



***Creating a paradigm shift:
Legal solutions to improve access
to remedy for corporate human
rights abuse***



Front page photo: Villagers' protest against the Monywa project during a visit by Myanmar opposition leader Aung San Suu Kyi, March 13, 2013. Photo credit © Soe Than WIN/AFP/Getty Images.

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Foreword

In 2014, Amnesty International published *Injustice Incorporated: Corporate abuses and the human right to remedy* (*Injustice Incorporated*) which outlined key challenges that victims face in accessing legal remedies.¹ Based on four emblematic case studies, the book examined three critical barriers to remedy in cases of human rights abuses involving multinational companies and advanced a number of key recommendations for legal and policy change. The barriers and proposed solutions highlighted are:

- **Legal restrictions resulting from the corporate form:** The difficulties of holding parent companies legally accountable for abuses caused by their subsidiaries' operations as a result of the "separate legal personality" (corporate veil) doctrine.² The proposal advanced in *Injustice Incorporated* is to establish through legislation an express parent company duty of care, and to reverse the burden of proof in certain circumstances.
- **Jurisdictional hurdles resulting from the use of *forum non conveniens*:** The risk for foreign claimants that their legal claim in home states such as Canada, the USA and Australia is rejected on *forum non conveniens* grounds. The proposal advanced in *Injustice Incorporated* is to eliminate this doctrine or reformulate the criteria for its application in cases of alleged corporate human rights abuse.
- **Lack of access to essential information:** The lack of access to human rights-relevant information, including evidence of detrimental impacts of companies' activities, which undermines the ability of affected individuals and communities to build a robust legal claim. Proposals advanced in *Injustice Incorporated* include making the disclosure of certain critical information mandatory and reforming civil procedure rules on disclosure.

As a follow up to this report, Amnesty International and Business & Human Rights Resource Centre held an expert workshop on remedy for corporate human rights abuses (corporate abuses) in London in December 2015. The objective of this meeting was to debate the proposals made in *Injustice Incorporated* and delineate further recommendations for legal and policy reform.³ The two organizations also commissioned expert papers that discuss and elaborate on the proposals in *Injustice Incorporated*. These are included in an Annex at the end of this briefing.⁴

Building from this expert input as well as further research and analysis, including an assessment of legal developments over the last two years, this briefing puts forward a number of key legal proposals that aim to eliminate or mitigate the effects of the three barriers to remedy highlighted above. The target audience includes legal experts, legislators, national, regional and international policy-makers and civil society actors working in the field of business and human rights.

A number of significant legislative initiatives in the last two years point to the beginning of a paradigm shift. Those driving legal reform must keep this momentum going and capitalise on the various legislative advances by tailoring proposals to their particular legal system, even if change is achieved through incremental steps over time. The aim of this publication is to highlight those legislative developments and fuel further legislative solutions to improve access to remedy for corporate abuses.

¹ Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy* (Index: POL30/001/2014). Available at: <https://www.amnesty.org/en/documents/pol30/001/2014/en/>

² In *Injustice Incorporated*, as well as in this briefing, "parent company" is understood broadly to include not only companies with decision-making power that hold all or a majority of the shares in another, but also companies that, for whatever reason, exercise effective control over the activities of another member of the corporate group. For this reason, this briefing often uses the terms "controlling" or "controlled" jointly with, or instead of, "parent" or "subsidiary" respectively, to denote that broader understanding.

³ Participants included practicing lawyers, academics and advocates from a variety of countries and backgrounds with direct experience on these issues.

⁴ While there is a broad convergence of opinion, the expert papers represent the views of their authors while this briefing reflects the views and recommendations of Amnesty International and Business & Human Rights Resource Centre.

Background

A persistent problem

While companies can be a force for good, many are implicated in human rights abuses in different contexts around the world. When companies cause or contribute to human rights abuses, adequate accountability and redress rarely occur. This is especially so when abuses are committed across borders. Systems of accountability that operate predominantly within state borders have not kept pace with the global nature of corporate operations.

Victims of corporate abuse face serious obstacles to obtaining a legal remedy both in the jurisdiction where the harm occurred (“host state”) as well as where multinational companies are headquartered (“home state”). When multinational companies commit human right abuses in host countries, host state courts often remain the preferred forum for pursuing legal redress. However, for various reasons which include a lack of due process, political interference, mistrust of the courts or lack of affordable legal assistance, a claim in the host state may not be a viable option. In these instances, legal options in the home state also need to be leveraged to ensure justice.

It is now well known that human rights claims in home states are also affected by many barriers. These barriers have been extensively documented over the past few years. As a result, our collective understanding of the existing challenges to accessing remedy in cases of human rights abuses involving companies has grown considerably.

Instances of corporate abuse often reveal that legal changes are needed in relation to the specific case. However, legal change is also needed in relation to systemic issues such as parent company liability, duty of care and human rights due diligence.

Under international human rights law, states have a duty to prevent and redress human rights abuses by companies, including when companies operate across borders. While the UN Guiding Principles on Business and Human Rights (UNGPs), endorsed by the UN Human Rights Council in 2011, were a positive development and recognised these legal duties, six years on meaningful state enforcement remains limited.

An agenda for legal reform

In the last two years, some positive developments in the areas of parent company liability, mandatory human rights due diligence, access to home state courts and disclosure of information have occurred. Importantly, some of these efforts have crystallised into hard law.

Among the most important legal developments are a law passed early this year in France that imposes a “duty of vigilance” on certain large French companies to prevent environmental and human rights harm caused by their subsidiaries and other business relationships.⁵ This is the first law of its kind; it expressly requires companies across sectors to design, implement and account for the measures put in place to identify, prevent and address human rights risks and impacts in their global operations. Crucially, it facilitates access to remedy by establishing that human rights harm resulting from a lack of vigilance as prescribed by the law can be invoked before a French court to seek compensation (see more on this law in section I on Parent or Controlling Company Liability).

In relation to access to information, the EU adopted a Directive on the disclosure of non-financial information in 2015 which includes a requirement that target companies describe their human rights policy, due diligence

⁵ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre Available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&dateTexte=&categorieLien=id> For more information and articles in English about this law see: <https://business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains>

processes, principal risks to human rights and management of those risks.⁶ Also in 2015, the UK adopted the UK Modern Slavery Act which requires that target companies carrying out business in the UK report on steps taken to ensure that slavery and trafficking are not taking place in their own businesses or supply chains⁷ (see more on these two developments in section III on Mandatory Collection and Disclosure of Information).

These are positive developments that demonstrate that legal measures to improve accountability and redress for corporate abuse are possible.⁸ However, despite these important advancements, legislative initiatives continue to be rare.

