

4. ENFORCING AND ADJUDICATING

4.1 The Key Issues

Domestic enforcement of laws governing business involvement in human rights abuses, including through adjudication, is still underdeveloped in almost all areas of the world. The basic components for an effective legal response are present in many countries, whether its formal recognition of the concept of corporate criminal liability, prosecution mechanisms, as well as tort-based systems for non-criminal claims, and administrative sanction and fine systems. Yet victims harmed by business activities around the world still face huge obstacles in accessing adequate and effective remedies (section 4.2). Even in the limited number of States that provide for corporate criminal liability, the practice of adjudicating criminal corporate involvement in human rights abuses is limited to non-existent in many States (section 4.3). Moreover, there is widely divergent State practice, as well as extensive practical, procedural and extraterritorial barriers, to the use of private or tort-based claims against companies that have limited the success rate of most cases (section 4.4). One response has been the development of non-legal remedy options, particularly mediation, but these are not used in every country and State capacities required to efficiently and effectively operate such mechanisms remains a challenge (section 4.5).

4.2 Access to Justice

As the UN Guiding Principles reaffirm, States have the duty to protect against human rights violations within their boundaries, including ensuring access to effective remedies. There are however often enormous obstacles to victims accessing justice for business-related impacts. The *Protect, Respect, Remedy* Framework itself describes them:

Judicial mechanisms are often under-equipped to provide effective remedies for victims of corporate abuse. Victims face particular challenges when seeking personal compensation or reparation as opposed to more general sanction of the corporation through a fine or administrative remedies. They may lack a basis in domestic law on which to found a claim. Even if they can bring a case, political, economic or legal considerations may hamper enforcement.⁹⁶

The UN Guiding Principles call for States to address the legal, practical, procedural and financial barriers preventing legal cases from being brought in situations where judicial resource is an essential part of accessing remedy or alternative sources of effective remedy are unavailable.⁹⁷ As will be discussed below however, disparities in the way States approach criminal, civil and administrative remedies for businesses' human rights related impacts means that in some cases victims will have one or more possible routes to remedy, and in other cases none at all. In one of his first reports to the UN, the SRSG pointed to the governance gap between the global evolution and expansion of business and the ability of Governments to effectively regulate them.⁹⁸ Yet recent reviews of the corporate legal accountability landscape confirm that while many multinational companies operate easily across national borders, those harmed by their activities struggle to access judicial remedies.⁹⁹

⁹⁶ Report of the SRSG, "Protect, Respect and Remedy: a Framework for Business and Human Rights", UN SRSG, A/HRC/8/5, (7 April 2008), pg. 23. Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

⁹⁷ Guiding Principle 26, Commentary.

⁹⁸ Report of the SRSG, "Business and human rights: mapping international standards of responsibility and accountability for corporate acts", A/HRC/4/035 (9 Feb 2007), pg. 23. Available at: <http://www.business-humanrights.org/Documents/SRSG-report-Human-Rights-Council-19-Feb-2007.pdf>

⁹⁹ See for example: Prof Gwynne Skinner, Prof Robert McCorquodale, Prof Olivier De Schutter, with Case Studies by Andie Lambe, "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business December 2013". Available at: <http://accountabilityroundtable.org/analysis/the-third-pillar-access-to-judicial-remedies-for-human-rights-violations-by-transnational-business/>. See also Business

4.3 Criminal Law

The Norwegian research foundation Fafo undertook a first of its kind comparative survey in 2006 of the relevant national legislation in selected countries concerning businesses' liability under domestic civil and criminal law for the commission of, or complicity in, violations of international criminal and humanitarian law, both in and beyond national jurisdictions. It found a range of countries, (usually civil law countries) that legally recognise the concept of corporate criminal liability, including **Australia, Canada, the US, South Africa, Norway, the Netherlands, the UK, Belgium, the Czech Republic, Italy, Luxembourg, Poland, Romania, the Slovak Republic, and Spain.**¹⁰⁰ Other countries, such as **France**, explicitly recognise the concept of corporate criminal liability, but caveat this general recognition with a list of exceptions. **Argentina, Indonesia and Japan** recognise corporate criminal liability only in relation to a specific list of offences contained in statutes and penal codes. More generally, States may impose criminal responsibility on a company for failing to properly act with due diligence to prevent certain crimes, which are often relevant to the protection of human rights though not couched in rights-explicit terms, for example regarding environmental crimes that may threaten the right to life or health, violent crimes, as well as failures to prevent transnational bribery of public officials.¹⁰¹ There are however far more countries that do not recognise the concept of corporate criminal liability than those that do.

