

COMMENTARY ON THE OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS'S STUDY  
ON DOMESTIC LAW REMEDIES:  
*CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES*

June 30, 2014

*Corporate Liability for Gross Human Rights Abuses* offers a comprehensive study of the present state of domestic judicial mechanisms, including remedial systems, in relation to corporate involvement in gross human rights abuses.<sup>1</sup> The report sought to answer the following questions:

- What do current state practice and litigation histories tell us?
- Are “protection gaps” a serious problem?
- Or do financial and practical factors, such as accessing funding and legal resources, pose the greatest difficulty for claimants and enforcement bodies?
- What are the consequences of differences in domestic approaches for victims?
- To what extent do these differences influence the availability, distribution, and use of domestic remedial mechanisms?
- What structural or political challenges might this pose?
- What are the advantages and disadvantages of divergence in domestic approaches from an access to justice point of view?
- Is there a case for greater convergence?
- If so, in relation to which areas, and how might this best be achieved?
- What problems and challenges are likely to be encountered?

The Office of the High Commissioner for Human Rights (OHCHR) issued a call to civil society to offer observations, comments and questions about the study. The University of Utah S.J. Quinney College of Law Center for Global Justice and the Center for International Law and Policy (CILP) at New England Law | Boston respectfully submit the following collaborative commentary reviewing the report.

The University of Utah S.J. Quinney College of Law Center for Global Justice examines the role of law in elevating the human condition. Through collaboration in research and innovations in teaching, the Center develops interdisciplinary insights on critical global challenges.

The Center for International Law and Policy (CILP) at New England Law | Boston was established in 1996 to promote the study and understanding of the relationship between international law and policy, with special emphasis on problems of an economic, environmental, criminal, or humanitarian nature. To this end, the Center sponsors research, publication, teaching, pro bono assistance, externships and the dissemination of knowledge in these areas.

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<sup>1</sup> JENNIFER ZERK, *CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES*, 1 (2014), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>.

## I. OBSERVATIONS AND QUESTIONS

We would like to first commend the efforts of Dr. Zerk and acknowledge her impressive undertaking to provide a comprehensive view of the state of affairs regarding remedies for corporate accountability. The following section offers observations, comments, questions and suggestions that both Centers agreed were important to share with the OHCHR in the spirit of moving this important and valuable project forward:

*Methodology:* Dr. Zerk acknowledges that she is conducting a “desk-based research” study that relies on existing studies of remedies for holding corporations accountable. In moving forward, it would be advisable to commission original studies that identify, digest, and analyze new cases that illustrate how domestic remedies in civil and criminal law have been employed to hold companies accountable. This new phase of study would also address potential limitations of the current report which focuses more on U.S. cases, in particular the Alien Tort Statute (ATS) which may have less legal relevance for claimants seeking remedy in U.S. federal courts in light of recent U.S. Supreme Court rulings, a challenge that Dr. Zerk recognizes. Certainly, the author recognizes possible changes to the remedy regime in U.S. federal courts, nevertheless much of the study is based on analysis of older cases prior to rulings that significantly limit the ability to seek remedy through litigation in U.S. federal courts. Also, it is not clear that the Report sufficiently distinguishes between remedies at different levels of government (e.g. the state versus the Federal Government of the United States and other countries with similar federal systems) and how we might approach the different legal and political challenges at both levels.<sup>2</sup> Actions against corporations alleged to be complicit in human rights violations have been brought in U.S. state courts in recent years and may shed relevant insight into the general question of effective remedies.

*Specific Observations:* While there may indeed be value to studying earlier U.S. cases perhaps as a hypothetical model for other jurisdictions, we believe a new legal landscape post-ATS is emerging. Accordingly, we believe future research should seek a more diverse sampling of countries and offer a more representative look at global efforts to build and strengthen remedies for human rights harms. How other countries are creating their own ATS-like legislation and the outcome would serve to contribute significantly to the body of knowledge on remedy and accountability.

*Non-judicial remedies:* The Report seeks to address what it identifies as a “liability gap” in corporate liability yet focuses only on judicial remedies without mention of non-judicial remedies, despite the fact that the United Nations Guiding Principles on Business and Human Rights (UNGPs) focuses significantly on this latter category of remedies.

*Specific Observations:* Next steps in researching the liability gap should integrate research on non-judicial remedies.

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<sup>2</sup> *Id.* at 78.