When it comes to legal claims for serious human rights abuses, parent companies can still hide behind the corporate veil to deflect liability. *Forum non conveniens* is still commonly invoked and applied in common law jurisdictions such as Canada and the USA, prolonging lawsuits and often resulting in dismissals. Very few companies today disclose meaningful information regarding their actual and potential human rights risks and impacts. It is evident that there still is a long way to go.

A substantial paradigm shift is needed in the way societies assign legal responsibility within corporate groups. This paradigm shift is underscored by a recognition that the entity that creates risks to society through its own operations or the operations of a company or group of companies it has an ability to control, and that benefits financially from these operations, must also bear responsibility for any negative consequences.

Courts have a critical role to play in the realisation of the right to remedy. As state authority, they are bound by international human rights law. As more and more claims of alleged corporate abuse are brought to their attention, they must live up to their human rights obligations and ensure their decisions align with, facilitate, and do not restrict, the human right to remedy.

Finally, disclosure of human rights-relevant information, whether held by state authorities or private actors, must become the norm and not continue to be the exception.

The following recommendations by Amnesty International and Business & Human Rights Resource Centre address these persistent problems by suggesting ways of attributing liability to parent companies for abuses committed by subsidiaries and other entities within the group that the parent companies have an ability to control; recommending changes in the rules that govern *forum non conveniens*; and advancing legal proposals to improve access to information by rights-holders affected by corporate activities.

⁶ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095> The European Commission has recently finalised guidelines to companies on the implementation of the Directive which are available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705\(01\)](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52017XC0705(01))

⁷ Companies making £36 million or more annually are required to report. See: <http://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted>.

⁸ Significant changes have also occurred at the international level. Influential bodies such as the UN Committee on Economic, Social and Cultural Rights and the Council of Europe have also placed the spotlight on access to remedy, disclosure and the responsibilities of parent companies, contributing to a greater understanding of the scope and implications of state duties in these areas. See: Committee on Economic, Social and Cultural Rights, General Comment 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, 10 August 2017, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en (General Comment 24); and Recommendation CM/Rec(2016)3 of the Committee of Ministers to member states on human rights and business - Adopted by the Committee of Ministers of the Council of Europe on 2 March 2016, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4 (Council of Europe Recommendation on Human Rights and Business).

Recommendations by Amnesty International and Business & Human Rights Resource Centre

I. Parent or Controlling Company Liability

Outstanding challenges

The “corporate veil”, or its more technical term “separate legal personality”, doctrine is a major barrier to holding parent companies legally accountable for abuses committed by their subsidiaries. According to this doctrine, each separately incorporated member of a corporate group is considered to be a distinct legal entity that holds and manages its own separate liabilities. This doctrine implies that the liabilities of one member of a corporate group will not automatically be imputed to another merely because one holds shares in the other, even if this is the totality or majority of those shares.

As pointed out by the UN Committee on Economic, Social and Cultural Rights (CESCR) in its recent General Comment on “State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities” (General Comment 24): “*Because of how corporate groups are organized, business entities routinely escape liability by hiding behind the so-called corporate veil, as the parent company seeks to avoid liability for the acts of the subsidiary even when it would have been in a position to influence its conduct.*”⁹

In considering legal options to establishing the liability of a parent company, legislators and advocates must assess the following factors: the extent to which control must be a determining factor in assigning liability; how to define control; and, whether it must be proven or can be assumed.

Regarding the standard of proof, issues they must address include: what claimants should prove; what legal defences might be available to corporate defendants; and, the role that due diligence could play in this.

In addition, there is a need to review the rules that determine what law applies to a claim filed before home state courts for alleged abuses in a host state. The challenge here is to ensure home state laws establishing parent company liability can apply.

The following recommendations for legal reform address these issues.¹⁰ They are not mutually exclusive; in fact many of them should be implemented together. For example, the recommended reforms in relation to tort law can all work together and would complement each other. However, some proposals could be implemented on their own and still represent significant progress, such as proposals 1 (a duty of care established by law) and 4 (automatic liability of a parent company). These recommendations can also operate alongside the proposal for direct regulatory action by the state, and would help reinforce compliance. Finally, the recommendation concerning applicable law is relevant and should be implemented in relation to all proposals dealing with private claims under tort/non-contractual liability law.

LEGAL PROPOSALS APPLICABLE TO PRIVATE CLAIMS UNDER TORT LAW¹¹

1. A duty of care or “duty to prevent” harm established by law

As a minimum, parent companies or companies with the ability to control members of the group should have a duty of care (or equivalent legal notion) towards individuals and communities whose human rights are affected by the group’s operations.

⁹ Committee on Economic, Social and Cultural Rights, General Comment 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, UN Doc. E/C.12/GC/24, 10 August 2017. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E/C.12/GC/24&Lang=en (General Comment 24), para. 42.

¹⁰ Although this section focuses on parent or controlling company liability, it is important to note that many of the considerations and the rationale for assigning liability to parent or controlling companies within corporate groups are relevant and applicable to companies in positions akin to “control” within supply chains.

¹¹ Tort, or “non-contractual” liability in civil law systems, is the branch of law that imposes civil liability on a person for causing harm to another as a result of a breach of an existing legal duty. For example, the tort of negligence requires the breach by a person of a duty of care owed to another under law as a result of which this other person suffered harm.

This proposal rests on the assumption that the company under a duty of care or equivalent has the ability to control the activities of the company directly causing the harm. The *ability* to control, and not *actual* control, should be enough as a basis for liability. Control should be defined broadly to cover not only majority shareholding, but other situations that give entities either legal or factual control. In certain cases, such as (but not limited to) when there is a majority ownership (over 50%), the ability to control should be assumed and the claimant should not have to prove it. Creating and structuring a relationship with a subsidiary, for example through holding companies or shell companies so that there is no apparent control over its activities, should not be a defence.¹²

The French “Duty of Vigilance” law

In February 2017 France adopted an unprecedented law that embodies some of the principles discussed above. Law 2017-399 (Duty of Vigilance law)¹³ imposes a “duty of vigilance” on French companies of a certain size to prevent serious human rights abuses and environmental damage resulting from their own activities, the activities of companies they control and those of established business relations.¹⁴

To this end, they must put measures in place to regularly identify and assess risks and take action to mitigate these risks and prevent serious abuses.¹⁵ Importantly, any person whose human rights are allegedly affected as a result of a lack of vigilance on the part of the French company can bring a civil claim against it before French courts.

