employed to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part by a purpose to serve the master”).

¹⁴⁶⁰ *United States v Potter*, 463 F.3d 9, 26 (1st Cir. 2006); *United States v Automated Medical Laboratories*, 770 F.2d 399, 406 (4th Cir. 1985); *United States v Ionia Management S.A.*, 525 F.Supp.2d 319, 324 (D. Conn. 2007).

¹⁴⁶¹ And the Model Penal Code: Model Penal Code § 2.07 (1985) (“A corporation may be convicted of the commission of an offense if (a) the offense is a violation ... in which a legislative purpose to impose liability on corporations plainly appears ... or (b) the offense consists of an omission to discharge a specific duty or affirmative performance imposed on corporations by law; or (c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment. (2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears ... (5) In any prosecution of a corporation ... for the commission of an offense included within the terms of Subsection (1)(a) ... it shall be a defense ... that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission ...”).

¹⁴⁶² E.g., Ariz. Rev. Stat. Ann. § 13-305 (“A. Notwithstanding any other provisions of law, an enterprise commits an offense if: 1. The conduct constituting the offense consists of a failure to discharge a specific duty imposed by law; or 2. The conduct undertaken in behalf of the enterprise and constituting the offense, is engaged in, authorized, solicited, commanded or recklessly tolerated by the directors of the enterprise in any manner or by a high managerial agent acting within the scope of employment; or 3. The conduct constituting the offense is engaged in by an agent of the enterprise while acting within the scope of employment and in behalf of the enterprise; and (a) the offense is a misdemeanor or petty offense; or (b) The offense is defined by a statute which imposed criminal liability on an enterprise”).

¹⁴⁶³ DOYLE, p. 5.

¹⁴⁶⁴ DOYLE, p. 20.

corporations and individuals face many of the same sanctions. Corporations can be fined.¹⁴⁶⁵ They can be placed on probation.¹⁴⁶⁶ Courts can order them pay restitution.¹⁴⁶⁷ Their property can be confiscated.¹⁴⁶⁸ They can be barred from engaging in various types of commercial activity.

[779] Whether a court is required to order a convicted corporation to pay restitution to a victim or has the discretion to do so will depend on the nature of the offense. Moreover, in some circumstances, the court may make restitution a condition of probation¹⁴⁶⁹ or part of a plea bargain.¹⁴⁷⁰ Restitution is required *inter alia* for the following crimes:

- theft of medical products¹⁴⁷¹
- sexual abuse¹⁴⁷²
- child pornography¹⁴⁷³
- telemarketing fraud¹⁴⁷⁴

and is discretionary, *inter alia*, for the following crimes:

- any offense under title 18 of the U.S. Code for which mandatory restitution is not required;¹⁴⁷⁵
- transportation of hazardous materials;¹⁴⁷⁶
- air piracy¹⁴⁷⁷
- violations of the Controlled Substances Act under 21 U.S.C 861 (using children in drug operations)¹⁴⁷⁸

[780] An officer of a corporation is not personally liable for the crimes of the corporation or of corporate employees merely by virtue of his position as an officer.¹⁴⁷⁹ Liability will, rather, be based

¹⁴⁶⁵ Cf., 18 U.S.C. 3571 (designating maximum fines for organizations convicted of felonies and various misdemeanours).

¹⁴⁶⁶ Cf., 18 U.S.C. 3561(a)(1) (noting that all defendants may be placed on probation other than individuals convicted of class A or B felonies).

¹⁴⁶⁷ The statutes that authorize restitution orders refer to simply to “victims” or “defendants” rather than to “individuals,” “organizations,” or “corporations,” 18 U.S.C. 3663, 3663A, 2248, 2259, 2264, 2327. DOYLE, p. 20.

¹⁴⁶⁸ DOYLE, p. 20.

¹⁴⁶⁹ 18 U.S.C. 3563(b)(2).

¹⁴⁷⁰ 18 U.S.C. 3663(a)(1)(A), (3). See generally GOODWIN.

¹⁴⁷¹ 18 U.S.C. 3663A(c)(iii); U.S.S.G. § 8B1.1(a)(1).

¹⁴⁷² 18 U.S.C. 2248.

¹⁴⁷³ 18 U.S.C. 2259.

¹⁴⁷⁴ 18 U.S.C. 3663(a)(1)(A).

¹⁴⁷⁵ 18 U.S.C. 3663(a)(1).

¹⁴⁷⁶ 18 U.S.C. 3663(a)(1);

¹⁴⁷⁷ 18 U.S.C. 3663(a)(1).

¹⁴⁷⁸ 18 U.S.C. 3663(a)(1).

¹⁴⁷⁹ LaFave, W.L., Substantive Criminal Law, Database updated October 2015 § 13.5. Enterprise liability, citing: *State v McBride*, 215 Minn. 123, 9 N.W.2d 416 (1943); *People v Matherson*, 35 N.Y.2d 694, 361 N.Y.S.2d 346, 319 N.E.2d 708 (1974). *McCollum v State*, 165 Tex.Cr.R. 241, 305 S.W.2d 612 (1957).

on a *respondeat superior* theory.¹⁴⁸⁰ The prosecutor must prove that the criminal acts were done at the officer's direction or with his permission.¹⁴⁸¹

[781] The question of who, if anyone, should be held personally liable for the strict-liability criminal omissions of the corporation gives rise to particularly problematic situations. Under existing law, the corporate officer generally escapes individual liability despite the fact that he is under an affirmative obligation to perform the duty on behalf of the corporation.¹⁴⁸² The Model Penal Code position is that the corporate agent having "primary responsibility for the discharge of the duty" imposed by law on the corporation is accountable for "a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself."¹⁴⁸³ A few of the modern state laws contain such a provision.¹⁴⁸⁴

[782] The U.S. Supreme Court has handed down two opinions¹⁴⁸⁵ concerning this question in the context of the Federal Food, Drug and Cosmetic Act,¹⁴⁸⁶ neither of which provides a particularly clear standard.

5.1.3. Victim's Participation and Other Rights in Criminal Proceedings

[783] 18 U.S. Code §3771 provides specifically that:

A crime victim has the following rights:

- (1) *The right to be reasonably protected from the accused.*
- (2) *The right to reasonable, accurate, and timely notice of any public court proceeding, or any parole proceeding, involving the crime or of any release or escape of the accused.*
- (3) *The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.*
- (4) *The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.*

¹⁴⁸⁰ See, LaFave, W.L., Substantive Criminal Law, Database updated October 2015 § 13.5. Enterprise liability, citing: *United States v Sain*, 141 F.3d 463 (3d Cir.1998) "defendant and his wholly-owned corporation were convicted of fraud. The defendant argued that he could not personally be convicted of the offense, as it covers only a person or entity contracting with the government, which in the instant case was only the corporation, and that he could not be convicted as an accessory because he was the only human being involved, a circumstance which, it is well established, would be a bar to a conspiracy conviction. The court, after noting that defendant's two arguments were inconsistent with one another, distinguished the conspiracy cases because they are grounded in the notion that it takes two minds to bring about an agreement, and then said that even if the corporation had no mental state of its own the defendant could still be convicted as an aider and abettor, as the applicable accomplice statute allowed conviction of the accomplice with the bad state of mind even if the principal lacked such a mental state."

¹⁴⁸¹ *State v Pincus*, 41 N.J.Super. 454, 125 A.2d 420 (1956); *People v Alrich Restaurant Corp.*, 53 Misc.2d 574, 279 N.Y.S.2d 624 (1967); *State v McBride*, 215 Minn. 123, 9 N.W.2d 416 (1943); *Compton v Commonwealth*, 22 Va.App. 751, 473 S.E.2d 95 (1996).

¹⁴⁸² *People v Clark*, 8 N.Y.Cr.R. 169, 14 N.Y.S. 642 (1891).

¹⁴⁸³ Model Penal Code § 2.07(6)(b) (1985).

¹⁴⁸⁴ Ark. Code Ann. §5-2-503; Haw. Rev. Stat. §702-228; Me. Rev. Stat. Ann. tit. 17-A, §61; Ohio Rev. Code Ann. §2901.24; Pa. Cons. Stat. Ann. tit. 18, §307; Tex. Penal Code Ann. §7.23; Wash. Rev. Code §9A.08.030.

¹⁴⁸⁵ *United States v Dotterweich*, 320 U.S. 277 (1943) and *United States v Park*, 421 U.S. 658 (1975)

¹⁴⁸⁶ 21 U.S.C. §§ 301 et seq.

- (5) *The reasonable right to confer with the attorney for the Government in the case.*
- (6) *The right to full and timely restitution as provided in law.*
- (7) *The right to proceedings free from unreasonable delay.*
- (8) *The right to be treated with fairness and with respect for the victim's dignity and privacy.*
- (9) *The right to be informed in a timely manner of any plea bargain or deferred prosecution agreement.*
- (10) *The right to be informed of the rights under [18 U.S. Code § 3771] and the services described in section 503(c) of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10607(c)) and provided contact information for the Office of the Victims' Rights Ombudsman of the Department of Justice.*

5.1.4. Measures to Facilitate Prosecution

[784] Our research revealed no criminal charges or procedures specifically address Business and Human Rights.

5.2. Private International Law and International Civil Procedure

[785] U.S. law requires that, in each case, the court must have subject matter jurisdiction, i.e. competence to decide the specific type of claim being brought, and *in personam*, or personal, jurisdiction over all of the parties. Although personal jurisdiction may be waived by the relevant party, without subject matter jurisdiction, a judgment is null and void.

[786] State courts are courts of general jurisdiction, although there may be limitations, in particular concerning claims arising in another state (or country).¹⁴⁸⁷ Federal courts, however, are courts of limited jurisdiction. In order to bring an action in federal court, the plaintiff must find a constitutional or congressional grant of *subject-matter jurisdiction* to allow the federal court to hear the claim.¹⁴⁸⁸ As a general rule, courts read congressional grants of subject-matter jurisdiction narrowly, resolving any ambiguities in favour of denying jurisdiction. Moreover, there is a presumption against extra-territorial application of federal law; absent an express Congressional intention, U.S. laws will not have extra-territorial effect.¹⁴⁸⁹

[787] It should be noted that, in addition to cases in which questions of federal law are posed (referred to as "federal question"¹⁴⁹⁰ jurisdiction), federal courts may also have subject matter jurisdiction where plaintiffs and defendants are domiciled in different states.¹⁴⁹¹

[788] Filing a lawsuit is considered a voluntary submission to jurisdiction and, as such, courts will necessarily have personal jurisdiction over plaintiffs. As a matter of constitutional law, a court

¹⁴⁸⁷ It should also be noted that, even where a U.S. court may have jurisdiction over an action, the notion of *forum non conveniens* may allow the court to refuse to exercise its jurisdiction if another court is deemed a more appropriate forum. E.g. *Wiwa v Royal Dutch Petroleum Co.*, 226 F.3d 88, 101 (2d Cir. 2000).