*Other types of human rights violations:* The study focuses on the most serious crimes (genocide, slavery, executions, torture, etc.)<sup>3</sup> and thus addresses only “gross,” “grave,” and “systematic” human rights violations.<sup>4</sup> Yet, many other situations implicate human rights harms caused by businesses without necessarily rising to this level of seriousness. Consider for example, issues related to labor and employment, environmental concerns and other situations that harm individuals and communities.

*Specific Observations:* We believe there may be a risk of only focusing on the most egregious rights violations might result in the exclusion of other transgressions that could culminate in egregious harms. Indeed, Principle 12 of the UNGPs is much more expansive (e.g. includes the full International Bill of Rights as well as other relevant treaties). Future steps to advance our understanding should examine cases that remedy violations of these types of human rights.

*Specific Questions:* The Report refers to the “manifest breach” of human rights but is not clear what this test requires and whether it varies depending on the type of human right violation. How do we determine if a human rights violation has occurred? Does it depend on the level of harm or type of injury?<sup>5</sup>

*Framing existing remedies as human rights remedies:* Related to the last observation, the inquiry into other types of human rights violations may require examining domestic remedies that do not per se arise out of human rights law but instead arise from bodies of law which mirror human rights norms even if they do not name them as such. The Report spends quite a bit of discussion of tort doctrine but is very abstract and thus could offer more concrete examples of case law that exemplifies human rights accountability measures.<sup>6</sup> Moreover, it might be helpful to have an interpretative frame to analyze how existing causes of action in tort and criminal law uphold human rights law even if they do not arise out of human rights causes of action (for example, ordinary tort theories of negligence, intentional torts, and strict liability).

The Report observes: “There are few legal regimes aimed specifically and explicitly at the problem of business involvement in gross human rights abuses.”<sup>7</sup> This statement raises the question of whether the term “human rights” needs to be explicit in the law to best promote human rights accountability for corporate activity; or whether existing law and causes of action which in fact provide a remedy through ordinary torts and criminal law satisfy this end goal.

*Specific Questions:* How do you look at an existing legal regime for these types of disputes and characterize them as human rights remedies? Should we focus on pushing legislatures to enact new causes of action or is it enough to understand that any enforcement of labor standards (for example) is a form of human rights accountability?

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<sup>3</sup> *Id.* at 26-27.

<sup>4</sup> *Id.* at 28-29.

<sup>5</sup> *Id.* at 75.

<sup>6</sup> *Id.* at 33,44.

<sup>7</sup> *Id.* at 40.

Can rights be sufficiently protected under another name? Consider systems that have extensive protection of employees, such as the United States, but do not self-identify as enforcing “human rights”.

For example, the Report raises the question of whether ordinary tort law reflects the gravity of human rights crime.<sup>8</sup> Future research could discuss whether this reality requires a “new” tort to supplement existing “ordinary” causes of action. If so, what would be required to educate judges about these new torts and would pleading cases require new approaches?

Conceptually speaking, are we seeking to apply international law in domestic forums or is it local law that in effect upholds international law norms?<sup>9</sup> While the Report seems to offer general observations about civil and criminal law, it is still unclear how this law “works” to vindicate human rights.<sup>10</sup> In other words, how would a practitioner actually litigate these cases?

*Specific Observations:* One next step may be to develop treatises of law that guide advocates and lawyers on how to frame legal arguments that both conform to local law and vindicate human rights issues.

*Legal reform initiatives:* Particular observations in the Report on the current status of remedies seemed to suggest possible areas where we might begin to discuss and develop areas of legal reform that would increase possibilities of holding corporations accountable:

- a. The Report mentions Belgium law that created universal jurisdiction. We believe a comparative examination of different experiences, outcomes, and challenges in different countries seeking to uphold this principle is warranted.<sup>11</sup>
- b. Limited liability is a construct that was created recently. Without taking a strong opinion either way, we believe it would be worthwhile to discuss whether reform of this legal limitation to expand liability would be realistic, and if so, would that be a desirable change?<sup>12</sup>
- c. The Report discusses the challenges of the doctrine of *forum non conveniens*.<sup>13</sup> We believe it would be worthwhile to discuss whether this discretionary doctrine could be limited by statute (or given more standards to help protect human rights) and whether such reform would be desirable.

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<sup>8</sup> *Id.* at 45.

<sup>9</sup> *Id.* at 90.

<sup>10</sup> *Id.* at 76.

<sup>11</sup> *Id.* at 43, fn 48.

<sup>12</sup> *Id.* at 46.

<sup>13</sup> *Id.* at 49.