The law determines that a company has control over another when it holds a majority of its voting rights, when it has the right to elect the majority of the members of its administrative, executive or supervisory bodies or when it exercises a dominant influence over it by virtue of a contract or statutory clauses.¹⁶

Unfortunately, the range of companies captured by the law was defined too narrowly.¹⁷ Because of the criteria, it will apply to around 100 to 150 of France’s largest companies only. Nevertheless, this is the first law to establish an express duty on companies to prevent human rights abuses both domestically and abroad, and to account for the steps taken to achieve this objective. Significantly, this legislation recognises and takes steps to address the existing accountability gap of companies that operate across borders.

Swiss legal initiative on mandatory human rights due diligence

The Swiss government is currently considering a proposal by a large coalition of national civil society organizations to enact legislation to compel companies to undertake human rights and environmental due diligence in all their activities abroad (the “Responsible Business Initiative”).¹⁸

This follows a successful popular initiative launched in 2015, which gathered well over the required 100,000 signatures to prompt a national referendum on the proposal.¹⁹ The proposed legal text, if enacted, would require Swiss-based companies to carry out human rights due diligence to identify actual and potential impacts on human rights and the environment, take appropriate measures to prevent and/or cease violations and account for the actions that they took. These duties would apply to “controlled companies” as well as all other business relationships. Unlike the French Duty of Vigilance law, the proposal does not define control. Instead, it clarifies that control would be determined according to the factual circumstances of each case. In addition, Swiss-based companies would be liable for damage caused by companies under their control unless they could prove that they carried out appropriate due diligence to avoid the harm.²⁰

This is another commendable effort to strengthen prevention of corporate abuse across borders. Amnesty International and Business & Human Rights Resource Centre urge the Swiss Government to support the legal text proposed by the Responsible Business Initiative.²¹

¹² Companies who create or operate through subsidiaries should not be able to delegate responsibility for aspects that are critical to human rights, such as the protection of the environment or security arrangements, and then allege a lack of control over those areas when they are sued. This would be contrary to their responsibility to respect human rights, which requires that they take an active role throughout their global operations.

¹³ Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre. Available at: <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000034290626&dateTexte=&categorieLien=id>. More information in English available at: <https://business-humanrights.org/en/france-natl-assembly-adopts-law-imposing-due-diligence-on-multinationals-to-prevent-serious-human-rights-abuses-in-their-supply-chains>

¹⁴ Article 1 of the Duty of Vigilance law. Importantly, the Duty of Vigilance law goes beyond subsidiaries and controlled companies within the corporate group and extends to suppliers and subcontractors in a “stable commercial relation”.

¹⁵ Article 1 of the Duty of Vigilance law.

¹⁶ Article 1 of the Duty of Vigilance law.

¹⁷ The law only covers companies that have their registered office in France and that, at the end of two consecutive financial years, employ at least five thousand employees within their company and subsidiaries in France or that employ at least ten thousand employees within their company and subsidiaries both in France and abroad. Article 1, Duty of Vigilance law.

¹⁸ See: <http://konzern-initiative.ch/?lang=en>

<http://konzern-initiative.ch/swiss-quality-must-include-the-protection-of-human-rights-and-the-environment/?lang=en>

¹⁹ <http://konzern-initiative.ch/over-140000-signatures-for-the-swiss-responsible-business-initiative/?lang=en>

²⁰ <http://konzern-initiative.ch/initiativtext/?lang=en>

²¹ Government and parliament have to take a position on the proposal, before it is finally voted on by Swiss citizens.

2. Presumption of liability

Where required, the law should presume the liability of the parent or controlling company and place on this company the burden of proving that it should not be held legally responsible.

This proposal is intended to complement the proposal above and would be warranted, for example, where the risk of harm is high or because of the seriousness of the harm.

Causation is often difficult to prove in a claim of human rights abuse against corporations because the relevant information (and expertise to understand it) is in the hands of the corporate defendant. If claimants can *prima facie* demonstrate that they have suffered harm (the injury) and that this is *likely* to have been the result of the company's activities (causation), the law should shift the burden of proof to the corporate defendant. Significantly, the CESCR calls on states to consider this recommendation. It notes in General Comment 24: "*Shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant.*"²³

Burden of proof in the initial French proposal

The initial proposal of the French Duty of Vigilance law had included a presumption of liability of the companies subject to a vigilance duty where damage resulted from their own activities or those of subsidiaries and subcontractors. Under its original terms, a company would have been able to rebut such presumption by proving that it had taken all necessary and reasonable measures to prevent the damage.²² However, this critical feature of the law was removed from subsequent drafts because of the strong opposition from some members of parliament.

3. "Reasonable steps" as a defence

To refute or limit liability, parent or controlling companies should demonstrate that they took every reasonable step to avoid the harm caused by the activities of a subsidiary or controlled company. Reasonable steps should be defined by reference to rigorous human rights due diligence standards.

This recommendation is designed to operate with proposals 1 and 2 above. The duty of care or "duty to prevent" under 1 above is proposed as an "obligation of means". This requires diligence in fulfilling a duty, but not guaranteeing the attainment of a specific result. This allows a company to refute or limit the extent of its liability by demonstrating that it took all reasonable steps to avoid causing harm, including in relation to their subsidiaries' activities. Nevertheless, these "reasonable steps" must be "outcome-oriented", that is, designed and implemented with the express and overriding objective of preventing harm. They should be defined by reference to rigorous human rights due diligence standards that focus on the prevention of human rights abuses.

Under the UNGPs, all companies across all sectors are expected to take due diligence steps to "identify, prevent, mitigate and account for how [they] address their impacts on human rights".²⁴ "Pillar 2" of the UNGPs elaborate further on what is required under each of these steps. Intergovernmental organizations such as the Organisation for Economic Cooperation and Development (OECD) have begun elaborating sector and issue-specific due diligence standards for companies, which lay out what is required to avoid harm in relation to particular situations. These standards provide guidance to assess liability to the extent that they elaborate on what "reasonable steps" might look like in particular circumstances. These assessments of corporate due diligence should not be a "box ticking" exercise but focus on the adequacy of the measures taken and, as expressed above, the extent to which they were genuinely geared towards preventing harm.

²² *Proposition de loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* N° 1519. Available at: <http://www.assemblee-nationale.fr/14/propositions/pion1519.asp>

²³ General Comment 24, para. 45.

²⁴ Principle 15(b) of the UNGPs.