¹⁴⁸⁸ US Const. Art. III, Sec. 2.

¹⁴⁸⁹ *American Banana Co. v United Fruit Co.*, 213 U.S. 347 (1909).

¹⁴⁹⁰ 28 U.S. Code § 1331.

¹⁴⁹¹ And the amount in controversy is at least US\$75,000; 28 U.S. Code § 1332.

located in any state (or federal district, in the case of the federal court system) other than that in which the defendant is domiciled may have *personal jurisdiction* over that defendant only if that defendant has certain minimum contacts with that other state (or federal district, where applicable).¹⁴⁹²

[789] In international Human Rights litigation, there may be issues concerning either or both of these types of jurisdiction.

5.2.1. Jurisdiction in the State of Domicile

[790] If the claim is brought against a company in the courts of its state of domicile, the court will have *in personam* jurisdiction over the company. It remains, then, to determine whether the court would have subject matter jurisdiction.

[791] This determination will, of course, depend on the cause of action and, therefore, must be made on a case-by-case basis. Human rights violations could involve a broad range of causes of action under both federal and state law; which causes of action will be appropriate will depend on the facts of a particular case. For example, the litigation in U.S. courts of claims against Swiss banks concerning assets of holocaust victims included claims such as breach of fiduciary and other duties, breach of contract, conversion, unjust enrichment, negligence, fraud, and conspiracy. The plaintiffs also claimed that the Swiss banks “concealed relevant facts from [the plaintiffs] in an effort to frustrate [their] ability to pursue their claims.”¹⁴⁹³ These were mostly state law claims; the federal court had jurisdiction based on diversity.¹⁴⁹⁴ Rules on subject matter jurisdiction in state courts will be a matter of state law. A comprehensive analysis of the laws of every state in the U.S. concerning each type of potential claim is beyond the scope of this opinion.

[792] For claims based on federal law, one must overcome the presumption against extra-territorial application of the law in question unless the statute on which the claim is based expressly provides otherwise. Courts differ, however, in their interpretation of “extra-territorial application.” The traditional view, articulated by Justice Holmes, is that this means that the U.S. law should apply only to *conduct that occurs within* the United States¹⁴⁹⁵. Another view, held by Judge Bork, is that acts of Congress apply only to *conduct that causes effects within* the United States, unless a contrary intent appears, regardless of where that conduct occurs.¹⁴⁹⁶ Other courts allow application of U.S. law in either case.¹⁴⁹⁷ For example, the U.S. Supreme Court has applied the presumption¹⁴⁹⁸ to the Federal Tort Claims Act¹⁴⁹⁹, the Immigration and Nationality Act¹⁵⁰⁰, and, more importantly, to Title VII (employment discrimination)¹⁵⁰¹, but not to the Sherman Act (antitrust)¹⁵⁰².

¹⁴⁹² *International Shoe Co. v Washington*, 326 U.S. 310 (1945).

¹⁴⁹³ See *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000).

¹⁴⁹⁴ BILSKY et al., p. 148.

¹⁴⁹⁵ *American Banana Co. v United Fruit Co.*, 213 U.S. 347 (1909).

¹⁴⁹⁶ *Zoelsch v Arthur Anderson & Co.*, 824 F.2d 27 (D.C. Cir. 1987).

¹⁴⁹⁷ *Environmental Defense Fund v Massey*, 986 F.2d at 531

¹⁴⁹⁸ An analysis of what is necessary to rebut the presumption is beyond the scope of this opinion.

¹⁴⁹⁹ *Smith v United States*, 507 U.S. 197, 203-04 (1993).

¹⁵⁰⁰ *Sale v Haitian Centers Council, Inc.*, 509 U.S. 155, 173-74 (1993).

¹⁵⁰¹ *E.E.O.C. v Arabian American Oil Co.*, 499 U.S. 244 (1991).

¹⁵⁰² *Hartford Fire Insurance Co. v California*, 509 U.S. 764 (1993).

[793] There are two pieces of federal legislation that specifically address international claims that would be applicable in the human rights context: the *Alien Tort Claims Act*¹⁵⁰³ (ATCA, also referred to as the Alien Tort Statute, or ATS) and the *Torture Victim Protection Act* (TVPA).¹⁵⁰⁴ The ATCA does not actually create a cause of action but, instead, is specifically a jurisdictional statute which provides as follows. “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The TVPA, on the other hand, creates the civil cause of action but does not grant jurisdiction.¹⁵⁰⁵ It may not be used to sue a corporation.¹⁵⁰⁶

[794] Since the 1990s, approximately 200 cases have been brought against transnational businesses under the ATCA “for their roles, typically vicarious, in violating customary international human rights norms in countries hosting businesses’ activities.”¹⁵⁰⁷ Many of these cases

*employed the [ATCA] as a form of civilside [sic] universal jurisdiction, offering recourse against serious violators of international law despite the absence, in many if not most cases, of any significant connection between the parties or events in issue and the United States. Jurisdiction rested not on particular U.S. connections or interests, but on a more general obligation to help redress certain violations of international law as such, regardless of where they may have occurred or the identity of the victim.*¹⁵⁰⁸

[795] As a result, where the facts supported a claim under the ATCA, jurisdictional issues were generally not an obstacle.

[796] In the April 2013 case of *Kiobel v. Royal Dutch Petroleum*,¹⁵⁰⁹ however, the U.S. Supreme Court held that the presumption against extra-territorial application of federal law applies to claims under the ATCA brought for violations of customary international law that occur abroad.¹⁵¹⁰ In this case, unanimous as to the result, the Court held that in order to overcome the presumption, plaintiffs must demonstrate that a claim “touch[es] and concern[s]”¹⁵¹¹ the territory of the United States with sufficient force; however, a business’ presence in the United States is not alone sufficient to overcome the presumption.¹⁵¹² To date, there is no Supreme Court case law defining the notion of “touch and concern,” and the future of ATCA litigation remains unclear.¹⁵¹³

¹⁵⁰³ 28 U.S. Code § 1330.

¹⁵⁰⁴ Torture Victim Protection Act of 1991, 28 U.S.C. § 1330 n. 2. The TVPA provides: “An individual who, under actual or apparent authority, or color of law, of any foreign nation--(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual’s legal representative, or to any person who may be a claimant in an action for wrongful death.”

¹⁵⁰⁵ It is worth noting here that there is also a federal criminal statute which grants jurisdiction over alleged offenders who are either U.S. citizens or are present in the U.S., regardless of the nationality of the victim or the alleged offender. 18 U.S. Code § 2340A.

¹⁵⁰⁶ See *Mohamad v Palestinian Authority*, 132 S. Ct. 1702 (2012) (holding that “only a natural person is an ‘individual’ who can be held liable under the Torture Victim Protection Act”).

¹⁵⁰⁷ SKINNER, p. 160.

¹⁵⁰⁸ YOUNG, p. 1026, internal citations omitted.

¹⁵⁰⁹ 133 S. Ct. 1659 (2013).

¹⁵¹⁰ 133 S. Ct. at 1669.

¹⁵¹¹ “[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.” *Ibid.*

¹⁵¹² *Ibid.*

¹⁵¹³ SKINNER, p. 198.

5.2.2. Jurisdiction to Sue the Parent Company

[797] This type of case poses additional problems under U.S. law. The jurisdictional issues are more complex, and, in addition, a specific basis for holding a parent company liable for the acts of its subsidiary must be proven.

[798] In *Daimler AG v. Bauman*¹⁵¹⁴, a 2014 case, the Supreme Court essentially held that asserting general¹⁵¹⁵ personal jurisdiction over a corporation that is not headquartered or incorporated within the court's jurisdiction violates the constitutional requirement of due process even if the corporation does significant business there directly or through a subsidiary.¹⁵¹⁶ The Supreme Court held that general personal jurisdiction can only be asserted in a country or state where the corporation is essentially "at home," however, in determining a corporation's home, the judge must evaluate a corporation's activities in their entirety, on both a national and an international plane while bearing in mind that a corporation cannot be "at home" in more than one location. For years, in practice, victims of human rights abuse abroad were able to bring cases in the United States against businesses that had neither their headquarters nor their principal places of business in the United States, but nevertheless engaged in significant and continuous activity in the United States; the holding in *Bauman* has significantly limited this practice.

[799] Suing a parent company for the acts of its subsidiary will require facts that justify piercing the corporate veil or holding the parent corporation directly liable, for example, via a "common enterprise" theory.¹⁵¹⁷

5.2.3. Jurisdiction to Sue the Controlling Company

[800] In U.S. law, this would be a substantive law question of liability rather than a question of jurisdiction.

5.2.4. Law Applicable to the Right to Obtain Damages

[801] The law applicable to the right to obtain damages depends on the cause of action. If the liability is based on state tort law, the answer will also vary depending on the state. *Lex loci delicti* is the traditional rule and applies in some states.¹⁵¹⁸ Ordinarily, if the tortious act occurs in one state but the resulting injury occurs in another, the law of the place of injury will control¹⁵¹⁹ although some states still apply the law of the place where the wrongful act occurred¹⁵²⁰. Some jurisdictions follow

¹⁵¹⁴ 134 S. Ct. 746 (2014).

¹⁵¹⁵ This refers to „all-purpose“ jurisdiction as opposed to „special personal jurisdiction“ which allows for personal jurisdiction only in connection with the specific (business) activities that constitute sufficient contacts with a state other than a corporation's domicile to justify the exercise of jurisdiction over such corporate defendant in accordance with constitutional due process requirements.

¹⁵¹⁶ 134 S.Ct. at 761-2.

¹⁵¹⁷ See, SYKES, pp. 2161 *et seq.*

¹⁵¹⁸ See, e.g. *Norris v Taylor*, 460 So. 2d 151 (Ala. 1984); *Myers v Hayes International Corp.*, 701 F. Supp. 618 (M.D. Tenn. 1988).

¹⁵¹⁹ *Ling v Jan's Liquors*, 237 Kan. 629 (Kan. 1985).