In practice, the legal recognition of corporate criminal liability for human rights impacts is not being put to the test. Though corporate criminal liability is a theoretical possibility in a number of States, attempted prosecutions of companies for human rights impacts are practically non-existent, though some exceptions exist¹⁰². Indeed, most criminal cases against companies on human rights grounds are brought or instigated by NGOs and other representatives of victims, including lawyers who specialise in bringing these types of claims.¹⁰³ Moreover, country practices differ as to how actively involved victims can be in the investigation and prosecution after legal proceedings are initiated, as well as to how accountable to victims the prosecution itself will actually be. This lack of prosecutions could be due to a range of factors: from a lack of political interest and will to proceed with investigations and enforcement, a lack of specific guidance and resources for prosecutors, or a combination of factors. For example, the involvement in unscrupulous employers in violations such as forced labour or human trafficking is already a criminal offence in most jurisdictions, but there have been very few prosecutions of such businesses in most States. This gap is even more obvious considering that gross labour exploitation is recognised as a global problem with vulnerability in every State. The lack of State-backed investigations shows the current challenges extend beyond the important step of putting an appropriate legal framework in place.

& Human Rights Resource Centre, "Annual Briefing: Corporate Legal Accountability", (November 2013) at: <http://www.business-humanrights.org/media/documents/corp-legal-acc-annual-briefing-final-nov-2013.pdf>

¹⁰⁰ See Fafo, Business and International Crimes. Available at: www.fafo.no/liabilities. Regarding European countries, see further Clifford Chance, "Corporate Liability in Europe", 2012, Available at: http://www.cliffordchance.com/content/dam/cliffordchance/PDF/European_Technical_Bulletin.pdf.

¹⁰¹ See further a recent update to ICAR's due diligence report: Mark Taylor, "2013 Progress Report". Available at: <http://accountabilityroundtable.org/wp-content/uploads/2013/11/ICAR-Human-Rights-Due-Diligence-2013-Update-FINAL.pdf>.

¹⁰² Such as the policy of the Government of the **Netherlands** to actively discourage investments by Dutch companies in settlements in the Israeli-occupied West Bank because it views such settlements as illegal under international law. The public prosecutor has also confirmed it considers business activity in settlements a potential war crime and suggesting Dutch companies take concrete steps to end their activities in the area. See further, Mark Taylor, "Human Rights Due Diligence: The Role of States – 2013 Progress Report", pg. 11. Available at: <http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/>.

¹⁰³ Recently, for example: a **Swiss** probe into a gold refiner accused in a criminal complaint by a Swiss NGO of suspected money laundering in connection with alleged war crimes in the **DRC**. See further: <http://www.reuters.com/article/2013/11/04/congo-gold-idUSL5N0IP29K20131104#comments>; a **French** judicial investigation the the sale of a surveillance system to the Gaddafi regime in **Libya** filed by FIDH and LDH. See further: <http://www.refworld.org/docid/511cb668a.html>; a **German** complaint regarding a timber manufacturer's senior manager regarding abuses by its contracted security forces against a community in the **DRC**. See further: <http://www.echr.de/index.php/danzer-en.html>.

One promising demonstration of legislative uptake of the corporate responsibility to respect was recently laid before the Parliament in **France**. In November 2013 MPs introduced a bill that would amend the penal and civil codes to require French companies to demonstrate due diligence systems have been put in place as defined by the content of the UN Guiding Principles and OECD Guidelines. As noted in a recent report notes: “The presumption of liability is not conclusive and the company may be exempt from liability if it proves that it was not aware of any activity that may have a potential impact on fundamental rights or if it proves that it made every effort to avoid it.”¹⁰⁴ Moreover, the bill would amend the French Commercial Code to encourage monitoring of all activities that may potentially impact fundamental rights, as well as to adjust these measures according to the means available to the company, enabling SMEs to implement measures according to their potential human rights impacts.¹⁰⁵

4.4 Civil Law

Most countries allow civil or private law claims against businesses for harm or loss as well as failing to act with due care. Claimants using civil law approaches however tend to have to adapt their language and description of the impacts to fit certain legal definitions, such as “assault”, “false imprisonment”, or “wrongful death”, rather than using human rights terminology such as “torture”, “enslavement” or “genocide”. Clearly, such definitions do not always readily or adequately describe the severity of harms at issue in a human rights case.