Precedents for defining a defence of due diligence

A useful precedent is the “due diligence” defence established by the UK Bribery Act (2010). Section 7 of the Act determines that a commercial organization will be liable if it fails to prevent bribery by an “associated person” carried out on its behalf. However, the commercial organization can invoke as a defence that it “had in place adequate procedures designed to prevent persons associated with [the commercial organisation] from undertaking such conduct.”²⁵

A “due diligence” defence is envisaged in the Swiss Responsible Business Initiative discussed above. Drawing from provisions on “principal liability” of Swiss law, the proponents argue that it should be down to the Swiss parent company to prove that it took all due care to avoid harm, rather than placing the burden of proving lack of care on the injured party. Under this proposal, companies would not be liable for damages caused by entities under their control if they could prove that they took all due care to avoid the damage, or that the damage would have occurred even if all due care had been taken.²⁶

4. An automatic liability for abuses committed by subsidiaries

In certain circumstances the law should provide for an automatic recourse to, or liability of, controlling companies for alleged or proven harm caused by subsidiaries or controlled companies.

This proposal operates independently from proposals 1 to 3 above, although it could coexist with them.²⁷ Making controlling companies automatically subject to a legal claim for alleged abuses by a subsidiary or automatically liable for “proven” abuses by a subsidiary, regardless of their own fault, is justified in certain circumstances. Where subsidiaries have been wound up (they no longer exist) or are underfunded (they cannot meet a damages award), claimants should be able to pursue their claim against the controlling company or, as the case may be, enforce a favourable award against its assets. A claim for damages against the subsidiary must still be proven,²⁸ but the conduct of the controlling company here would be irrelevant.

The Office of the High Commissioner for Human Rights (OHCHR) highlighted the need to secure remedy against parent companies in these circumstances in a report presented in June 2016 to the UN Human Rights Council: “... *there will be cases in which a claim against a parent company may be the only way of securing an effective remedy for the human rights impacts of a subsidiary’s activities, such as where the subsidiary has been dissolved, is insolvent or has insufficient resources to meet a legal claim for damages.*”²⁹

A scenario that warrants the same solution is that of subsidiaries operating in countries that offer no realistic avenues to seek reparation against them if they cause harm. This may be the case of countries affected by or emerging from armed conflict, or where there is a total collapse of the rule of law. In these circumstances, the level of inefficiency of the legal system, the degree of impunity for human rights abuse, or the level of arbitrariness in the promulgation, enforcement and adjudication of laws may be such that the prospects of achieving due process and justice in a given case may be very low. In these cases, home state laws should allow claims to be brought directly against the controlling company, or against both the controlling company and its subsidiary.³⁰ If allegations of wrongdoing against the subsidiary were proven,³¹ the controlling company would be liable for the harm, regardless of fault. Again, the due diligence of controlling companies in these cases would be irrelevant.

²⁵ Section 7 of the UK Bribery Act (2010) <http://www.legislation.gov.uk/ukpga/2010/23/contents>

²⁶ <http://konzern-initiative.ch/initiativtext/?lang=en>

²⁷ If the controlling company were subject to an express duty of care or obligation to prevent as suggested in 1 above, an alleged failure to comply with these duties could be the basis for a direct claim against the parent/controlling company. However, this proposal is meant to provide a different basis for a claim against the parent/controlling company that could operate independently. The liability at stake is that of the subsidiary, but because of the circumstances around the subsidiary, an automatic recourse to, or the automatic liability of, the parent is established.

²⁸ Because it is the subsidiary’s liability that is at stake, the host state law would normally apply.

²⁹ Improving accountability and access to remedy for victims of business-related human rights abuse - Report of the United Nations High Commissioner for Human Rights. A/HRC/32/19 (May 2016). Available at: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/19, para. 22.

³⁰ Some states such as the UK and Netherlands allow claims against both the parent company and the subsidiary to proceed jointly based on “joinder” (the union in one lawsuit of multiple co-defendants). The added value of this proposal is that a proven claim against the subsidiary would automatically engage the liability of the parent.

³¹ As stated above, the host state law determining the liability of the subsidiary would normally apply. However, given the possible inadequacy of the law emanating from countries affected by the sort of circumstances envisaged in this proposal, it should be possible to invoke “public policy” considerations to apply home state law to assess the conduct of the subsidiary.

LEGAL PROPOSALS FOR DIRECT REGULATORY ACTION BY THE STATE

5. Using regulatory bodies to mandate human rights due diligence

In addition to tort/non-contractual liability regimes, states should adopt regulations that impose on companies a duty to conduct human rights due diligence throughout their global operations, and attach state sanctions or civil liability for due diligence failures.

States can make use of a variety of administrative or public law regimes to impose on companies a duty to conduct human rights due diligence. This includes legislation governing the activities of state-owned enterprises or commercial transactions with the state. The 2016 Council of Europe Recommendation on Human Rights and Business specifically highlights the need for member states to require respect for human rights, and human rights due diligence, where states “own or control business enterprises”, “grant substantial support and deliver services” and “conduct commercial transactions” with business enterprises. Importantly, the Recommendation urges member states to “provide for adequate consequences if such respect for human rights is not honored.”³²

States can also enact regulations expressly designed to mandate and enforce human rights due diligence. To ensure effective accountability and remedy, it is critical that due diligence duties are effectively enforced by the relevant regulatory authorities. These authorities should have powers to monitor, order corrective action where needed, and sanction non-compliance regardless of whether damage has occurred or a lawsuit has been initiated. The purpose of these regulations should be prevention. However, avenues for claiming reparations should also be available. For example, findings of corporate non-compliance by regulatory authorities, when such non-compliance has caused harm, should serve as grounds or evidence for tort/non-contractual liability claims.

Mandatory due diligence for EU importers of raw minerals and metals

In May 2017, the EU passed legislation requiring importers of certain raw minerals and metals (tin, tantalum, tungsten and gold) to carry out human rights due diligence in accordance with the five steps required under the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.³³ This was a welcome first step by the EU. However, the way in which the law is to be enforced has been entirely left to member states, and it is unclear whether and how this will work in practice. EU member states must adopt rules dealing with infringements of the law by importers, and issue a “notice of remedial action” (an order to correct a failure or deficiency) to any importer that infringes the legislation. Authorities in each member state will also be responsible for undertaking “ex-post checks” to ensure importers comply with their due diligence obligations under the law. In practice however this means that the effectiveness of these mechanisms will depend on whether member states adopt adequate laws and regulations to deter and address infringements (like effective penalties for non-compliance) and whether the relevant authorities take a pro-active approach to checking compliance.

³² Council of Europe Recommendation on Human Rights and Business, para. 22. Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4

³³ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2017:130:TOC> .