¹⁵²⁰ See SYMEONIDES, p. 331.

the “most significant relationship” rule¹⁵²¹; still others follow the “governmental interests” approach¹⁵²² or the “comparative impairment approach.”¹⁵²³ In a diversity case, the court applies the *lex fori*, including the forum’s choice of law rules.¹⁵²⁴ At least one commentator believes that, regardless of the conflicts methodology employed by a U.S. state court, a tort action would likely result in the application of the laws of the foreign nation where the wrongful act and/or the injury occurred, and that “the best hope for applying the forum state’s law would be if one or more of the parties were a citizen of the forum state [otherwise] application of the forum state’s common law would be extremely unlikely and probably unconstitutional.”¹⁵²⁵

[802] A federal court sitting in diversity jurisdiction or in general, when hearing state law claims such as ancillary claims to a federal question lawsuit, must apply state substantive law (especially common law) to resolve claims under state law.¹⁵²⁶ For the determination of procedural issues, however, it will apply federal procedural law.

[803] It is, nonetheless, important to note that, if the defendant does not raise the question of applicable law (and provide adequate proof of the foreign law, if it is applicable), the *lex fori* will apply.¹⁵²⁷

5.2.5. Law Applicable to the Quantum of Damages

[804] This is perhaps the most difficult issue to answer definitively. “Conflicts law regarding damages is notoriously byzantine and unstable, with the murky boundary between ‘procedure’ and ‘substance’ continuing to shape much of the debate.”¹⁵²⁸ The traditional rule seems to be that the type of damage is a substantive issue (and, therefore, foreign law may apply) whereas the quantification of damages is a procedural issue and, therefore governed by the *lex fori*. According to Professor Hay, “In general, U.S. courts will apply the punitive damage law of the place in which the wrongful actions took place, and punitive damages – in the sense of damages payable to a private plaintiff solely for the purpose of deterring wrongful conduct – are allowed only in limited types of actions in non-U.S. common law jurisdictions and are unknown to the civil law.”¹⁵²⁹

[805] This does not appear to be the case for claims brought under the ATCA although our research to date has revealed no clear statutory or judicial guidelines for the law applicable to the determination of liability or of damages for suits under the ATCA. It is not entirely clear what law applies to the determination of liability under the ATCA. It is however likely that “(1) the substantive violation is governed by international law; and (2) federal common law provides the cause of action and, therefore, governs non-substantive issues.” In one case, the U.S. Supreme Court held that the ATCA imported a “very limited category [of substantive tort claims] defined by the law of nations

¹⁵²¹ See, *Enron Wind Energy Sys., LLC v Marathon Elec. Mfg. Corp. (In Enron Corp.)*, 367 B.R. 384 (Bankr. S.D.N.Y. 2007).

¹⁵²² See, *District of Columbia v Coleman*, 667 A.2d 811 (D.C. 1995), but see also, *Richards v United States*, 369 U.S. 1 (U.S. 1962).

¹⁵²³ See, *Bernhard v Harrah's Club*, 16 Cal. 3d 313 (Cal. 1976).

¹⁵²⁴ See, *Myers v Hayes International Corp.*, 701 F. Supp. 618 (M.D. Tenn. 1988).

¹⁵²⁵ BORCHERS, State Court, p. 50.

¹⁵²⁶ *Erie Railroad Co. v Tompkins*, 304 U.S. 64 (1938).

¹⁵²⁷ HAY et al., p. 607.

¹⁵²⁸ BORCHERS, State Court, p. 52.

¹⁵²⁹ HAY et al., p. 53, citing: BORCHERS, Punitive Damages, 547 and GOTANDA, 396–97.

and recognized at common law.”¹⁵³⁰ With respect to damages, it would appear from the cases in which they have been awarded that U.S. law (clearly, since punitive damages were awarded) and *lex fori* (in particular) is what is applied in practice.

5.2.6. Addendum on Recent Development in June 2017: the Bristol-Myers Squibb Case

[806] On June 19, 2017, the U.S. Supreme Court handed down its opinion in *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County, et. al.*¹⁵³¹

[807] In that case, a group of plaintiffs, most of whom were not California residents, sued Bristol-Myers Squibb Company (BMS) in California state court, alleging that the pharmaceutical company’s drug Plavix had damaged their health. BMS is incorporated in Delaware and headquartered in New York, and it maintains substantial operations in both New York and New Jersey. Although it engages in business activities in California and sells Plavix there, BMS did not develop or create a marketing strategy for manufacture, label, package, or work on the regulatory approval for Plavix in the State. The non-resident plaintiffs did not allege that they obtained Plavix from a California source, that they were injured by Plavix in California, or that they were treated for their injuries in California.

[808] Although it was clear that the California courts lacked general jurisdiction, following the Supreme Court’s decision in *Daimler AG v. Bauman*,¹⁵³² the California Court of Appeal found that the California courts had specific jurisdiction over the claims brought by the non-resident plaintiffs. Affirming, the State Supreme Court applied a “sliding scale approach” to specific jurisdiction (“the more wide ranging the defendant’s forum contacts, the more readily is shown a connection between the forum contacts and the claim.”), concluding that BMS’s “wide ranging” contacts with the State were enough to support a finding of specific jurisdiction over the claims brought by the non-resident plaintiffs. That attenuated connection was met, the court held, in part because the non-residents’ claims were similar in many ways to the California residents’ claims and because BMS engaged in other activities in the State.

[809] The U.S. Supreme Court reversed, holding that California courts lack specific jurisdiction to entertain the non-residents’ claims. The Court explained that the “primary concern” in assessing personal jurisdiction is “the burden on the defendant.” For a court to exercise specific jurisdiction over a claim there must be an “affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State.” Holding that when no such connection exists, specific jurisdiction is lacking regardless of the extent of a defendant’s unconnected activities in the State, the Court then rejected the California Supreme Court’s “sliding scale approach”.

[810] In particular, the U.S. Supreme Court noted that BMS’s decision to contract a California company to distribute Plavix nationally even coupled with the fact that other plaintiffs were prescribed, obtained, and ingested Plavix in California and that BMS conducted research in California on matters unrelated to Plavix did not constitute grounds for personal jurisdiction. What was needed was a connection between the forum and the specific claims at issue.

¹⁵³⁰ *Sosa v Alvarez-Machain*, 542 U.S. 692, 709 (2004).

¹⁵³¹ *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773 (2017)

¹⁵³² *Daimler AG v. Bauman*, 571 U.S. 20 (2014).

5.3. Tort Law and Corporate Law

5.3.1. Liability of the Company Director

[811] Rules of tort-based liability do not vary with the size or type of corporation that is involved and directors can be personally liable for supervision and management.¹⁵³³ The general theory imposing liability on directors is that an agent, even if acting on someone else's behalf, is personally liable for his or her own tortious conduct.¹⁵³⁴ Following this reasoning, a director remains personally responsible for his own torts, "even if committed while acting in the scope of his employment and in his official capacity as director [...] of a corporation."¹⁵³⁵ Personal liability attaches even where the acts are performed for the benefit of the corporation and without personal benefit to the director.¹⁵³⁶ The plaintiff may choose to proceed against the director individually, the corporation, or both.¹⁵³⁷ There must, however, be sufficient connection between the director and the tort. There are essentially three theories which U.S. courts use to guide this determination: 1) an analysis of the defendant's participation in the tort; 2) whether a personal duty of the director was breached; or 3) piercing of the corporate veil. There are also a significant number of state statutes providing for liability.¹⁵³⁸

A. Participation Theory

[812] A director is liable under a "participation" theory where s/he "sanctions, directs or actively participates in the commission of a tort, or [...] for an act [including voting for a board decision] or omission from which a tort necessarily follows or may be reasonably expected to follow."¹⁵³⁹ If a director "reasonably" should have known about a situation within the board's control that could injure a third party and "negligently failed to take or order appropriate action to avoid the harm" s/he may also be liable.¹⁵⁴⁰

[813] In *Lobato v. Pay Less Drug Stores*¹⁵⁴¹ the court held that there was personal liability if the director "sanctions, directs or actively participates in the commission of a tort."¹⁵⁴² Participation can take various forms, such as voting in favour of a board decision which subsequently causes

¹⁵³³ PETRIN, p. 1663.

¹⁵³⁴ "General agency principles posit that an individual is personally liable for all torts he commits, notwithstanding that the person may have acted as an agent or under directions of another. See *Bowles v Ruppel*, 157 F.2d 944, 946 (3d Cir. 1946) and Restatement (Third) of Agency § 7.01 (2006); Restatement (Second) of Agency §§ 343-44 (1957). When an agent acts affirmatively and causes physical harm, the rule is clear that the fact that he is acting as an agent does not relieve him from liability. Difficulties sometimes occur with respect to an agent's conduct which results merely in pecuniary loss to the plaintiff and to what can be referred to as nonfeasance or a failure by the agent to perform an act which he ought to do. See Restatement (Second) of Torts §§ 350-57, Reporter's Notes (2008).", PETRIN, p. 1666 N17.

¹⁵³⁵ PETRIN, p. 1666, Internal citations omitted.

¹⁵³⁶ *Ibid.*

¹⁵³⁷ *Ibid.*

¹⁵³⁸ *Ibid.*

¹⁵³⁹ PETRIN, p. 1668, citing *Lobato v Pay Less Drug Stores*, 261 F.2d 406, (10th Circuit) 1958.

¹⁵⁴⁰ PETRIN, p. 1668.

¹⁵⁴¹ 261 F.2d 406 (10th Cir. 1958).

¹⁵⁴² PETRIN, p. 1668.

harm¹⁵⁴³, being the “guiding spirit” or “central figure” behind the act in question,¹⁵⁴⁴ having constructive knowledge of a tort¹⁵⁴⁵, or even knowing (including where s/he “reasonably” should have known) that a situation under the director’s control could injure a third party and negligently failing to take or order appropriate action to prevent the injury.¹⁵⁴⁶

B. Duty Approach

[814] Under the duty approach, a director is personally liable for a tortious act only where the director has breached an independent duty of care owed personally to an injured third party. Some courts, however, have found a personal duty based on a defendant’s personal participation in or direction of a tortious act.¹⁵⁴⁷ As a result, this approach may sometimes be difficult, if not impossible, to distinguish from the participation theory. Other cases find liability where “(1) the corporation owed a duty of care to the victim; (2) the corporation delegated that duty to the director [...]; and (3) the director [...] breached the duty of care by his or her own conduct, causing injury to the victim.”¹⁵⁴⁸

C. Piercing the Corporate Veil

[815] A separate corporate identity may be ignored and, as a consequence, liability may be imposed on a director if the corporation is controlled and functions such that it is a “mere instrumentality of another” and that the “observance of the fiction of separate existence would, under the circumstances, sanction fraud or promote injustice.”¹⁵⁴⁹ It is interesting to note that courts have used the veil-piercing approach to find directors personally liable even in the absence of their participation in the tortious acts alleged and where application of a participation or duty-based theory would not give rise to personal liability.¹⁵⁵⁰

D. Statutory Liability

[816] In addition to liability under general common law tort theories, directors may have civil and/or criminal liability under an increasingly long list of federal statutes e.g. the National Banking Act¹⁵⁵¹, the Federal Food, Drug, and Cosmetic Act¹⁵⁵², Section 11 of the Securities Act of 1933¹⁵⁵³, the

¹⁵⁴³ See *Francis T. v Vill Green Owners Ass’n*, 723 P.2d 573, 586 (Cal. 1986) (*en banc*) (a director who votes for the commission of a tort is liable notwithstanding the fact that the act was committed in the name of the corporation).