While many States allow the use of civil law for alleged human rights impacts by businesses, there are wide variances in States’ approaches to bringing such cases, including on issues such as deciding on the forum to hear the case, the various grounds for dismissal of a case, State immunity, serious challenges around financing of such cases, the speed, efficacy and competence of the court itself, rules around damage awards, investigation and enforcement across borders, and other political and procedural issues. All of this divergence makes the private law approach a very unpredictable remedy option for victims.

The **U.S.** Alien Tort Claims Act (ATCA) has been the overwhelmingly dominant tort-based tool to try to hold businesses accountable for human rights impacts inside and outside the USA. Historically however, claims have rarely made it beyond the procedural stage to the merits of the case in trial. Moreover, in April 2013, a US Supreme Court decision in *Kiobel v Royal Dutch Petroleum* curtailed the ability of non-U.S. claimants to bring cases in the future involving business conduct occurring outside the U.S. or against non-U.S. companies.¹⁰⁶ The decision does for now leave the door open to cases involving U.S. companies, and potentially wider interpretations based on cases that “touch and concern” the U.S. As a result, there are new initiatives in the U.S. emerging to spur exploration of this new domestic legal landscape’s potential and limits.¹⁰⁷

As noted in a recent update to a 2012 report on State regimes around due diligence by the International Corporate Accountability Roundtable (ICAR), there have been some promising developments within the civil law sphere in other jurisdictions. For example in **Uganda** where the High Court in Kampala recently found in favour of land tenants violently evicted by Government forces in order to develop a coffee plantation on the grounds that the Ugandan Investment Authority failed to act with due diligence regarding the land transfer and community relocation.¹⁰⁸

¹⁰⁴ As reported in ICAR, “Human Rights Due Diligence: The Role of States – 2013 Progress Report”, pg. 5. Available at: <http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/>.

¹⁰⁵ Ibid.

¹⁰⁶ For further background on the case, see: <http://business-humanrights.org/media/documents/kiobel-supreme-court-17apr-2013.pdf>

¹⁰⁷ See e.g. ICAR and EarthRights International’s “Nation-wide law school partnership project”, where Loyola University New Orleans College of Law, New England Law (Boston), Santa Clara Law, UCLA School of Law, University of Oregon School of Law, University of Virginia School of Law, Western New England University School of Law, Rutgers School of Law–Camden will research state law and propose recommendations and draft legislation for legal reform around corporate accountability in their state.

¹⁰⁸ ICAR, “Human Rights Due Diligence: The Role of States – 2013 Progress Report”, pg. 6. Available at: <http://accountabilityroundtable.org/analysis/human-rights-due-diligence-2013-update/>

Another recent development was in the **Netherlands**, where a Dutch Court found a Nigerian subsidiary negligent for damages from pipeline oil spills harming a Nigerian farmer, by failing to take the precautionary measures necessary to reduce the risk to local people from sabotage to their operations (though the Court refused to rule on the explicit existence of a violation to their human rights due to a lack of precedent regarding a third party causing the harm).¹⁰⁹

The ability to bring civil claims is an indispensable avenue of redress for victims, and one where too few lawyers are willing to act given the costs and risks of litigation. States must not act in ways that further restrict access to such mechanisms, including within their legal aid programmes and other supportive measures.¹¹⁰ Instead, as set out in the UN Guiding Principles, there is a clear need to reinforce access to civil remedies for victims. States should expect civil society organisations to continue to research and advocate for expansion of the civil mechanisms available, as well as to experiment with new national and international avenues that yet to be tested.¹¹¹

4.5 Administrative Law

States such as **Germany, Italy** and **Ukraine** apply administrative penalties to companies – if found guilty a company will face financial and other penalties. Within their administrative systems, States' explicit expectations with respect to corporate due diligence ranges considerably. The most widespread requirements for mandatory due diligence is in the area of environmental protection, where over 130 countries are reported to have adopted an environmental assessment regime of one sort or another. Other topics covered by mandatory due diligence requirements often include workplace health and safety due diligence (such as in **Canada, China** or the **Netherlands**), and the prevention of money laundering and illicit flows (such as in widespread State regulation around "Know Your Customer" legislation).¹¹²

A promising development is that of many countries developing additional deterrents to financial penalties, such as restricting company operations in specific economic areas, banning them from procurement opportunities, publicising the conviction and penalties, and confiscating property if found to breach administrative regulations. Under the **U.S.** Sentencing Guidelines for example companies can be put on probation, which requires proof of compliance with the law, combined with implementation of an ethics programme and periodic reporting on its progress in implementing the designated reform programme.¹¹³

As noted earlier, the **U.S.** has also mandated reporting for new investments in **Myanmar/Burma** in relation to their human rights due diligence processes, as well as regarding supply chain due diligence in relation to conflict minerals sourced from the **DRC** or adjoining countries. Besides these cases however, there few examples of other States explicitly clarifying their human rights due diligence expectations of business within their administrative systems. Developing such requirements could go a long way in preventing human rights impacts in the first place, lessening the demand for the various judicial remedy options yet to provide sufficient access to justice for victims of business-related human rights impacts.