The German “public law” proposal

The German Green party tabled a proposal in parliament in 2016 under which German companies of a certain size that operate directly, or through subsidiaries, in a high-risk sector or area, would be required to conduct human rights due diligence to identify and address risks of contributing to human rights abuses.³⁴ The government's majority in parliament rejected the motion, but civil society organizations continue to promote it.³⁵ The proposal broadly lays out the required due diligence steps, while also allowing for a number of factors, such as country and sector-specific risks, and the size of the company, to be taken into account in any assessment of the adequacy of the actual steps taken. Unlike the French Duty of Vigilance law, which would be enforced through private claims, this would be enforceable by the state through a variety of instruments, including administrative orders and fines. However, public enforcement is supplemented by a provision that would allow or facilitate civil liability claims in case of due diligence failures. According to the proposal, the due diligence duties established in the law would define the expected standard of conduct for tort/non-contractual liability claims.³⁶

APPLICABLE LAW RULES

6. Flexibility to use the more favourable law in transnational litigation

Claimants in corporate human rights abuse cases should be able to use the domestic law which best enables claims against controlling companies.

Strengthening laws in home states might prove useless if, because of applicable law rules, the law that ultimately applies to a case is the law of a host state that might be weaker. A coherent package of legal reforms must look at all potential loopholes. Generally, the law applicable to a claim involving alleged harm in another state (the host state) is the law of the place where the harm occurred.³⁷ Some states can make use of exceptions to this rule such as on “public policy” grounds, by declaring certain laws “overriding mandatory laws”³⁸ or, in certain circumstances, by giving the claimant the ability to choose the law to apply to their claim.³⁹ Corporate liability regimes must be accompanied by changes in rules governing applicable law to ensure that claimants can use these regimes when their claim rests fully or in part on the acts or omissions of the defendant parent or controlling corporation.

In the EU, “applicable law” is governed by common EU regulations (“Rome II”), so reforms to these regulations will be needed to secure the necessary changes across all EU states.

Applicable law in the Swiss and German legal proposals

The way the Swiss Responsible Business Initiative discussed above deals with this challenge is by recommending that the proposed due diligence law be considered an “overriding mandatory” law. That is, the law itself would clarify that the due diligence responsibilities it establishes, “apply irrespective of the law applicable under private international law.”⁴⁰ The German proposal on corporate due diligence follows the same approach.⁴¹ This is an appropriate way to ensure principles of fundamental importance such as the protection of human rights prevail over laws that might afford less protection.

³⁴ The German original of the proposed law can be found in: *Klinger/Krajewski/Krebs/Hartmann*, Verankerung menschenrechtlicher Sorgfaltspflicht von Unternehmen im deutschen Recht (March 2016), pages 38 to 42, available at <https://germanwatch.org/de/download/14745.pdf>. The proposal drew from model legislation put forward by a group of civil society organizations.

³⁵ Civil society organizations promoted the adoption of the proposal in the state's National Action Plan on Business and Human Rights (NAP), which was adopted in December 2016. The proposal was not incorporated in the NAP, but a commitment was made that if at least 50% of German companies with more than 500 employees failed to put policies and processes in place to conduct human rights due diligence by 2020, the government would consider further steps, including the introduction of mandatory human rights due diligence. See more on this in Business & Human Rights Resource Centre, “3 entry points to implement the German National Action Plan”, available at: <https://business-humanrights.org/en/3-entry-points-to-implement-the-german-national-action-plan>.

³⁶ Also of note, on 7 February 2017 the House of Representatives of the Dutch parliament approved a law requiring companies to identify and draw a plan of action to combat child labour in their supply chain. This law is pending approval by the Senate. See: <https://business-humanrights.org/en/netherlands-parliament-adopts-child-labour-due-diligence-law-for-companies-senate-approval-pending>

³⁷ In the EU, this issue is governed by a Council Regulation known as “Rome II”. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF>

³⁸ Article 16 of “Rome II” permits “overriding mandatory provisions” of a state to override the otherwise applicable law to a non-contractual obligation claim: “Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.”

³⁹ Under Article 7 of Rome II, a claimant in an environmental case can choose to base the claim on the law of the country where the damage occurred or where the event giving rise to the damage occurred.

⁴⁰ <http://konzern-initiative.ch/initiativtext/?lang=en>

⁴¹ Section 15 of the proposal, which reads as follows: “Regarding non-contractual liability claims, the obligations deriving from §§ 5 to 11 define the applicable duty of care on a mandatory basis and irrespective of the law otherwise applicable to the non-contractual liability under private international law.”

II. *Forum non conveniens*

Outstanding Challenges

Forum non conveniens is the discretionary power of a court to decline jurisdiction to hear a case when another court is deemed better suited to do so. In transnational litigation against corporations, this doctrine continues to be a major barrier to justice in common law states that use it such as Canada and the USA. Corporate defendants in these states raise *forum non conveniens* as a jurisdictional barrier routinely and often maliciously,⁴² causing many claims brought by victims of corporate abuse to fail.

Legislators and advocates must assess whether *forum non conveniens* should be used at all in transnational litigation. In light of the challenges to effective access to justice resulting from the use of this doctrine, the 2016 Council of Europe Recommendation on Human Rights and Business mentioned above simply recommends that the doctrine not apply in transnational tort claims for alleged corporate-related human rights abuses.⁴³

If *forum non conveniens* is to remain, the critical question is how to ensure that human rights and access to justice considerations become central to *forum non conveniens* decisions.

Most civil law jurisdictions do not recognise *forum non conveniens* as a basis for refusing to hear a case. In the EU, it has been expressly barred by the *Owusu v Jackson* case.⁴⁴ *Forum non conveniens* is not a necessary feature of the common law, however, it is unlikely that the doctrine will be removed altogether in jurisdictions that use it. In Canada, *forum non conveniens* is being increasingly codified. The Uniform Court Jurisdiction and Proceedings Transfer Act (CJPTA) contains common rules for *forum non conveniens* that are being increasingly adopted by Canadian provinces.⁴⁵ Because of the particular circumstances of transnational human rights claims against corporations, amendments to the CJPTA or “carve out” rules for this type of litigation are justified. Changes could also be pursued at provincial level. In the USA, reforms to *forum non conveniens* should also occur at state level. Two critical changes are suggested below.

1. The exceptional character of *forum non conveniens*

A presumption of applicable forum should be adopted with the burden on the corporate defendant to prove that the forum chosen by the claimant is “clearly inappropriate”. Courts should only dismiss claims based on *forum non conveniens* in exceptional circumstances.