¹⁵⁴⁴ *Cruz v Orthos Pharm. Corp.*, 619 F.2d 902, 907 (1st Cir. 1980).

¹⁵⁴⁵ *Child v Purell*, 82 A.2d 227, 239

¹⁵⁴⁶ *Frances T.*, 723 P.2d at 584.

¹⁵⁴⁷ PETRIN, p. 1670. See also e.g., *McCaskey v Cont’l airloines, Inc.*, 159 F.Supp 2d 562, 577 (S.D. Tex. 2001).

¹⁵⁴⁸ PETRIN, p. 1671, citing: *Manning v United Med. Corp. of New Orleans*, 902 So. 2d 406, 410-12 (La. Ct. App. 2005); *Downey v Callery*, 338 So. 2d 937, 943-44 (La. Ct. App. 1977), cert. denied, 431 U.S. 955 (1977); *Saltiel v GSI Consultants, Inc.* 788 A.2d 268, 272 (N.J. 2002); *Metuchen Sav. Bank v Pierini*, 871 A.2d 759, 764 (N.J. Super. Ct. App. Div. 2005); *Schaefer v D & J Produce, Inc.*, 403 N.E. 2d 1015, 1020-21 (Ohio Ct. App. 1978).

¹⁵⁴⁹ PETRIN, p. 1672, citing: *Gidwitz v Stirco*, 646 F. Supp. 825, 830 (N.D. Ill. 1986) and *Lambert v Kazinetz*, 250 f. Supp. 2d 908, 914 (S.D. Ohio 2003).

¹⁵⁵⁰ See e.g., *Smith v Hawks*, 355 S.e.2d 669, 675-76 (Ga. Ct. App. 1957).

¹⁵⁵¹ 12 U.S.C. § 38 et seq. See, *del Junco v Conover*, 682 F.2d 1338, 1341-42 (9th Cir. 1982) (explaining that § 93 of the National Banking Act imposes liability on directors for violating, or allowing violations, of the banking laws).

¹⁵⁵² *United States v Park*, 421 U.S. 658, 676-77 (1975) (noting that the Federal Food, Drug and Cosmetic Act holds corporate officials responsible for remedying and preventing violations, including continuing violations, of the Act).

¹⁵⁵³ 15 U.S. Code § 77k.

Lanham Act,¹⁵⁵⁴ the Patent Act,¹⁵⁵⁵ the Copyright Act,¹⁵⁵⁶ the Sherman Anti-Trust Act,¹⁵⁵⁷ the Fair Credit Reporting Act,¹⁵⁵⁸ the Employee Retirement Income Security Act (ERISA),¹⁵⁵⁹ the Sarbanes-Oxley Act,¹⁵⁶⁰ and the Racketeer Influenced and Corrupt Organizations Act (RICO),¹⁵⁶¹ among others. Furthermore, environmental statutes such as the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),¹⁵⁶² and the Resource Conservation and Recovery Act (RCRA)¹⁵⁶³ may also provide for director liability. Few, if any, of these acts are likely to apply to the Human Rights context, however.

[817] The requirements for personal liability for “tort-like” statutory violations vary from one statute to another. Nonetheless, we see some common themes. One of the major differences is that statutory liability may include both civil and criminal liability without the need to prove intent or even negligence.¹⁵⁶⁴ In addition, regulatory statutes may impose liability on “controlling persons,” not normally subject to liability under corporate, tort, or agency law theories, on the basis of the “responsible corporate officer doctrine.”¹⁵⁶⁵ Note that this theory is to be distinguished from the veil

¹⁵⁵⁴ *Donsco, Inc. v Casper Corp.*, 587 F.2d 602, 606 (3d Cir. 1978) (explaining that the principle that a corporate officer is individually liable for torts he personally commits also applies to acts constituting unfair competition).

¹⁵⁵⁵ See, e.g., *Hoover Group v Custom Metalcraft, Inc.*, 84 F.3d 1408, 1412 (Fed. Cir. 1996) (noting that, under the Patent Act, corporate officers are personally liable if they assist with the corporation’s infringement); see also OSWALD, pp. 115-7 (criticizing the erosion of traditional protections provided to corporate officers in the area of patent infringement).

¹⁵⁵⁶ *Feder v Videotrip Corp.*, 697 F. Supp. 1165, 1177 (D. Colo. 1988) (stating that a corporate officer may be held liable if he or she is responsible for the corporation’s copyright infringement).

¹⁵⁵⁷ *United States v Am. Radiator & Std. Sanitary. Corp.*, 433 F.2d 174, 188 (3d Cir. 1970) (noting that a corporate officer is subject to prosecution under § 1 of the Sherman Act whenever he or she knowingly participates in violations of the Act).

¹⁵⁵⁸ *Mone v Dranow*, 945 F.2d 306, 308 (9th Cir. 1991) (*per curiam*) (noting that federal and state law hold corporate officers are personally liable for their torts even if they were committed on the corporation’s behalf).

¹⁵⁵⁹ *Leddy v Standard Drywall, Inc.*, 875 F.2d 383, 387-88 (2d Cir. 1989) (explaining that a corporate officer with operational control who is directly responsible for a failure to pay statutorily required wages can be personally liable for the shortfall).

¹⁵⁶⁰ For example, directors and officers may incur liability under Sarbanes-Oxley’s document destruction and whistleblower provisions. See Sarbanes-Oxley Act 18 U.S.C. § 1513 *et seq.*

¹⁵⁶¹ *Lode v Leonardo*, 557 F. Supp. 675, 680 (N.D. Ill. 1982) (“Congress did not limit the scope of RICO to those involved in what has traditionally been thought of as organized crime.”).

¹⁵⁶² See, e.g., *Sidney S. Arst Co. v Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420-21 (7th Cir. 1994) (adopting an expanded standard of liability under CERCLA); *United States v Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 743 (8th Cir. 1986) (opining that “construction of CERCLA to impose liability upon only the corporation and not the individual corporate officers and employees who are responsible for making corporate decisions about the handling and disposal of hazardous substances would open an enormous, and clearly unintended, loophole in the statutory scheme”); *New York v Shore Realty*, 759 F.2d 1032, 1052-53 (2d Cir. 1985) (holding that individuals can be considered “owners” or “operators” under CERCLA).

¹⁵⁶³ *United States v Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 745-46 (1986).

¹⁵⁶⁴ GLYNN, p. 357.

¹⁵⁶⁵ See, e.g., *Comm’r, Dept. of Envtl. Mgmt. v RLG, Inc.*, 755 N.E.2d 556, 559 (Ind. 2001) (explaining that an individual, though acting in a corporate capacity as an officer, director, or employee, may be individually liable under Indiana environmental management laws either as a responsible corporate officer, as a direct participant under general legal principles, or under specific statutes or provisions). The responsible officer doctrine is often traced back to *United States v Dotterweich*, 320 U.S. 277 (1943), where the Supreme Court allowed criminal liability to be imposed on a corporate officer under the Federal Food, Drug, and Cosmetic Act of 1938. *Ibid.* The Court held that any persons who have a responsible share in the furtherance of the transaction which the Act outlaws could be personally liable. *Ibid.* at 284-85. The theory has subsequently been applied in the context of criminal as well as civil liability. See, e.g., *People v Roscoe*, 87 Cal. Rptr. 3d 187, 193 n.4, 195 (Cal. Ct. App. 2008) (utilizing the responsible corporate officer doctrine to impose civil liability, but noting that the distinction between civil and criminal liability is irrelevant).

piercing and participation theories¹⁵⁶⁶. Pursuant to this theory, a director may be personally liable if:

- (1) The individual is in a position of responsibility which allows the individual to influence corporate policies or activities; (2) there is a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and (3) the individual's actions or inactions facilitated the violations.¹⁵⁶⁷

5.3.2. Liability of the Company for Tortious Acts of Its Subsidiaries

[818] Although the application of these theories varies enormously in the case law, there are essentially four basic common-law theories for piercing the corporate veil or disregarding the corporate entity: 1) fraud, 2) "alter ego" or "mere instrumentality," 3) enterprise entity, and 4) agency. That said, however, as one commentator has pointed out:

*Courts often are unclear as to which theory they are applying; some use these terms interchangeably, and others seem to combine different theories into a single analytical framework. Interestingly, the New York Court of Appeals mentioned each of these theories in its seminal Walkovszky v. Carlton¹⁵⁶⁸ decision. Like many piercing decisions, however, Walkovszky's analysis is cursory and confusing, providing little guidance for future cases.*¹⁵⁶⁹

A. Fraud

[819] Under the first theory, the court will pierce the veil when a shareholder uses the corporate entity to further a fraud, mislead creditors transacting business with the entity, fraudulently transfer funds out of the corporation, or otherwise engage in fraudulent or deceitful activity within the corporate enterprise.¹⁵⁷⁰

B. Alter Ego

[820] The "alter ego" or "mere instrumentality" theory bases shareholder liability on the "unity of interest" or lack of separation between the shareholder and the corporate entity.¹⁵⁷¹ Courts use a dizzying array of tests for determining whether to pierce the veil under this type of theory;¹⁵⁷²

¹⁵⁶⁶ *Celentano v Rocque*, 923 A.2d 709, 721 n.11 (Conn. 2007) (explaining the rationale for implementing the responsible corporate officer doctrine). PETRIN, p. 1674.

¹⁵⁶⁷ *Ibid.* See *Matter of Dougherty*, 482 N.W.2d 485, 490 (Minn. Ct. App. 1992).

¹⁵⁶⁸ 223 N.E.2d 6 (N.Y. 1966). Walkovszky was a struck by a cab operated by the Seon Cab Corp. Carlton owned Seon and nine other taxicab corporations, each owning only two cabs and carrying only the minimum liability insurance required by applicable law.

