
At the outset, IHRB would like to express its appreciation for the scholarly approach taken by Dr Zerk which lays out the seriousness of the situation by offering an overview of protection gaps, noting the impediments that prevent an easy solution while significantly contributing to the knowledge gaps in this area. We appreciate that the study has reflected on and incorporated comments from the earlier, expert consultation. IHRB remains ready to engage in and support this important work going forward.

We note that OHCHR has asked for comments on “the issues identified in the study as requiring further clarification (see issues listed in Chapter 5, section 5.2.1).” We also note that the study is recommending a consultative, multi-stakeholder process of clarification in two parts:

1. *A consultative process aimed at clarifying key issues of principles and policies*, including the elements of corporate liability for involvement in gross human rights abuses under private and public law regimes but focusing in particular on criminal law;

2. *A process to identify models of best State practice* in relation to the functioning of domestic judicial mechanisms, including identifying a programme of activities to promote technical cooperation and knowledge exchange to improve domestic judicial mechanisms from a practical, victim-centred point of view.

I. **Overarching Points**

Before addressing the points in Section 5.2.1, there are several preliminary points IHRB would like to emphasise. We agree that:

1. **An evidenced-based approach to exploring the key issues around providing more effective access to remedy is the most appropriate path to addressing this complex issue.**

The study very usefully lays out in clear and accessible language many of the key issues impeding better access to justice. The tables summarising approaches are particularly helpful in giving a quick overview of the situation across the many different sub-issues that must be addressed. The study itself is already a significant and very useful contribution to the evidenced-based approach.

We believe that it will not be possible to make progress in this area without such a grounding in factual analysis that explores the different types of legal systems and the challenges posed in each type of system. We therefore support an approach to addressing access to remedy that is grounded in research that highlights key challenges and possible solutions as a first step before moving straight into proposing solutions that may not be useful or appropriate in many legal systems.
2. **A strong focus on domestic remedies is justified.**

The study notes the key challenges for victims in bringing cases in jurisdictions outside where the abuse takes place. Strengthening domestic remedies would provide the most immediately accessible means of accessing justice while also strengthening the rule of law in countries. As in many areas of governance, an approach that supports the national systems rather than bypassing them whenever possible is a more sustainable approach and consistent with the principle of state sovereignty and with the state obligation to protect human rights. This is therefore an appropriate goal for the work that would have the added benefit of strengthening national systems to also deal with less grave but potentially far more common claims for other types of human rights abuses. This would also be very beneficial to improving the protection of human rights.

Abuses occur in all settings, regardless of the ownership of a corporation. Focusing only on multinationals (or transnationals, or what it implies – large companies alone), would undermine the whole principle of the research: focusing on victims. Where a company is based is relevant to choosing a strategy for securing remedies but should not be the defining focus of the research. For example, while foreign corporations had contracted local factories operating from the Rana Plaza, which collapsed in Bangladesh in April 2013, and over 1,100 workers died, the factory owners and the building’s owners and operators were Bangladeshi, and operated under Bangladeshi jurisdiction. This example may indicate reckless or criminal negligence, and may not meet the definition of “gross violation” (more about that later in this submission), but such a case demonstrates the need for a victim-focused approach, and not an owner-focused approach.

3. **There is also a need to explore conditions under which it is not only appropriate, but also necessary to provide access to remedies outside the jurisdiction where the harm occurred.**

IHRB also recognises that there will be situations where victims are unable to turn to their domestic systems for relief and remedy, particularly where the government itself is the source of the abuse and where the judicial system is weak and unlikely to be able to deliver justice. Given that many of the cases involve corporate complicity in abuses by governments, there is an even stronger reason for exploring other options for seeking remedies. We believe it would send the wrong signal for the purpose of deterrence to both companies and countries potentially engaged in gross violations, that there would be no options other than in the country itself for prosecution and punishment. And importantly, it would also effectively negate the potential for remedy for victims in certain circumstances.

The study could explore whether it is possible to establish a set of prompts or criteria when it would be particularly appropriate for other governments, particularly home jurisdictions, to take up prosecution or at least offer a forum for complaints.

4. **There is no one-size fits all but there may be useful lessons learned from other areas of law that could provide useful models or precedents.**

There are expected to be other areas of law, beyond just anti-bribery and corruption that might provide useful models for both domestic approaches as well as approaches to international cooperation or the exercise of extraterritorial jurisdiction that the research could usefully explore. IHRB would also welcome a review of other levers for deterrence and even potentially jurisdiction, such as linking company access to investment treaty protection to engagement in a process to provide remedy.

5. **The focus of the work should not be exclusively or even principally on convergence except in targeted areas where convergence may facilitate cross-border claims.**

We agree with the conclusions of the study that a focus on convergence of approaches would risk diverting time, energy and importantly attention from the hard work States have ahead in strengthening their own systems. Focusing on convergence might risk giving pretexts for delay, rather than a prompt for action. Having said that, forthcoming research should be alert to targeted areas where some level of convergence would be useful and it is expected that this would be in areas relating to facilitating cross-border claims, such as around international judicial cooperation.
6. Proceeding with the consultations as proposed by OHCHR is the appropriate approach.

IHRB also welcomes the primary recommendation of launching an inclusive, consultative multi-stakeholder process to clarify key issues of principle and policy with regard to identifying appropriate remedies in cases where human rights abuses have occurred and questions of corporate liability are raised.