¹⁰⁹ Ibid.

¹¹⁰ See for example the 2011 letter from the SRS to the Parliamentary Under-Secretary of State concerning changes proposed to the legal aid system in the **UK**, outlining the significant potential barriers to legitimate business-related human rights claims that can be imposed by States' structures. At: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-ltr-to-uk-justice-minister-djanogly-16-may-2011.pdf>

¹¹¹ In this regard, see further the 2nd annual briefing by the Business and Human Rights Resource Centre on corporate legal accountability, noting that barriers are worsening for victims. Available at: http://business-humanrights.org/Links/Repository/1023587/link_page_view

¹¹² See further ICAR, "Human Rights Due Diligence: The Role of States", pg. 20. Available at: <http://accountabilityroundtable.org/wp-content/uploads/2012/12/Human-Rights-Due-Diligence-The-Role-of-States.pdf>

¹¹³ Ibid. See further: US Sentencing Guidelines Manual, para. 8D1.4, page 527. Available at: http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_8.pdf

4.6 Extraterritorial Jurisdiction

States can exercise jurisdiction over activities occurring beyond their territorial boundaries under customary international law (though discussion of the complex nuances falls outside the scope of this Report).¹¹⁴ There are variations in State practice in exercising extraterritorial jurisdiction regarding businesses' human rights impacts at a number of levels, both in regard to when they take a cross-border case and the extent to which they retain that jurisdiction through to conclusion. There is even variation within a single State's approach, depending on the political implications of the case.¹¹⁵ This divergence leads to a great deal of uncertainty in accessing judicial remedy outside the jurisdiction where the harm occurred, with the uncertainty itself becoming a barrier to victims accessing justice. The *Protect, Respect, Remedy* Framework notes:¹¹⁶

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

Compounding the issue, the concept of separate corporate "personality" means that one member of a corporate group will not automatically be held legally responsible for the actions of another member of the corporate group. Using the corporate form can be a legitimate way of allocating and dividing risk to limit liability. There will however be times when there are grounds for "piercing the corporate veil" in order to hold the parent company liable for its involvement in or control over the acts of a subsidiary. Many jurisdictions are still working out their tests for determining when to look to the parent rather than the subsidiary as the responsible party. Most domestic courts are cautious in taking such action out of concern that they will undermine the concept of separate corporate personality.¹¹⁷ As a result, it is only in very rare circumstances that parent companies have been held liable in their home jurisdiction for the actions of their overseas subsidiaries. This was seen however in a major legal precedent set within the **UK** in 2012 where a parent company of a multinational group was held accountable under the law of negligence for the harms to the employees of one of its subsidiaries in **South Africa**.¹¹⁸

There are many reasons why claimants may want to bring their human rights claim in another jurisdiction, for example if they have concerns over impartiality or the capacity of the local court to hear the claim in a timely way, or there may be more advantageous funding arrangements in another jurisdiction for payment of costs and fees to bring a claim, access to more public interest lawyers and pro bono help, or there may be procedural advantages or greater scope for damage awards. Bringing a claim in the legal environment where the abuse occurred will not necessarily

¹¹⁴ For a comprehensive discussion of extraterritoriality in a range of regulatory contexts, see: Jennifer Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" Harvard Corporate Social Responsibility Initiative, 2010, 163-169. Available at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

¹¹⁵ For example with the **US** Presidential Administration of George Bush took a position on the question of corporate liability under the US Alien Tort Claims Act that was reversed by the subsequent Obama Administration. Moreover, the US Government opinion during the Obama Administration changed during the course of a single case under the Act. The case also elicited a range of views from the **German, Dutch** and **UK** Governments, as well as from the European Commission. See further: <http://www.scotusblog.com/case-files/cases/kiobel-v-royal-dutch-petroleum/>

¹¹⁶ Report of the SRSG, "Protect, Respect and Remedy: a Framework for Business and Human Rights", UN SRSG, A/HRC/8/5, (7 April 2008), pg. 23. Available at: <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf>