¹⁵⁶⁹ GLYNN, p. 344.

¹⁵⁷⁰ *Ibid.* See *Weisser v Mursam Shoe Corp.*, 127 F.2d 344, 346 (2d Cir. 1942), which provides an example of this theory. Although incorporating or dividing a single enterprise into multiple entities as a means of judgment proofing does not constitute fraud (223 N.E.2d at 10) in some cases, structural changes to avoid an already existing liability may constitute fraud. See, e.g., *Parker v Bell Asbestos Mines, Ltd.*, 607 F. Supp. 1397, 1403-04 (M.D. Pa. 1985).

¹⁵⁷¹ GLYNN, p. 345.

¹⁵⁷² For example, *Mid-Century Insurance Co. v Gardner*, 11 Cal. Rptr. 2d 918, 922 (Ct. App. 1992), describes the alter ego doctrine as embodying two elements: "(1) that there be such unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist and (2) that, if the acts are treated as those of the corporation alone, an inequitable result will follow" (citation and internal quotation marks omitted). Courts that expressly follow an instrumentality theory often apply a three-prong test: (1) Control, not

however, there must at least be shareholder control of the entity¹⁵⁷³ as well as additional circumstances -- including undercapitalization, lapses in corporate formalities, or utter shareholder domination -- suggesting a lack of distinction between the shareholder and the corporation.¹⁵⁷⁴ Some courts also impose the additional requirement that there be shareholder misuse of the corporate form, such as to perpetrate a fraud or illegal activity, or otherwise engage in conduct that promotes injustice (beyond the mere inability of the plaintiff to receive complete relief).¹⁵⁷⁵

C. Enterprise

[821] The “enterprise entity” or “enterprise liability” doctrine allows courts to extend liability within corporate groups, including parent-subsidiary relationships and other groups of aligned or affiliated entities. Under this theory, when two or more firms are in fact conducting business as a single enterprise, a plaintiff should be able to collect a judgment from the assets of all firms making up the enterprise.¹⁵⁷⁶

D. Agency

[822] The “agency” theory purports to apply agency principles to hold a shareholder personally liable as a “principal” when the shareholder treats or uses the corporate entity as its “agent.”¹⁵⁷⁷ There is no clear jurisprudential test for determining when a shareholder’s actions create an agency relationship. In fact, most courts, including the *Walkovszky* court, mention agency but apply an alter ego analysis.¹⁵⁷⁸

5.4. Procedural Law

5.4.1. Statute of Limitations

[823] The appropriate time limitations depend on the cause of action and on the forum. Certain heinous crimes, for example, have no limitations in some jurisdictions¹⁵⁷⁹. In some cases, the statute begins to run from the date of the act complained of; in others, from the time the injury is, or should have been, discovered. Some situations can “toll” a statute (i.e. stop the clock from

mere majority or complete stock control, but complete domination, not only of finances, but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own; and (2) Such control must have been used by the defendant to commit fraud or wrong, to perpetrate the violation of a statutory or other positive legal duty, or a dishonest and unjust act in contravention of plaintiff’s legal rights; and (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of. *Ibid.* fn. 65.

¹⁵⁷³ Bainbridge, S.M., Abolishing Veil Piercing, 43 Corporate Practice Commentator 517, 547 (2001).

¹⁵⁷⁴ See, e.g., *Perpetual Real Estate Servs., Inc. v Michaelson Props., Inc.*, 974 F.2d 545, 548 (4th Cir. 1992); *Sea-Land Servs., Inc. v Pepper Source*, 941 F.2d 519, 524 (7th Cir. 1991); *Minifie v Rowley*, 202 P. 673, 676 (Cal. 1921).

¹⁵⁷⁵ GLYNN, p. 346.

¹⁵⁷⁶ *Ibid.* p. 347.

¹⁵⁷⁷ *Rapid Transit Subway Constr. Co. v City of New York*, 259 N.Y. 472, 488 (1932).

¹⁵⁷⁸ *Walkovszky*, 223 N.E.2d at 10; *Sonora Diamond Corp. v Superior Court*, 99 Cal. Rptr. 2d 824, 837 (Ct. App. 2000).

¹⁵⁷⁹ E.g. *People v Ross*, 235 Mich. 433, 209 N.W. 663 (1926) ; Official Code of Georgia Annotated (O.C.G.A.) § 17-3-1(a).

running) such as where a criminal suspect is a fugitive.¹⁵⁸⁰ Under the “continuing violations” doctrine, if a defendant commits a series of illegal or illicit acts against another person the limitation period may begin to run from the last act in the series¹⁵⁸¹

[824] The general federal criminal statute of limitations provides that prosecution must begin within 5 years¹⁵⁸² of the commission of the offence. Some federal crimes, however, provide for differing statutes of limitation, or even no limitation at all.

[825] Where no specific statute of limitations governs the particular claim at issue, 28 U.S.C.A. § 1658(a), the *four-year statute of limitations for civil actions* arising under federal statutes, is the fallback provision.¹⁵⁸³

[826] The Victim Protection Act of 1991¹⁵⁸⁴ (hereafter TVPA) specifically provides for a statute of limitations of 10 years after the cause of action arose. The Alien Tort Claims Act (hereafter ATCA), however, does not have a statute of limitations provision; the applicable period is the statute of limitations for the specific cause of action being pursued¹⁵⁸⁵.

[827] Tort law statutes of limitation also vary considerably from state to state as well as among the various possible causes of action. For example, the general personal injury statute of limitations varies from 1¹⁵⁸⁶ to 10 years¹⁵⁸⁷ or more.

5.4.2. Costs and Legal Aid

[828] The fees required in connection with a given litigation will be governed by the rules of the court in which the case is brought or tried, which rules may vary considerably from one jurisdiction to another. The government must provide legal assistance to criminal defendants who cannot afford to pay a lawyer pursuant to the U.S. Constitution.¹⁵⁸⁸ This right does not, however, extend to plaintiffs or to civil matters, such as tort law.

[829] Legal aid other than for criminal defence is generally provided by public interest law firms and community legal clinics. Some law firms may also take certain cases on a *pro bono publico* basis. There is no right to such assistance, however, and there is usually a much greater demand for assistance than that which is available.¹⁵⁸⁹

¹⁵⁸⁰ ROBIN & ANSON , Art. 1.

¹⁵⁸¹ *Treanor v MCI Telecommunications, Inc*, 150 F.3d 916 (1998).

¹⁵⁸² 18 U.S.C. § 3282.

¹⁵⁸³ *Firstcom, Inc. v Qwest Corp.*, 555 F.3d 669 (8th Cir. 2009).

¹⁵⁸⁴ Public Law 102-256 available at: <https://www.gpo.gov/fdsys/pkg/STATUTE-106/pdf/STATUTE-106-Pg73.pdf> (accessed on 27.06.2016).

¹⁵⁸⁵ *Wesley Papa, et al. v United States and the U.S. Immigration & Naturalization Service*, 281 F.3d 1004, 1013 (Court of Appeals, 9th Circuit, 2002).

¹⁵⁸⁶ E.g. Kentucky Revised Statutes Annotated §§ 413.135(2); 413.140.

¹⁵⁸⁷ E.g. General Laws of Rhode Island § 9-1-13(a).

¹⁵⁸⁸ *Gideon v Wainwright*, 372 U.S. 335 (1963).

¹⁵⁸⁹ See, LSC updated 2009 report "Documenting the Justice Gap in America: The Current Unmet Civil Legal Needs of Low-Income Americans" available at: http://www.americanbar.org/mwg-internal/de5fs23hu73ds/progress?id=O9zdBvMjXvhlyCpiealKh47Hzo3oeGB_ZBVjEB4fBk, (accessed on 27.06.2016).

[830] In 1974 Congress established the Legal Services Corporation (LSC)¹⁵⁹⁰, an independent non-profit organization whose aim is to provide financial support for civil legal aid to Americans who live in households with annual incomes at or below 125% of the federal poverty guidelines.¹⁵⁹¹ Non-US citizens may benefit from assistance only if they qualify under certain anti-abuse laws.¹⁵⁹² LSC provides funding to 134 independent non-profit legal aid programs in every state, the District of Columbia, and U.S. Territories.¹⁵⁹³ LSC funds are not available for class actions.¹⁵⁹⁴

[831] The general rule in U.S. law (often referred to as the “American Rule”) is that each party pays his or her own costs of litigation, including both court costs and legal fees, regardless of the outcome of litigation¹⁵⁹⁵. This rule may, however, be altered to allow reasonable costs by statute, case law, rules or a specific court order at both the state and the federal level.¹⁵⁹⁶

[832] Contingency Fee arrangements exist in the U.S. and are fairly common in personal injury cases. They usually provide that plaintiffs do not pay their attorneys during the course of the litigation (although they will often be required to pay costs, including court costs) but, in the event that the plaintiff obtains an award, the attorney will be entitled to a percentage (often between 30%-50%) of the award.¹⁵⁹⁷

5.4.3. Standard and Burden of Proof

[833] A party that alleges a fact has the burden of proof with respect to that fact. As a result, the plaintiff ordinarily must prove all of the elements of his or her claim.¹⁵⁹⁸

[834] Pursuant to the notion of *res ipsa loquitur*, if a plaintiff in a tort case can prove that the harm alleged would not ordinarily have occurred without negligence, that the object that caused the harm was under the defendant's control, and that there are no other plausible explanations, proof of that harm will create a rebuttable presumption of negligence by the defendant, thereby shifting the burden of proof with respect to the negligence to the defendant.¹⁵⁹⁹

[835] The U.S. legal system allows for very broad discovery in general and, necessarily, then, in the Human Rights context as well. For example, the Federal Rules of Civil Procedure provide:

Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative

¹⁵⁹⁰ See Legal Services Corporation Act, 42 U.S.C. 2996 *et seq.* available at: <http://www.lsc.gov/about-lsc/laws-regulations-guidance/lsc-act> (accessed on 27.06.2016); LSC Regulations (a link as of 01.10.2015 and information on updates is available at: <http://www.lsc.gov/about-lsc/laws-regulations-guidance/lsc-regulations> (accessed on 27.06.2016)).

¹⁵⁹¹ Website of the Legal Services Corporation at: <http://www.lsc.gov/> (accessed on 27.06.2016).

¹⁵⁹² 45 CFR 1626.4, available at: <https://www.law.cornell.edu/cfr/text/45/1626.4> (accessed on 24.08.2017).

¹⁵⁹³ *Ibid.*

¹⁵⁹⁴ 45 CFR § 1617.