- d. Is there a way to formalize the “public policy” exception through statute to make it less discretionary and create more basis for judges to move forward with human rights cases?<sup>14</sup>

*Choice of Law and Sovereign Immunity Issues:* When evaluating cases that arise in countries where local laws fall below Universal Human Rights standards, how do courts decide on the appropriate choice of law?<sup>15</sup> Would this choice require judges to first evaluate whether local laws of host states adhere to human rights standards? Does this examination raise issues of sovereign immunity? Does it matter whether or not the host state has signed human rights treaties? If a case involves suing state owned companies that may raise issues of sovereign immunity, it might offer a new perspective to study the United States practice under the Foreign Sovereign Immunity Act (FSIA)<sup>16</sup> and the issue of immunity.

*Barriers to Justice:* The author contends that the concept of “barriers” has limitations as an analytical tool “due to a lack of consensus on the detail of the baseline standards that domestic judicial mechanisms should be operating to do in practice.”<sup>17</sup> Further discussion of this concept would be worthwhile to seek some consensus of the meaning of this term.

Moreover, the author recognizes the limited time and space for offering an exhaustive itemization and analysis of barriers to justice.<sup>18</sup> More research should be conducted to expand our knowledge of barriers, beginning with those identified in UNGPs Principle 26.<sup>19</sup> Most importantly, it is not apparent from the study that the author consulted victims directly in her quest to examine the issue of barriers. Future research should consult victims as stakeholders, who may also have novel ideas on possible solutions.

*Specific Observations:* The author discusses legal aid but could do more to distinguish examples where such aid is provided for purely civil suits.<sup>20</sup> One idea might be if a government could set up a fund using funds from corporate fines to provide plaintiffs with legal aid.

Additionally, the Report analyzed the limited availability of legal aid as a barrier to an effective remedy; however the analysis focused on the availability of counsel only in the most affluent countries. How can we address the lack of legal aid in nations where some of the most grievous violations occur? Could there be some sort of on the ground task force (such as something akin to Lawyers Without Borders that would provide actual representation for individuals as opposed to just training)? How do you get more lawyers involved in these cases?<sup>21</sup> Is it lack of training in law schools?

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<sup>14</sup> *Id.* at 74.

<sup>15</sup> *Id.* at 51.

<sup>16</sup> *Id.* at 51, 67.

<sup>17</sup> *Id.* at 63.

<sup>18</sup> *Id.* at 64.

<sup>19</sup> *Id.* at 61.

<sup>20</sup> *Id.* at 79.

<sup>21</sup> *Id.* at 81.

Future research regarding barriers might look at National Action Plans and how governments are responding to barriers (including how they are identifying problem and proposing to address them).<sup>22</sup> While it might be possible to develop benchmarks for comparison, it is also important to create flexible systems of analysis that value plural responses based on local contexts.

Is one barrier that needs to be considered the lack of substantive law recognizing causes of action in human rights law at the local level?

*Criminal Law:* The Report looks at other examples of countries that set up “specialized investigation units” as ways to strengthen criminal prosecution. It would be helpful to learn of more examples of such units, how they were established, challenges they have faced and other relevant practical information to offer guidance to other countries seeking to institute similar units.<sup>23</sup>

*Specific Observations:* We believe it would be worthwhile to study why there is such low prosecution of companies and their managers by consulting actual prosecutors to learn what factors into their decision-making with regard to pursuing investigations (or not).<sup>24</sup>

*Focus on reparations apart from remedies:* Conceptually speaking, this inquiry may need to keep clear the separate although sometimes overlapping goals that liability serves: 1) providing reparations for victims and 2) and ensuring enforcement/accountability and deterrence of companies. Analysis of the effectiveness of remedies may alter depending on which goal is leading the discussion (e.g. is a remedy effective for holding companies accountable and is a remedy effective for vindicating victims’ rights). Moreover, the concepts of procedural remedies (such as judicial and administrative mechanisms) and reparations (such as compensation and other forms of redress for victims) are often conflated causing some confusion. A criteria of effectiveness needs to be developed for both procedural remedies and substantive reparations.

*Specific Questions:* The Report does not delve into the topic of administrative reparations programs. One idea to explore is whether it would make sense to encourage governments that prosecute companies and their managers for human rights violations, to establish administrative funds to distribute reparations to victims.

## II. GENERAL RECOMMENDATIONS

The study concludes with presenting “a way forward” and presents as a primary recommendation the idea of launching an “inclusive, consultative, multi-stakeholder process of clarification.”<sup>25</sup> This process would include:

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<sup>22</sup> *Id.* at 87.