¹¹⁷ Jennifer Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" Harvard Corporate Social Responsibility Initiative, 2010, pg. 23. Available at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

¹¹⁸ See: <http://www.business-humanrights.org/Links/Repository/1012578/jump> and <http://www.business-humanrights.org/Links/Repository/1012519/jump>.

invoke a victim's confidence, whether for doubts about local court capacity, lack of genuine political will to halt and remediate the harms, or fear of reprisal in bringing any claim at all. As such, there is evolving practice in terms of parent-subsidiary liability and expansive rules on jurisdiction regarding certain offences, extending the geographic reach of domestic law systems, such as in the **UK, France and Australia** where new theories are being developed based on a duty of care towards victims.¹¹⁹ This is a positive trend, and one that should be considered by all States to consolidate the reach of their human rights due diligence expectations on business, and not allow or enable the corporate form or chains of business relationships to be used to evade responsibility for impacts.

Calls for an international legally binding mechanism to hold companies accountable for human rights abuses committed anywhere in the world, often raised before the SRSG's mandate began in 2005, have recently been renewed by a group of States, led by **Ecuador**, and backed by dozens of NGOs.¹²⁰ The UN Office of the High Commissioner for Human Rights, in collaboration with the United Nations Working Group on Business and Human Rights, is conducting research aimed at contributing to the development of a more coherent and consistent global response to corporate liability for gross human rights abuses. Moreover, in January 2014, the former SRSG issued his own briefing on the prospect of a "business and human rights treaty", calling firstly for a systematic assessment of overall progress on global implementation of the UN Guiding Principles, as well as a needs assessment of what an international instrument would need to achieve to be of value.¹²¹ Clearly, 2014 promises to be an important year in deepening discussions on further necessary steps to enhance access to remedies. Extraterritoriality will continue to be one of the most vexing of State-to-State issues in terms of legal redress. It raises sensitive issues of sovereignty not just for the host State but also the home State¹²² and is no longer an issue of "north" versus "south" as the number of transnational companies registered in key emerging economies continues to rise. Some encouragement can be drawn from non-legal extra-territorial cooperation, as relating to the OECD Guidelines on Multinational Enterprises, discussed further below.

4.7 Non-Legal Processes

Mediation is a central function of National Contact Points (NCP) in relation to the OECD Guidelines on Multinational Enterprises (the OECD Guidelines). Each OECD member, as well as a number of other Governments in **North Africa and South America**, adhering to the Guidelines is required to operate a non-legal national mechanism to contribute to the resolution of issues that arise from the alleged non-observance of the guidelines in specific instances by companies wherever in the world they might be operating. In this way, the mechanism is truly extraterritorial.

In the period since the OECD Guidelines were updated in 2011, human rights has emerged as a common denominator across nearly all the cases brought to NCPs by NGOs and communities, and to a lesser extent also by trade unions.¹²³ An increasing number of business sectors are the subject

¹¹⁹ Jennifer Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas" Harvard Corporate Social Responsibility Initiative, 2010, pg. 163-168. Available at: http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_59_zerk.pdf

¹²⁰ See the civil society statement in support of the statement made to the Human Rights Council by **Ecuador** on behalf of the **Africa Group, the Arab Group, Pakistan, Sri Lanka, Kyrgyzstan, Cuba, Nicaragua, Bolivia, Venezuela and Peru**. Available at: http://www.tni.org/sites/www.tni.org/files/statement_in_support_of_states_at_the_hrc_enesp_17092013.pdf and <http://cancilleria.gob.ec/wp-content/uploads/2013/09/DECLARACION.pdf> (in Spanish only).

¹²¹ See further, John Ruggie, "A UN Business and Human Rights Treaty?" (28 January 2014). Available at: <http://business-humanrights.org/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>

¹²² As will be explored by the Inter-American Commission on Human Rights, which recently announced it will consider the question of "home country liability" for the extraterritorial actions of their companies abroad. See: <http://www.earthrights.org/blog/inter-american-commission-human-rights-consider-home-country-liability-extraterritorial-actions>.