¹⁵⁹⁵ *Alyeska Pipeline Service Co. v Wilderness Society*, 421 U.S. 240 (1975).

¹⁵⁹⁶ See, e.g., Federal Rules of Civil Procedure 54(d)(1).

¹⁵⁹⁷ EMONS.

¹⁵⁹⁸ Legal Information Institute website at: https://www.law.cornell.edu/wex/burden_of_proof (accessed on 01.07.2016).

¹⁵⁹⁹ Definition of „Res Ipsi Loquitur“ on the website of the Legal Information Institute available at: https://www.law.cornell.edu/wex/res_ipsi_loquitur (accessed on 27.06.2016).

*access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.*¹⁶⁰⁰

Pursuant to a New York practice manual¹⁶⁰¹:

*The matter sought by disclosure must be material to the prosecution or defense of the action.*¹⁶⁰² *In determining the materiality of matter sought to be elicited by disclosure, it is ordinarily material if it is relevant*¹⁶⁰³ *or pertinent*¹⁶⁰⁴ *to the issues involved under the cause of action or defense pleaded. The operative test as to what is discoverable is one of "usefulness and reason." Disclosure that is "material and necessary" relates to any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing the delay and prolixity.*

[836] Thus, although there are limits¹⁶⁰⁵, what is discoverable in “American style” discovery probably affords access to information far beyond that which is available in most other jurisdictions.

[837] Unless otherwise specified in a particular statute, all elements for which a party has the burden of proof in a *criminal* trial must be proven *beyond reasonable doubt* and, in *civil* matters, by a *preponderance of the evidence*.¹⁶⁰⁶

¹⁶⁰⁰ Fed. R. Civ. Pro. § 26(b)(1).

¹⁶⁰¹ 7 Carmody-Wait 2d New York Practice with Forms September 2016 Update § 42:255.

¹⁶⁰² New York Civil Procedure Law Revised (“CPLR”) § 3101(a).

¹⁶⁰³ *425 Park Ave. Co. v Finance Adm'r of the City of New York*, 69 N.Y.2d 645, 511 N.Y.S.2d 589, 503 N.E.2d 1020 (1986); *Watkins v City of New York*, 211 A.D.2d 544, 621 N.Y.S.2d 72 (1st Dep't 1995); *Brossoit v O'Brien*, 169 A.D.2d 1019, 565 N.Y.S.2d 299 (3d Dep't 1991); *Pickens v Hercules*, 134 A.D.2d 222, 521 N.Y.S.2d 16 (1st Dep't 1987); *Suzuki Performance of Huntington, Ltd. v Utica Mut. Ins. Co.*, 121 A.D.2d 530, 504 N.Y.S.2d 25 (2d Dep't 1986); *Johnson v Association for the Advancement of Blind and Retarded*, 21 Misc. 3d 268, 863 N.Y.S.2d 323 (Sup 2008); *Mora v Saint Vincent's Catholic Medical Center of New York*, 8 Misc. 3d 868, 800 N.Y.S.2d 298 (Sup 2005).

¹⁶⁰⁴ *Tannenbaum v Carvel*, 271 A.D. 790, 65 N.Y.S.2d 56 (2d Dep't 1946); *Uterhart v National Bank of Far Rockaway*, 255 A.D. 860, 7 N.Y.S.2d 509 (2d Dep't 1938).

¹⁶⁰⁵ Fed. R. Civ. Pro. § 26(b)(2) *et seq.*

¹⁶⁰⁶ Legal Information Institute website at: https://www.law.cornell.edu/wex/burden_of_proof (accessed on 01.07.2016).

5.5. Collective Redress

[838] Numerous forms of collective redress exist in U.S. law, including, *inter alia*, class actions, representative actions, joinder (required¹⁶⁰⁷ and permissive¹⁶⁰⁸), intervention¹⁶⁰⁹ and

¹⁶⁰⁷ Fed. R. Civ. Pro. § 19:

"Required Joinder of Parties

(a) Persons Required to Be Joined if Feasible.

(1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

(2) Joinder by Court Order. If a person has not been joined as required, the court must order that the person be made a party. A person who refuses to join as a plaintiff may be made either a defendant or, in a proper case, an involuntary plaintiff.

(3) Venue. If a joined party objects to venue and the joinder would make venue improper, the court must dismiss that party.

(b) When Joinder Is Not Feasible. If a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed. The factors for the court to consider include:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

(c) Pleading the Reasons for Nonjoinder. When asserting a claim for relief, a party must state:

(1) the name, if known, of any person who is required to be joined if feasible but is not joined; and

(2) the reasons for not joining that person.

(d) Exception for Class Actions. This rule is subject to Rule 23."

¹⁶⁰⁸ Fed. R. Civ. Pro. § 20:

"Permissive Joinder of Parties

(a) Persons Who May Join or Be Joined.

(1) Plaintiffs. Persons may join in one action as plaintiffs if:

(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all plaintiffs will arise in the action.

(2) Defendants. Persons—as well as a vessel, cargo, or other property subject to admiralty process in rem—may be joined in one action as defendants if:

(A) any right to relief is asserted against them jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and

(B) any question of law or fact common to all defendants will arise in the action.

(3) Extent of Relief. Neither a plaintiff nor a defendant need be interested in obtaining or defending against all the relief demanded. The court may grant judgment to one or more plaintiffs according to their rights, and against one or more defendants according to their liabilities.

consolidation¹⁶¹⁰. Some forms of representative actions also exist, provided that the representative party has standing to bring the suit.¹⁶¹¹ The U.S. is, however, perhaps the quintessential “class action” jurisdiction; this opinion will therefore focus on that specific form of litigation.

[839] Class actions form an integral part of the U.S. litigation landscape; they are well known, relatively common and represent powerful tools both in and of themselves, and as a means of leverage to obtain an out-of-court settlement. In a US-style class action, a group of plaintiffs – be they individuals, corporations, associations, etc. – are joined together as a party or parties, represented by a court-approved representative, in a single litigation. Once the class is certified, all

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- (b) Protective Measures. The court may issue orders—including an order for separate trials—to protect a party against embarrassment, delay, expense, or other prejudice that arises from including a person against whom the party asserts no claim and who asserts no claim against the party.”

¹⁶⁰⁹ Fed. R. Civ. Pro. § 24:

“Intervention

- (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:

- (1) is given an unconditional right to intervene by a federal statute; or
- (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

- (b) Permissive Intervention.

- (1) In General. On timely motion, the court may permit anyone to intervene who:

- (A) is given a conditional right to intervene by a federal statute; or
- (B) has a claim or defense that shares with the main action a common question of law or fact.

- (2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

- (A) a statute or executive order administered by the officer or agency; or

- (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

- (3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

- (c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.”

¹⁶¹⁰ Fed. R. Civ. Pro. § 42:

“Rule. Consolidation; Separate Trials

- (a) Consolidation. If actions before the court involve a common question of law or fact, the court may:

- (1) join for hearing or trial any or all matters at issue in the actions;

- (2) consolidate the actions; or

- (3) issue any other orders to avoid unnecessary cost or delay.

- (b) Separate Trials. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.”

¹⁶¹¹ Standing, or *locus standi*, is capacity of a party to bring suit in court. State laws ordinarily provide a definition for state court litigation. The essence of this notion is the requirement that plaintiffs have sustained or will sustain direct injury or harm and that this harm can be redressed. At the Federal level courts only have constitutional authority to resolve actual disputes between real parties, U.S Constitution, Art. III, Sec. 2. Only those with enough direct stake in an action or law have “standing” to challenge it. See, e.g., *County of Riverside v McLaughlin*, 500 U.S. 44 (1991), *Northeastern Fla. Chapter of the Associated Gen. Contractors v City of Jacksonville*, 508 U.S. 656 (1993) and *Lujan v Defenders of Wildlife*, 504 U.S. 555 (1992). Legal Information Institute of Cornell University Law School available at: <https://www.law.cornell.edu/wex/standing> (accessed on 27.09.2016).

members of the class will ordinarily be bound by the outcome of and/or determinations made in the litigation.

[840] US class actions exist both in federal procedural law and in the laws of each of the states; both offer an exceptionally broad remedy. State courts are generally perceived as being more favourable to plaintiffs, whereas federal courts are perceived as more defendant-friendly. The initial choice of a state or federal forum is made by the plaintiff; nonetheless, under certain circumstances, the defendant may have the right to have the case transferred to federal court.¹⁶¹² In those cases, however, where a significant number of plaintiffs and the main defendant are domiciled in the same state, the federal court may decline to exercise jurisdiction in favour of that state's court, based on consideration of (i) whether the law of the original forum will apply; (ii) whether there has been an attempt to avoid federal jurisdiction; (ii) the nexus between the original forum and the class members, the alleged harm, or the defendants; (iii) what proportion of the plaintiffs are domiciled in the original forum state; and (iv) whether any similar claims have been filed within the previous three years.¹⁶¹³ Given the constraints of this mandate, however, we will focus our discussion here on class actions in federal court.

[841] Class actions are available as a form of litigation for virtually all types of civil claims, including contract, tort, environmental and discrimination claims. In addition, the U.S. has two specific statutory bases that would clearly apply in the Human Rights context: the Alien Tort Claims Act ("ATCA") and the Torture Victim Protection Act ("TVPA").¹⁶¹⁴

[842] In the U.S., *all remedies* generally available for civil law claims, such as damages – including pain and suffering, injunctive relief, restitution, etc. - are *available* for these actions. How these damages are calculated will depend on the cause of action, not the form of litigation.

[843] The U.S. rules concerning class actions are fairly precise. Under U.S. federal law, *four requirements must be fulfilled for a class action:* 1) there must be questions of law and fact that are common to all of the plaintiffs (*commonality*), 2) the number of plaintiffs must be so large that individual suits would be impracticable (*numerosity*), 3) the representative's case must be typical of other members' cases (*typicality*), and 4) the representative must be able to "fairly and adequately protect the interests of the class" (*adequacy of representation*).¹⁶¹⁵ The class representative is generally self-appointed.¹⁶¹⁶ Sometimes, plaintiffs must also prove that common issues not only exist but will predominate, and that a class action is better suited than individual litigation in the case(s) at hand.¹⁶¹⁷

[844] The factors to be taken into consideration concerning the requirement of *numerosity* include the ease of identifying and finding individual class members, geographical separation, fluid composition of class population, size of individual claims, individual ability and motivation to bring

¹⁶¹² This will be true where the claim in question arises under federal law, or where all representatives of the plaintiff are from a state different from the state of domicile of the defendant; Class Action Fairness Act, 28 USCA §§ 1711 et seq.