Courts should be reminded of the exceptional nature of *forum non conveniens*. Codified versions of the doctrine, such as that in the CJPTA, should be amended to emphasise this principle. The onus should be on the corporate defendant to prove that the chosen forum is “clearly inappropriate”. This is the approach followed in Australia. Rather than requiring an examination of the adequacy of another state’s courts, the Australian law requires an evaluation of the country’s own courts.⁴⁶ In doing so, it avoids having to pass judgement about the legal system in another forum as well as any politically sensitive comparisons between two places. In addition, it gives deference to the claimant’s choice of forum.

⁴² See for example Omai and Bhopal cases in Injustice Incorporated, pages 43 to 49, 74 to 78 and 129 to 131.

⁴³ Council of Europe Recommendation on Human Rights and Business, para. 34.

⁴⁴ *Andrew Owusu v. N.B. Jackson* (2005), Case C-281/02, ECR I-1383.

⁴⁵ Uniform Law Conference of Canada, *Court Jurisdiction and Proceedings Transfer Act* (CJPTA) of 1994. Available at: <http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/739-jurisdiction/civil-jurisdiction/1730-court-jurisdiction-proceedings-transfer-act>

⁴⁶ *Oceanic Sun-Line Special Shipping Co. Inc. v. Fay* (1988) 165 C.L.R. 197.

Exceptionality of *forum non conveniens* in *Garcia v Tahoe Resources*

On 26 January 2017 the British Columbia Court of Appeal in Canada overturned a lower court's decision in *Garcia v Tahoe Resources* that had dismissed a claim on *forum non conveniens* grounds.⁴⁷ The claim was brought by a group of Guatemalan men who were injured by Tahoe's private security personnel while protesting outside the company's silver mine in Guatemala. The decision of the Court of Appeal emphasised the exceptional character of *forum non conveniens*. It also reiterated prior jurisprudence establishing that the burden of proving that another jurisdiction was "clearly more appropriate" rested on the party seeking the dismissal of the claim.⁴⁸ However, the Court fell short of following the Australian approach which, as expressed above, would be preferable in transnational tort cases involving alleged human rights abuses.

2. Human rights as an overriding consideration

Courts should be compelled to consider universal human rights, and the human right to remedy in particular, as an overriding factor in *forum non conveniens* decisions.

Claims against corporations for alleged abuses to human rights are often dismissed because of arguments that suggest that there are more factors connecting the claim with the host than with the forum state (the state where the claim was filed). However, these assessments are often too superficial and do not reflect the real constraints confronting the claimants in the host state.⁴⁹ Courts may incorrectly decide that the foreign court would be a more "convenient" jurisdiction for hearing the case. A cursory examination of connecting factors does not always lead to fair results. As noted by the CESCR in General Comment 24: "*Practice shows that claims are often dismissed under this doctrine in favor of another jurisdiction without necessarily ensuring that victims have access to effective remedies in the alternative jurisdiction.*"⁵⁰ Applicable laws or guidance should compel courts to consider human rights and the ability of claimants to access justice effectively as an overriding factor in deciding *forum non conveniens* claims. Codified versions of the doctrine such as that in Canada's CJPTA should be amended to reflect this overarching consideration.

Recently, two Canadian courts interpreted *forum non conveniens* in a manner that is more responsive to the concerns expressed above, as the examples below show:

Araya v. Nevsun Resources

On 6 October 2016, the Supreme Court of British Columbia in Canada also dismissed the *forum non conveniens* application by Nevsun Resources Ltd in a claim for alleged collusion with the Eritrean government in the forced labour and torture of Eritrean refugees while working at the company's Bisha mine. On the basis of evidence pointing at systemic and procedural impediments and a lack of integrity of the Eritrean legal system, the court concluded that there was a real risk that the plaintiffs would not be provided with justice in Eritrea.⁵¹

⁴⁷ *Garcia v. Tahoe Resources Inc.* 2017 BCCA 39.

⁴⁸ *Garcia v. Tahoe Resources Inc.* 2017 BCCA 39, paras 54 and 55.

⁴⁹ See for example Omai and Bhopal cases in *Injustice Incorporated*, pages 43 to 49, 74 to 78 and 129 to 131.

⁵⁰ General Comment 24, para. 43.

⁵¹ *Araya v. Nevsun Resources Ltd.* 2016 BCSC 1856. More information available at: <https://business-humanrights.org/en/nevsun-lawsuit-re-bisha-mine-eritrea>

García v Tahoe Resources

In the case of *García v Tahoe Resources* cited above, the British Columbia Court of Appeal considered a number of facts which would affect the plaintiffs' ability to bring a case in Guatemala including: stalled criminal proceedings in that jurisdiction, limited discovery procedures, the expiration of the limitation period for a civil suit and the real risk that the appellants would not obtain justice in the country. The Court of Appeal found that, in actual fact, Guatemala was not "clearly more appropriate" to hear the case. In a precedent-setting decision, the Court stated: "...there is some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state. This factor points away from Guatemala as the more appropriate forum."⁵²

The decision of the Court of Appeal in *García v. Tahoe Resources* signals a welcome departure from the more dogmatic decisions of the past. Considerations of justice ultimately prevailed in its decision. The Court of Appeal noted that it was not necessary to prove, as the lower court had demanded, that "justice could never be done", but that there was a "real risk of an unfair trial process" in the alternative forum. Crucially, it added that this assessment must be done with due consideration to the "broader context". The Court stated:

*"In characterizing the appellants' claim as a personal injury case, the judge was insufficiently attentive to the context in which the conflict arose. This claim is not akin to a traffic accident. Rather, it arose in a highly politicized environment surrounding the government's permitting of a large foreign-owned mining operation in rural Guatemala. The protest that led to the battery at issue in this case was not an isolated occurrence..."*⁵³

Contrary to the lower court's conclusions, the Court of Appeal also found that the limited discovery proceedings available to the claimants in relation to a foreign defendant and the expiration of the limitation period for a civil claim in Guatemala posed significant risks to the ability of claimants to access justice in that country. The Court found that these factors, together with the political context described above, pointed away from Guatemala as an appropriate forum to hear the case.

Unlike the lower court, the Court of Appeal took a much closer look at existing barriers to justice, including structural problems affecting the judiciary and the political context of the dispute, and their potential effect on the ability of the claimants to access justice in Guatemala. Without framing it in human rights terms, the Court of Appeal's approach is genuinely geared toward an understanding of, and concern for, the ability of claimants to access justice in practice. In doing so, it upheld the claimants' human right to a remedy.

Amnesty International and Business & Human Rights Resource Centre welcome the rights-sensitive approach to assessing *forum non conveniens* claims, including legal interpretations that reflect a fairer and more achievable threshold for claimants to meet in cross-border human rights cases. Adopting or moving closer to the Australian approach should be the next step.