¹²³ See for example: IHRB and the UK Government "Update on the role of OECD National Contact Points with regard to the extractive sectors" (London, 22 March 2013). Available at: <http://www.ihrb.org/pdf/IHRB-NNCP->

of cases, but the extractive sector still dominates NCP activity across a broad range of geographic jurisdictions. Some NCPs attract more extractive sector-related cases than others (for example, **Australia, Argentina, Canada, Chile, Netherlands, Norway, UK and US**) given the composition of the industries in these countries. However, an increasing diversity of NCP cases can also be seen (for example, the following NCPs have also been involved in recent cases: **Belgium, Japan, Luxembourg, Mexico, Morocco, South Korea and Switzerland**). Increasing collaboration between NCPs in relation to specific cases is also evident, as well as peer-review and support more generally. In 2012-2013 several NCPs have been re-constituted or strengthened in line with the updated Guidelines and national priorities. Other interesting trends over the last 12 months include the growth of capacity in non-OECD members who currently adhere to the Guidelines (for example a recent NCP conference in **Brazil**) and the development of parallel mechanisms in other economies (such as in **India** for example).

Some States use NCPs increasingly strategically in their foreign policy. The **Norwegian** and **UK** NCPs have capacity-building agreements with the **Brazilian** NCP, and several NCPs have been engaged in peer-review, for example the **UK** with **Japan**. Although such collaboration brings no direct commercial benefit, it does work towards a more level playing field for all OECD-based companies when working in key emerging markets. Another interesting example is the effort by the **Italian** NCP, together the OECD Secretariat, to promote much greater coherence and commonality of expectation of OECD registered companies operating in **Myanmar**.

States can also strengthen the leverage of NCPs by ensuring there are economic consequences for businesses that are unwilling to enter into mediation and against whom they have issued a statement. The OECD "Common Approaches" for Export Credit Agencies requires these agencies to take all NCP statements into account when considering whether to grant finance. The **Norwegian** State Pension Fund has already cited NCP statements as a reason for divesting from certain companies.

It should be noted that most non-OECD States do not yet have an NCP equivalent. However, a significant sub-set do have functioning National Human Rights Institutions (NHRIs). The best of these institutions, those granted "A status" in relation to the "Paris Principles", can be effective monitors not just of State behaviour in relation to human rights, but also non-State actors such as business. For example, the **African** Group of NHRIs is one of the largest and most active – many of its members have mediated directly in cases involving companies, some have initiated their own investigations whilst others have also proactively engaged with companies to increase awareness and even delivered training.¹²⁴ There has yet to develop any strategic alliance between NCPs and NHRIs but there seems to be a strong complement both in terms of geographic coverage and also function. One question to be considered is whether a complaint should go directly to an NCP if an NHRI is better placed to deal with the issue locally, at least in the first instance. It might be expected that donor Governments will at least see the potential for stronger collaboration.

4.8 Summary Note

In one of his first reports to the UN, the SRSG pointed to the governance gap between the global expansion of business and the ability of Governments to effectively regulate them. Yet even today the conditions for and enforcement of corporate liability for human rights harm have not evolved along with the global expansion of modern business. States have the tools to provide for appropriate and measured responses to human rights abuses involving business. Administrative law, civil law and criminal law, and sometimes a combination of the three are legal avenues States may pursue to ensure that businesses take preventative measures to avoid harm to people and are

OECD-National-Contact-Points-and-the-Extractive-Sector_2013-Update.pdf. A more recent discussion was also held jointly with the Norwegian NCP entitled "Multinational Enterprises, Human Rights and Internet Freedom" at the OECD in June 2013.

¹²⁴ See for example, **Uganda** Human Rights Commission, IHRB and OHCHR, "Summary Report: Capacity Building for NHRIs from **East Africa, Malawi** and **Ghana** (Kampala, January 25-26th, 2012)". Available at: http://www.ihrb.org/pdf/Uganda-Workshop-Final_Summary_Report.pdf

held accountable for human rights harms in which they are involved. Prevention and remedy are two fundamental legal functions – and yet, many States are failing on both counts. They are failing to provide sufficiently clear messages – regulatory or otherwise – of what is expected of business, and failing to take action where those expectations are not met. Even for gross violations of human rights, where the theoretical possibility of sanctions may exist, the current system of remedies in the vast majority of States, and internationally, is very often unpredictable and ineffective.

The failure to provide appropriately structured outlets for claims does not serve the interests of victims, States, or businesses. A national system that provides for stable and robust application of the rule of law is an attraction rather than deterrent for most businesses. Structured, efficient, and predictable processes for mediating disputes – judicial or non-judicial – serve all parties and can help avoid resorting to more desperate and extreme measures to seek justice. The unequal pace of addressing access to justice is already foreshadowing a schism in the carefully built coalition that led to the unanimous approval of the UN Guiding Principles in the Human Rights Council. 2014 promises to be an important year in deepening discussions on further necessary steps to enhance access to remedies.