¹⁶¹³ 28 U.S.C. § 1332 (d)(3).

¹⁶¹⁴ See discussion of limitations concerning corporate defendants and applicability of these laws where the plaintiff, the defendant and/or the acts complained of took place outside the U.S. under Sec. II.(4) of this opinion.

¹⁶¹⁵ Fed. R. Civ. Pro. § 23(a).

¹⁶¹⁶ ALEXANDER, pp. 4-6.

¹⁶¹⁷ Fed. R. Civ. Proc. § 23(b)(3).

separate actions, and the nature of the claims raised and relief sought. It need not be impossible to join all of the individual parties or to try the suits individually; impracticability is sufficient.

[845] There are three types of class actions under the Federal Rules of Civil Procedure. The general model for class actions in the U.S. is an *opt-out structure*.¹⁶¹⁸ In this type of class action, if a class is certified, any party that falls within the class is bound by the court decision unless that party specifically opts out of the class. This is generally the form used in suits for damages. Nonetheless, in cases where (i) an opposing party may be confronted by contradictory individual judgments or the interests of third parties might be decided or compromised in the absence of a class action¹⁶¹⁹ or (ii) where injunctive or declaratory relief is appropriate for all members of the class¹⁶²⁰, a certified class is mandatory and opting out is not possible.

[846] The opt-out structure has two additional requirements under the Federal Rules:

- First, the questions that are common to the class must *predominate* over any questions that affect only individual class members. In order to assure that the class will be “sufficiently cohesive to warrant adjudication by representation.”¹⁶²¹ This determination is made based on how trial time and focus will be spent.¹⁶²²
- Second, class treatment must be “*superior to other available methods* for the fair and efficient adjudication of the controversy.” This determination is made taking into account several factors, including “the difficulties likely to be encountered in the management of a class action,” or “*manageability*,” the interests of individual class members in controlling the litigation of their own claims, the extent and nature of any individual lawsuits that are already pending, and the desirability of concentrating all claims in the chosen court.¹⁶²³

[847] It is interesting to note that, in the U.S., most class actions are financed by the attorneys who bring them.¹⁶²⁴ The “American Rule” provides that each party pays its own legal fees regardless of which party prevails. Where the class action is successful and results in a common fund out of which the members of the class are to be compensated, under the “common fund” doctrine, attorneys’ fees and costs may be paid out of that fund (before the remaining funds are distributed among the plaintiffs as ordered by the court) based on general notions of fairness.¹⁶²⁵ In federal courts, in addition, there are some statutes that specifically provide that the judge may make an award of attorneys’ fees to be paid by the defendant(s) to the plaintiffs’ class.¹⁶²⁶

[848] Once the court has certified a lawsuit as a class action, class members must be notified of the pending litigation. Fed. R. Civ. Pro. §23(c)(2) requires that notice of a (b)(3) class contain detailed information about the class, the lawsuit, and procedures for requesting exclusion, or “opting out” from the class. For other types of class actions, since there is no possibility of opting

¹⁶¹⁸ Fed. R. Civ. Pro. § 23(b)(3).

¹⁶¹⁹ Fed. R. Civ. Pro. § 23(b)(1).

¹⁶²⁰ Fed. R. Civ. Pro. § 23(b)(2).

¹⁶²¹ *Amchem Products, Inc. v Windsor*, 117 S.Ct. 2231 (1997).

¹⁶²² ALEXANDER, at. 5.

¹⁶²³ Fed. R. Civ. Proc. §23(b)(3).

¹⁶²⁴ ALEXANDER, p. 10.

¹⁶²⁵ *Alyeska Pipeline Serv. Co. v Wilderness Soc.*, 421 U.S. 240 (1975); *Boeing Co. v Van Gemert*, 444 U.S. 472 (1982).

¹⁶²⁶ E.g., the Civil Rights Attorney’s Fees Awards Act, 42 U.S.C. §1988(b), which authorizes the award of reasonable attorney’s fees to the prevailing plaintiffs in litigation under 42 U.S.C. §1983.

out, the notice must simply be “appropriate.”¹⁶²⁷ In a controversial decision, the U.S. Supreme Court has held that plaintiffs must pay the costs of this notice.¹⁶²⁸

[849] Our research revealed no specific legal rules concerning whether the names¹⁶²⁹ of class action plaintiffs are made public. The general rule in the U.S. is that court proceedings are public¹⁶³⁰ and, as a result, the names of parties to lawsuits are ordinarily part of the public record, however, usually only the representative of a class is a named party. Several attorneys have responded to queries on the Internet indicating that, although the administrator of the claim will have the names of all members of the class who have been notified individually and/or have not opted out of the class, there is no reason why those names must be included in the public record, but, of course, this does not provide a legal basis for such a claim. As a result, there is no guarantee of anonymity for class members. This is particularly true during the phase of class action litigation during which the court must determine whether to certify a class. U.S. procedural rules allow for exceptionally broad discovery; obtaining information concerning potential class members’ claims will clearly be relevant to this phase of the procedure. In at least one case, a California court allowed the defendant access to information concerning the potential plaintiffs.¹⁶³¹

[850] More recently, in the class action lawsuit against the owners of Ashley Madison, a website for people seeking extra-marital affairs, in connection with a data security breach, the Federal District Court ordered those plaintiffs wishing to be class representatives who had filed under a pseudonym to “decide whether to proceed using their real names or dismiss their complaints and proceed, without publicly disclosing their names, as class members – if and when a class is certified.”¹⁶³²

¹⁶²⁷ Fed. R. Civ. Pro. § 23(c)(2):

“Notice.

(A) For (b)(1) or (b)(2) Classes. For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) For (b)(3) Classes. For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).”

¹⁶²⁸ *Eisen v Carlisle & Jacquelin*, 417 U.S. 156 (1974).

¹⁶²⁹ Or other information concerning these persons.

¹⁶³⁰ US Constitution, Amendment VI.

¹⁶³¹ *Pioneer Elecs. (USA), Inc. v Superior Court*, 150 P.3d 198, 207 (Cal. 2007) (holding in a precertification discovery ruling, that, since complaining customers “had no reasonable expectation of any greater degree of privacy,” the trial court properly ordered disclosure of their names and contact information unless they opted out by responding to notice mailed to them). For a discussion of the appropriate balance between privacy and discovery in this context see, KOSSEF.

¹⁶³² *In re Ashley Madison Customer Data Security Breach Litigation*, 2016 WL 1366616 (Eastern Dist. of Missouri 2016).

ANNEX 2: BIBLIOGRAPHY

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ANNEX 4: COMPARATIVE OVERVIEWS

Comparative Overview table: National Contact Points

	Structure	Resources	Specific Instances	Competencies	Peer Review
Switzerland	- The NCP is located in one Ministry and is supported by an advisory board and inter-departmental ad hoc working groups	- Secretariat consists of one full time staff member and two part time staff members - Dedicated annual budget to conduct its activities	- The NCP publishes the initial assessment and final statement - May envisage specific follow-up activities	- Role of a mediator promoting a dialogue - May issue a statement on whether the Guidelines were breached or not	- concluded in 2017
Denmark	- Mediation and Complaints Handling Institution for Responsible Business Conduct (MKI) serves as the Danish NCP - Independent body housed within the Ministry of Business and Growth	- Five members - Served by a secretariat with three full time staff members - Dedicated annual budget to conduct its activities	- Statute of limitation - Five-stage approach - Publishes results of the preliminary investigation, final statement and follow-up statement	- Two mandates (OECD mandate and domestic mandate) allow the MKI to assume further tasks than required by the Guidelines. E.g. may initiate proceedings at its own discretion - Investigation power - Issues a statement on whether the Guidelines were breached or not - Power to re-consider a case if indicated by specific circumstances	- concluded in 2015
Germany	- Interagency body housed within the Federal Ministry of Economic Affairs and Energy. Acts in coordination with the Interministerial Steering Group for the OECD Guidelines - Supported by an advisory body (Working Party on the OECD Guidelines)	- Two full-time and two part-time staff members - Dedicated annual budget to conduct its activities	- The NCP publishes the final statement - May envisage specific follow-up activities	- Issues a statement on whether the Guidelines were breached or not	- due in 2017
UK	- Interagency body based in the Department for International Trade (DIT) - Supported by an independent Steering Board	- Three members - Dedicated annual budget to conduct its activities	- The NCP publishes the initial assessment, the final statement and the follow-up statement - Mediation process and examination process - May envisage specific follow-up activities	- Investigative power in the examination process - Issues a statement on whether the Guidelines were breached or not - Possibility to re-open a case	- due in 2018

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France	<ul style="list-style-type: none"> - Tripartite body housed in the Directorate General of the Treasury in the Ministry of Economy and Finance 	<ul style="list-style-type: none"> - Representatives from several ministries, trade unions and an employer's federation - No dedicated annual budget, however receives funding 	<ul style="list-style-type: none"> - The NCP publishes the initial assessment and the final statement - May envisage specific follow-up activities 	<ul style="list-style-type: none"> - May issue a statement on whether the Guidelines were breached or not 	<ul style="list-style-type: none"> - due in 2017 	
Netherlands	<ul style="list-style-type: none"> - Independent expert body housed within the Ministry of Foreign Affairs - Supported by a Secretariat 	<ul style="list-style-type: none"> - Four independent members - Four advisory members - Dedicated annual budget to conduct its activities 	<ul style="list-style-type: none"> - The NCP publishes the initial assessment, the final statement and a follow-up statement - May envisage specific follow-up activities - Possibility to complain with the Minister of Foreign Trade and Development Cooperation 	<ul style="list-style-type: none"> - May issue a statement on whether the Guidelines were breached or not 	<ul style="list-style-type: none"> - concluded in 2010 	
Canada	<ul style="list-style-type: none"> - Seven-department interagency body, collaborating with three official non-governmental partners and with the Canadian Office of the Corporate Social Responsibility Counsellor for the Extractive Sector 	<ul style="list-style-type: none"> - Two full time staff members - Six part time staff members - Dedicated budget to conduct its activities 	<ul style="list-style-type: none"> - The NCP publishes the initial assessment, the final statement - May envisage specific follow-up activities - 2014 CSR Strategy encompasses material consequences if company is reluctant to take part in the NCP proceedings 	<ul style="list-style-type: none"> - Possibility to pursue enquiries and engage in fact-finding activities - May issue a statement on whether the Guidelines were breached or not 	<ul style="list-style-type: none"> - due in 2018 	
US	<ul style="list-style-type: none"> - Monopartite plus body, housed within the Bureau of Economic and Business Affairs of the U.S. Department of State - NCP consults with an interagency working group (IWG), representing different departments - Supported by a stakeholder advisory board (SAB) 	<ul style="list-style-type: none"> - Three full time staff members - Twelve part-time staff members - Funded by the budget of the U.S. Department of State 	<ul style="list-style-type: none"> - The NCP publishes the final statement - May envisage specific follow-up activities 	<ul style="list-style-type: none"> - Will not issue a statement on whether the Guidelines were breached or not - Possibility to conduct mediation at the location of the allegations 	<ul style="list-style-type: none"> - due in 2017 	