⁵² *García v. Tahoe Resources Inc.* 2017 BCCA 39, para. 130. More information available at: <https://business-humanrights.org/en/tahoe-resources-lawsuit-re-guatemala>

⁵³ *García v. Tahoe Resources Inc.* 2017 BCCA 39, para. 109.

III. Mandatory Collection and Disclosure of Information

Outstanding challenges

People affected by corporate activities often experience great difficulty in defending their rights due to the unavailability, inaccessibility or unreliability of key human rights-relevant information. Often, individuals and communities whose rights may be affected by corporate projects have little or no knowledge about the terms of relevant plans or projects, or the risks that these pose to their human rights. When adverse impacts occur, affected communities are often unaware of the nature or extent of this impact, either because the relevant information is not gathered, not disclosed or, where disclosed, is irrelevant, selective or unreliable.⁵⁴ Because government authorities often lack the capacity to gather, assess and disclose the relevant information, this task is often delegated to the company itself. In the absence of laws and mechanisms that require and oversee the adequacy of corporate disclosure, companies are left to decide what type of information, if any, they will gather and/or disclose, creating obvious conflicts of interest.

In practice, companies hold a lot of information about the potential human rights impacts of their plans and operations, and they often hold this information exclusively. There is a need to counter the imbalance in the generation, interpretation and disclosure of information that exists between companies, who act as the generators and owners of the information, and communities. Individuals and communities affected by corporate operations have a right to information relating to the actual or potential impact of those operations on their human rights. This right must be recognised and protected in law, and as a matter of public policy.

Relevant information must be documented, including who produces the information and when. This information should be maintained for a reasonable amount of time; for example, for a period that exceeds the life-span of a large-scale mining project. To be of use, this information must be relevant, reliable and timely. Information must also be accessible, and understandable to the people who could be impacted by an activity or operation. Below are some key proposals and considerations on each of these aspects.

1. A duty to generate critical information

Companies should be required by law to generate and maintain information that is relevant for a full understanding of their actual and potential adverse impacts on the human rights of people affected by an activity or project.

More often than not, there is no legal requirement for companies to generate certain human rights relevant information, such as the potential impact on human rights of a given project. If the generation of certain information is not mandated by law, companies might not collect it. The law must prescribe the generation of certain human rights relevant information, for example, as a condition for obtaining an operating licence. Certain laws such as environmental impact assessment laws or laws governing mining or other industrial activities are appropriate for regulating the generation, maintenance and disclosure of certain project/activity-specific information. These laws exist in many countries. However, problems often arise in relation to the reliability, usefulness and accessibility of the information generated and/or disclosed.

a) Ensuring the reliability of the information

To best ensure that the information generated by a company is reliable, the law must establish minimum requirements regarding the way in which this information is collected and disclosed. This includes a requirement to explain the methodology used to generate and interpret data as well as the disclosure of the raw data itself. As part of the state duty to protect against corporate harm, relevant government authorities must generate their own information and/or independently and transparently assess the information provided by a company. Where this government capacity does not exist, it must be developed.

⁵⁴ See Amnesty International, *Nigeria: Bad information: Oil spill investigations in the Niger Delta* (Index: AFR 44/028/2013). Available at: <https://www.amnesty.org/en/documents/afr44/028/2013/en/>; Amnesty International, *Myanmar: Mountain of trouble: Human rights abuses continue at Myanmar's Letpadaung mine* (Index: ASA 16/5564/2017). Available at: <https://www.amnesty.org/en/documents/asa16/5564/2017/en/>. See also Decode Oil Spills project at: <https://decoders.amnesty.org/projects/decode-oil-spills>

Community monitoring mechanisms are also a good way of increasing trust and reliability of information generated by companies as well as the state.⁵⁵ However, this requires knowledge and resources. Some forms of monitoring are cheap and might only require basic training. For example, measuring water levels. Others require high levels of expertise such as the detection of toxic substances in the environment. Ideally, communities should be in a position to accurately assess and contest, if necessary, externally produced information. A way of securing resources could be for companies to pay into an independently administered fund that communities can access to procure their own independent monitoring and expert advice.⁵⁶ Universities or other third parties could also be given a monitoring or advisory role.

An alternative method is to set up collaborative ways of producing, managing and sharing information that can help address concerns about information credibility, accessibility, and lack of trust referred to above. Multi-stakeholder processes involving company, government and community representatives with equal access and management of information and expert advice could be particularly useful. Experts can be contractually accountable to the group.

b) Ensuring the usefulness of the information

A way of denying information to communities is by giving them too much information that may either disguise or obfuscate human rights issues, or be irrelevant for purposes of understanding the potential human rights impacts (for example, thousands of pages of an environmental assessment with no clear explanation as to how environmental impacts may affect health). The law or implementing regulation should specify minimum requirements in terms of what is disclosed and in what format for purposes of assessing and understanding potential impacts on human rights. This must aim at ensuring that what is disclosed is complete (avoiding glaring/convenient omissions) and at the same time relevant and concise (avoiding excessive, obfuscating or superfluous information). The law should specify that certain information, such as background technical data or assessments, be generated and kept so it can be disclosed on request or whenever there is a need for it.

c) Ensuring the accessibility of the information

Often information released is highly technical and difficult to interpret by a non-expert. This is the case for example of raw data. However, data interpreted by the company itself can be biased. Because of this, both “interpreted” data as well as raw data should be released. In addition, information should be proactively distributed at a time and in a format, language and location that best ensure those for whom it is intended notice it, are made aware of its importance and can use it effectively to protect their rights. This information should also be published on the web.

2. Disclosure of information as part of due diligence

Timely disclosure of reliable, relevant and accessible information to those potentially affected by a company’s activities or projects should be mandated as an integral part of an adequate human rights due diligence process.

Due diligence is about generating and disclosing information. The evaluation of the adequacy of a company’s human rights due diligence efforts includes an assessment of its disclosure practices. An adequate human rights due diligence process requires the disclosure of information about human rights policies, processes and their outcomes, *as well* as information about actual and potential adverse human rights impacts of specific activities or projects. Timely access to activity- or project-specific information that is reliable, useful and accessible as outlined above is critical to ensure genuine engagement and consultation with potentially affected individuals and communities. This in turn is essential for an accurate assessment of risk. Human rights due diligence and disclosure are intrinsically connected and indispensable for each other. Disclosure failures are serious failures of due diligence.

⁵⁵ Also see <https://business-humanrights.org/en/how-to-record-allegations>

⁵⁶ Strong safeguards must be in place to protect against corruption and the mishandling of funds.