Towards the aim of understanding the practical barriers and overcoming them, IHRB recommends that OHCHR organize in-depth consultations with advocacy groups, law firms, academics, officials, businesses and independent experts to feed into the process of developing a knowledge-base of existing practices and practical experiences.

II. Part 1: Clarify key issues of principle and policy

1. IHRB welcomes the list of issues identified in the study in Section 5.2.1. We believe that this part of the consultation would also benefit from a further focus on drawing out the conditions under which companies have become secondarily liable for such actions. Given the low level of awareness around the UN Guiding Principles generally, this focus would be help sharpen the analysis of the elements of corporate liability while at the same time serving an important prevention role by spreading awareness of the types of situations or conditions in which companies can become complicit in such actions (usually by governments). This should include an explicit focus on the types of contractual or other arrangements that companies may have with entities that are perpetrators and the types of support given. The current study has given a brief overview of a number of cases which is very helpful but going a step further and developing this into different typologies would be useful for the work going forward.

2. It would be useful to explore other models of the exercise of extraterritorial jurisdiction or other models of international cooperation, including international legal cooperation, to complement this section.

3. While the study does not explicitly mention it, the assumption is that the research would also look at other emerging areas of law dealing with a particular area of gross violations such as slavery to identify any good lessons learned.

4. Focusing on gross violations of human rights helps focus the discussion on critical issues that need to be addressed first. It is true that there is no single universal definition of what constitutes “gross violations” of human rights. It is understandably inappropriate to define such violations only in the context of business and human rights, for that would create an exclusive category of violations, whereas such violations are prevalent in the wider human rights sphere, and may occur in instances that involve state and other non-state actors, including armed groups or religious organisations. Some context-specific violations have been defined.1

III. Part 2: Identify models of best State practice in relation to functioning of domestic judicial mechanisms

1. IHRB agrees that a series of best practice models (or modules) is the best way forward, given the complexity of the situation as this would allow a flexibility for states with different systems to move forward more rapidly on options to strengthen their domestic systems without waiting for lengthy and perhaps fruitless discussions on convergence around one particular solution. This has the potential benefit of increasing access to remedies at the domestic level on a more expedited, but realistic time frame.

2. We believe that the list as presented could be organised into groups of issues that are linked that might provide a better framework for analysing and addressing the key practical challenges. We would also suggest

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1 For example, in the context of the rights of the child, six grave violations during armed conflict have been identified, which include the recruitment of children in armed conflict, killing and maiming children, sexual violence against children, attacks against schools and hospitals, abduction, and denial of humanitarian access. 

the addition of a few points integrated below. For example, the study highlighted the importance of NGOs or other groups in supporting claimants to put forward their claims. They may or may not be the same as legal representation so it is worth highlighting attention to these support groups separately.

Victims
- **Awareness raising / information about the possibility of making a claim**
  - Promoting awareness of legal rights and remedial mechanisms
- **Resources to support victims in making claims**
  - Legal funding options
  - Paralegal support
  - Processes to ensure appropriate levels of involvement of victims in decision-making by prosecution bodies, including access to information and rights of consultation at different stages of the proceedings
  - Access to legal representation
  - Expanding and supporting the parties who can bring claims on behalf of victims
- **Arrangements that facilitate victims making claims**
  - Management of collective, representative and group actions
  - Protecting victims and witnesses from intimidation and harm

Prosecution
- **Arrangements that facilitate prosecution of a case**
  - Simplifying and streamlining the process of prosecuting a claim
  - Rules of discovery
  - Challenges faced by prosecution bodies in investigating allegations
  - Training for prosecutors to familiarize them with cases involving business and human rights
- **Enforcement**
  - Options for enforcement that provide compensation or other remedies to victims
- **Cross border cases**
  - Challenges faced by prosecution bodies in investigating allegations in cross-border cases
  - International judicial cooperation
  - Managing jurisdictional conflicts
  - Mutual legal assistance
  - Enforcement of foreign judgments

Broader Goals of the System
- **Appropriate deterrence**
  - Devising appropriate and effective sanctions;
  - Calculating damages;
  - Seeking balance between retributive and restorative justice;
- **Maintaining the integrity of the process**
  - Protecting prosecution bodies and courts from political interference and the effects of corruption
  - Protecting victims and witnesses from intimidation and harm;

3. It would be useful if these models could include more specific tools such as model language for laws, training packages, etc. The next step could be supporting States to implement the work from the research. Recognising that funding for such work may be difficult to secure, one option is for developing components or approaches that would fit into broader packages of development assistance in the judicial sector that should include access to justice for victims of human rights abuses.

4. Future research and discussion should also keep a watching brief on developments in corporate law, particularly with respect to evolving concepts around parent-subsidiary relationships and ‘piercing the corporate veil’ as there is pressure on these concepts from a number of angles that may be relevant to this area of law as well. This is probably implicit in the list above but might usefully be made explicit.
IV. **Part 3: Further activities to build know-how and capacity of domestic prosecution bodies**

1. IHRB agrees that further research is needed into the causes of the overall lack (and in many jurisdictions virtual absence) of activity by domestic criminal law enforcement agencies in relation to the problem of business involvement in gross human rights abuses. Political inertia is a major factor. This could also look at successful efforts to increase attention to other serious crimes for lessons learned.