Comparative Overview table: Non-judicial remedy mechanisms in National Human Rights Institutions

	Structure	Competencies	Further comments
Switzerland	- Currently no NHRI compliant with the Paris Principles; University-network (SCHR); - Consultation draft on the creation for a NHRI	- The SCHR has no quasi-judicial competencies; - the consultation draft does not foresee any quasi-judicial competencies as well	
Denmark	NHRI with A-status accreditation	- No quasi-judicial competencies; - giving advice and assistance to individuals filing discrimination complaints	- Closely cooperating with other core HR structures such as the Parliamentary Ombudsman, the Danish National Council for Children and the Data Protection Agency
Germany	NHRI with A-status accreditation	- Not mandated to deal with individual complaints; - assists victims by referring them to competent institutions	- Might act as amicus curiae in legal proceedings and has done so in cases of alleged corporate-related human rights violations
UK	NHRI with A-status accreditation	- Not dealing with / mediating individual complaints	- Has the power to initiate judicial review of decisions of public authorities; may act as amicus curiae; intervene in legal proceedings regarding issues of public policy and general public concern - territorial jurisdiction is understood to be limited to acts committed within the UK
France	NHRI with A-status accreditation	- No mandate to handle complaints; - transmitting individual petitions to other bodies	
Netherlands	NHRI with A-status accreditation	- May hear individual complaints related to the national equality legislation Informal and cost free procedure - NHRI may act as an expert in legal actions when a member of the Institute is summoned to appear by the courts.	- NHRI has a so-called Front office, serving as initial contact point for all questions about human rights and equal treatment
Canada	- federal NHRI with A-status accreditation - provincial and territorial Human Rights Agencies	- quasi-judicial competencies for discrimination complaints on the federal level for federally regulated employers and service providers - dispute settlement mechanisms in individual cases on provincial and territorial level	
US	No NHRI compliant with the Paris Principles		

Comparative Overview table: Non-judicial remedy mechanisms through Ombudsperson offices

	Structure	Competencies	Further comments
Switzerland	Several ombudsperson offices established in the context of concessions for (public) services such as in the area of telecommunication services (Ombudscom), postal services, radio and television, regarding salary and working conditions as well as for private security service providers	Ombudsperson offices in the context of public services may review individual complaints; mostly, recommendations issued are non-binding.	Ombudspersons receiving complaints of collective nature in the area of Data Protection and prices of goods and services Arbitration and Conciliation Bodies on federal and cantonal level such as in the area of collective work-related disputes and disputes regarding redundancies plans Consultations bodies for different topics such as racism, equality, international labour standards
Denmark	Parliamentary Ombudsman (Folketingets Ombudsmand); independent parliamentary control body	Individual complaints mechanism; may issue non-binding recommendations can issue binding decisions	extraterritorial scope of the Ombudsman's jurisdiction is not explicitly addressed Several other specialized mechanisms (such as the consumer ombudsman, the Danish Data Protection Agency, the Board of Equal Treatment, the National Council for Children and the Danish Press Council) with considerable differences regarding their powers and functions.
Germany	the general idea of ombudsperson offices does not yet seem as prominently anchored in Germany; some mechanisms merely address certain aspects relating to business and human rights		
UK	Ombudsperson concept is common in the UK, there exist a number of public ombudspersons	The Parliamentary and Health Services Ombudsman hears and decides on individual complaints relating to alleged maladministration and may issue recommendations. He cannot investigate ex officio. Private companies do not fall under the Ombudsman's jurisdiction; neither are the commercial and contractual activities of government covered Local Government Ombudsmen investigate individual complaints and may issue reports Specialized and sector-specific ombudspersons exist and partly investigate individual complaints against companies, see N [296].	Existing ombudspersons mechanisms established by the government are in principle limited to the UK in their scope of jurisdiction, i.e. that they do not have extraterritorial jurisdiction. The existing offices seem, if at all, mainly linked to the first and third pillar of the UNGP. Most lack jurisdiction over private companies and/or are focused on specific sectors.
France	Défenseur des Droits, a specific ombudsperson tasked to supervise the protection of (human) rights; independent constitutional authority	May hear individual cases by natural and legal persons; enjoys extensive powers of investigation and intervention; may propose	

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	<p>Chairs three boards in the fields of the rights of children, the fight against discrimination and inequality and security ethics.</p>	<p>amendments to laws or regulations and consult on legislative proposals</p> <p>Remedies include non-binding measures (e.g. mediation) as well as binding measures such as, inter alia, requests for disciplinary action or recommendations for administrative sanctions</p>	
Netherlands	<p>Several specialized ombudspersons offices such as the Dutch Data Protection Agency</p> <p>National Ombudsman (Nationale Ombudsman), enshrined in the Constitution</p>	<p>may investigate claims by individuals or on its own initiative; enjoys broad powers of investigation, administration must cooperate. May issue reports containing findings, decisions and recommendations to the public administration</p>	<p>Limited jurisdiction only covering actions by government authorities; private companies do, in principle, not fall within the Ombudsman's jurisdiction</p>
Canada	<p>Canadian Human Rights Tribunal</p> <p>Several specialized federal ombudsmen of interest for the field of business and human rights such as the Office of the Procurement Ombudsman and the Office of the Federal Ombudsman for Victims of Crime.</p> <p>Also, a number of ombudsperson offices at the provincial and municipal levels</p>	<p>Canadian Human Rights Tribunal hears discrimination claims relating to federally regulated individuals and organizations. It enjoys extensive powers, similar to those of a court and may decide on a remedy to correct experienced the discrimination experienced; see N [304].</p> <p>Specialized federal and provincial ombudsperson offices may hear claims by victims and could potentially relate to the third pillar of the UNGP</p>	<p>Recently, the establishment of a federal independent ombudsperson for the extractive industry sector in Canada was defeated</p>
US	<p>No ombudsperson service with general jurisdiction on the federal level. Several offices addressing specific complaints both on federal and state level, such as the Department of State Office of the Ombudsman or the Food and Drug Administration Ombudsman.</p>	<p>Sectors and competencies of ombudsperson offices vary widely, see N [306].</p>	<p>specific human rights ombudsperson offices neither exist on the federal nor on the state level in the United States.</p> <p>Overall, the jurisdiction in the United States regarding corporations appears to be very limited on the federal level</p>

Comparative Overview table: non-judicial remedy mechanisms in Export Credit Agencies

	Structure	Competencies	Further comments
Switzerland	Swiss Export Risk Insurance (SERV)	no formalized complaints procedure to handle human rights concerns arising from its business activities.	NGOs can raise questions concerning the regularly published transactions at any time and face-to-face meetings with NGOs are organized on a yearly basis.
Denmark	Eksport Kredit Fonden (EKF)	No grievance mechanism in place; the establishment of a whistle blower or grievance function is planned.	
Germany	Euler Hermes Aktiengesellschaft	No defined grievance mechanism for human rights complaints	
UK	UK Export Finance	complaints procedure where claims regarding the support offered or services provided can be lodged by email or phone; possibility to escalate complaints to the Parliamentary Commissioner for Administration (Ombudsman) it is unclear whether this procedure is open to human rights-related complaints by third parties who are not customers.	
France	Compagnie française d'Assurance pour le commerce extérieur (COFACE),	No grievance mechanism for human-rights related concerns	
Netherlands	Atradius Dutch State Business	No formalized grievance mechanism in place. Complaints can be lodged online via the official complaint form but there is no information on the complaint procedure available.	The Dutch NCP suggested to the Dutch ECA to publish a complaint procedure, including a time frame of the procedure in a recent specific instance (Both ENDS – Fórum Suape vs. Atradius DSB).
Canada	Export Development Canada (EDC)	Grievance mechanism run by EDC's Vice-President and Chief Compliance and Ethics Officer; mandated to receive and review complaints from stakeholders in connection with EDC's internal ethics codes, as well as external inquiries regarding EDC's corporate social responsibility policies and initiatives; for more details see N [320].	
US	Export-Import Bank of the United States (EXIM Bank)	provides a process for customers, individuals and organisations to submit information or share environmental and social concerns about a project that may receive or has got export financing support from EXIM Bank; for more details see N [321].	

Overview table non-judicial remedy mechanisms within Bilateral Development Finance Institutions

	Structure	Competencies	Further comments
Switzerland	Swiss Investment Fund for Emerging Markets (SIFEM)	No grievance mechanism in place	Emphasises the need for businesses to respect environmental and social standards, including human rights.
Denmark	Denmark's Investment Fund for Developing Countries (IFU)	grievance mechanism for individuals and communities adversely affected by the activities of an IFU investee who does not attempt or fails to resolve the issues by itself; for more details see N [323].	
Germany	Deutsche Investitions- und Entwicklungsgesellschaft mbH (KfW/DEG)	Individual Complaints Mechanism; grievances are reviewed by an Independent Expert Panel operating completely independent; for more details see N [324].	shared initiative with the Dutch FMO
UK	British CDC (formerly Commonwealth Development Corporation)	grievance mechanism that deals with complaints by anyone who believes to be negatively affected by a breach of CDC's Code of Responsible Investing through CDC itself, operations of a company in which CDC's capital is invested in or operations of a fund manager whom CDC's capital is invested; for more details see N [326].	
France	AFD/Proparco Groupe Agence Française de Développement,	Environmental and Social Complaints Mechanism; grievances can be made by anyone who is negatively affected by a AFD-funded project; for more details see N [325].	The mechanism is even aimed to eventually align with the FMO/DEG mechanism
Netherlands	FMO Entrepreneurial Development Bank	Individual Complaints Mechanism, grievances are reviewed by an Independent Expert Panel operating completely independent; for more details see N [324].	shared initiative with the the German DEG
Canada	Yet no bilateral development finance institution; one is planned to become operational in January 2018	Yet no information available if a grievance mechanism is planned.	
US	Overseas Private Investment Corporation (OPIC)	The OPIC is mandated to engage in dispute resolution with the parties (problem-solving) or to perform a review how relevant OPIC policies had been applied in a specific project (compliance review); for more details see N [328].	