<sup>23</sup> *Id.* at 98.

<sup>24</sup> *Id.* at 90.

<sup>25</sup> *Id.* at 111.

- 1) clarifying key issues of principle and policy, and
- 2) identifying models of best State practice in relation to functioning of domestic judicial mechanisms.<sup>26</sup>

Specifically, the recommendation focuses on identifying a program of activities that would promote technical cooperation and knowledge exchange to improve judicial mechanisms of redress.<sup>27</sup>

With respect to the second recommendation, we believe it may be premature given that we first need to decide what constitutes “best” and establish standards that would allow for the identification of best practices. We believe that such an identification process could appropriately be guided with reference to Principle 31 of the UNGPs. Although Principle 31 of the UNGPs offers a preliminary list of factors that could be helpful for determining the “effectiveness” of a remedy, it is still offering abstract standards that need further examination and development to guide actual practice as well as the evaluation of remedies.

One suggestion for conducting this next step would be to rely on existing networks of practitioners and scholars to collect specific examples of practice. However, to assure consistency of methodology and data collection, the OHCHR might offer a template of sorts to guide what local partners should “look for” with regard to relevant local remedies. The OHCHR might serve as a type of clearing-house for this data although it may be more efficient to delegate this role to existing civil society institutions such as the Business and Human Rights Resource Centre as it already maintains databases of case studies.

While the Report seems to lean towards the idea that uniformity would be a good thing (although acknowledging the potential hazards), we believe that this tendency may not meet with universal acceptance. Our Centers are not in complete agreement with the recommendation that “uniformity” should be the primary goal of our collective effort to identify standards for the evaluation of effectiveness. Nor do we agree that remedies law be uniform in all local jurisdictions. Honoring plurality in the development of this area of law would allow for a more organic development towards desirable practice. That said, it would be worthwhile to open a dialogue on what, if any, aspects of remedy law would require some type of universal agreement to assure substantive and procedural fairness in these matters around the world.

Along similar lines, the Report advises that next steps include technical advising and workshops, but it is not yet clear what would be the content of this advice.<sup>28</sup> Again, it would seem we first need better clarity on legal standards, elements, tests, and institutional reforms that constitute best practices before any effort is made to offer technical assistance on the implementation and/or improvement of local technical advising.

The Report suggests continued consultation of stakeholders but does not offer concrete

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 113.

<sup>28</sup> *Id.* at 111-112

suggestions on how this should proceed.<sup>29</sup> We believe the following questions should be considered: Would this activity be undertaken by or in collaboration with the U.N. Working Group? How would it complement other initiatives in civil society? Would it make sense to fund smaller projects in collaboration with local partners?

In sum, it is unclear that we are at a stage to begin to offer examples of best practice. It would seem that we are still in a period of diagnosis and fact-finding to collect enough data to determine standards.

In our view, next steps to attain more concrete recommendations for remedies must include:

- 1) providing concrete practical suggestions for how such groups would consult/clarify (prong number one of the Report's recommendations);
- 2) providing actual hypothetical suggestions on how such examinations could result in fruitful remedies for victims of gross human rights violations (prong number two of the Report's recommendations); and
- 3) expanding from the "desk-based" research focus of the study to more qualitative assessments of how remedial procedures are experienced by various stakeholders.

Most notably, the study remains silent on participation from two important stakeholders in this dialogue; corporations and victims. The multi-stakeholder group of experts consulted for feedback on the study (see Appendix 1)<sup>30</sup> does not appear to include corporations or victims of alleged crimes. Victims could also offer suggestions on what remedies they would find most appropriate. While each situation is unique, a victim-centered study could provide patterns of violations to which appropriate remedies could be tailored. Although it may be difficult to have corporations participate in such dialogues, their commitment to assessing the situation is pivotal to a thorough analysis of the problem. Further, corporations may value an invitation to offer their perspective on how to structure responsible business practices around remedies. Indeed, certain segments of the business community have become committed and valuable contributors to efforts to ensure that human rights are respected as good business practice.

In conclusion, we respectfully submit these observations, comments and questions with the aim of forwarding this most important endeavor to strengthen and ensure remedies for human rights harms caused by corporations.



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Erika George  
Professor of Law  
Co-Director Center for Global Justice  
S.J. Quinney College of Law  
The University of Utah



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Lisa J. Laplante  
Associate Professor of Law  
Director, Center for International Law and Policy  
New England Law | Boston