Documentation under the German proposal

The German proposal on corporate due diligence mentioned in section I above (Parent or Controlling Company Liability) contains various provisions in this regard. Under its terms, companies would be required to document the due diligence steps taken in compliance with the law with the express objective of preserving evidence in the interest of future claimants alleging human rights abuse. In the event of a legal claim, the documentation would have to be disclosed. In addition, the company under this obligation would be required to hand over such documentation to the supervisory body upon request. These are innovative provisions that would ensure human rights-relevant information is generated, stored and, where needed, disclosed for the benefit of the regulatory body or claimants in a civil suit. The proposal also envisages regular public reporting on compliance with the mandatory human rights due diligence.

3. Integrating community-held information in impact assessments

Community-held information should be recognised and integrated into mainstream due diligence processes as well as formal accountability and redress systems.

Communities hold valuable information about the natural, social and cultural environments they live in and their transformation over time, including as a result of corporate activities. Laws relating to impacts assessments, baseline studies, the design of preventative measures and other critical components of formal risk assessments and decision-making processes must explicitly require that this information be integrated and given due weight. A critical way of ensuring this is by holding genuine, transparent and timely consultations with communities.

Communities that have already experienced the negative impacts of corporate activity have further information to share that is relevant for ensuring more effective preventative and accountability systems.⁵⁷ However, this information is not always recorded in writing or held in a way that courts and other formal accountability mechanisms recognise. While there is a need to assist communities in documenting and presenting evidence in a way that is recognisable by official accountability systems, courts and regulators must also become more amenable to accepting and using less formal means of evidence.

4. Ensuring freedom of information laws are effective in practice

Freedom of information laws should be designed and implemented to ensure timely and effective access to information held by companies, particularly if this is necessary to protect human rights.

Freedom of information acts (FOIAs) should facilitate access to information held not only by public bodies, but also by companies, if such information is necessary for the exercise and protection of a human right. The South African Promotion of Access to Information Act 2 of 2000 is an example of a law which compels corporate disclosure (more details below). FOIAs must be guided by the principle of disclosure. Non-disclosure must be the exception; grounds for non-disclosure must be kept to a minimum and strictly constructed. If a public authority or company refuse disclosure, they must bear the burden of proving that the information falls under one of the recognised exceptions, such as trade secrets or commercially sensitive information. Blanket denials based, for example, on general claims of corporate confidentiality should not be permissible. A system of exceptions to exceptions should also be built. This would require that exceptions to disclosure are still balanced against, and ultimately displaced by, an overriding public interest such as where the information shows an imminent risk to the environment or public health.

For FOIAs to work effectively in practice, sufficient financial and human resources must be allocated to setting up and maintaining information management systems that can process and deliver the requested information efficiently. In addition, the South African experience shows that over-reliance on a request mechanism can lead to a culture of non-disclosure (where disclosure is only the result of FOIA requests), protracted procedural fights often ending in the courts (because FOIA requests are refused) and an overburden system requiring ever more

⁵⁷ See here a useful on-line tool for information sharing and community to community support: <https://business-humanrights.org/en/community-action-platform>

resources. For this reason, FOIAs will work best if combined with a system of automatic disclosures as articulated above.

5. Rules against confidentiality of public interest information

Public interest information concerning the environment and public health should not be subject to confidentiality clauses under out of court settlements.

As part of settlement negotiations, corporate defendants often try to limit the ability of plaintiffs to divulge information that has been disclosed during proceedings.⁵⁸ This information often involves public interest issues which should be in the public domain, such as studies on the health impacts of corporate operations or pollution. This raises ethical dilemmas for lawyers working with communities whose environment or health have been impacted. To avoid the predicament often faced by lawyers of having to consider the best settlement option for their clients against the larger public interest in disclosure, the law itself should make this practice illegal. If public interest issues are not allowed to be confidential, this cannot be subject to negotiation and relieves claimants' lawyers of having to even entertain the idea.

6. Meaningful non-financial reporting

Non-financial reporting laws should require the disclosure of information that leads to an accurate understanding of a company's risks to, and adverse impacts on, human rights and its response to these risks and impacts, regardless of whether they carry any financial repercussions on the reporting company.

While financial reporting is primarily done for the benefit of investors and shareholders, non-financial reporting (for example, reporting on environmental and social impacts), is done for the benefit of a larger group of people that includes consumers, regulators, affected communities and non-governmental organizations. Their interest in this information is different from that of investors and shareholders, who are mostly concerned about the financial performance of the company. Laws and regulations on non-financial reporting must reflect the objectives and audience for which this type of reporting is done.

Today, non-financial reporting remains highly selective and discretionary and often of little value as a result. There often is a marked divergence between companies' annual reports and what non-governmental organizations, universities and other actors report about these companies' practices through their own research. To be useful, the law and its implementing regulation must prescribe certain minimum contents such as what risks and impacts a company must report and the methodology for assessing those risks and impacts. In addition, inaccurate or incomplete reporting should lead to consequences, including sanctions and withdrawal of government support, and the ability of interested parties to legally seek the necessary amendments.

⁵⁸ See, for example, Toxic Waste Dumping case in Injustice Incorporated, pages 105 and 106.

The EU Directive on Non-financial Reporting

The EU took a significant step in this context when it adopted in 2015 the Directive 2014/95 on the disclosure of non-financial Information by EU companies.⁵⁹ This instrument sets minimum reporting requirements for all EU states expected to transpose its provisions into national legislation by December 2016.⁶⁰ Under the Directive, certain large EU companies are required by law to report publicly on their policies, due diligence procedures, principal risks and management of these risks in a number of areas which include human rights. Of particular importance is the fact that the Directive goes beyond traditional concepts of “materiality”, making clear that relevant information is not only that which is necessary for an understanding of the company’s financial performance, but also of its external impacts on society, including on human rights.⁶¹ The guidelines issued by the European Commission in June 2017 reinforce this concept.

Unfortunately, the Directive covers a limited number of companies,⁶² it does not include an obligation to report on “significant incidents” (an element that had been included in an earlier proposal), and member states can permit companies to withhold information on impending developments or matters in the course of negotiations. This last element is critical for communities to become aware of and access information about impending business activity which might affect them. The Directive’s review at the end of 2018 will provide a critical opportunity to assess these and other gaps, and examine the results achieved so far against the objective of securing greater public understanding of companies’ existing and potential human rights impacts.⁶³

The UK Modern Slavery Act

Another important development in relation to reporting is the enactment, in March 2015, of the UK Modern Slavery Act.⁶⁴ Under section 54 of this Act (the “Transparency in Supply Chains” clause) companies with a total annual turnover of £36m or more carrying on a business in the UK must report on what steps they have taken during the financial year to ensure that slavery and trafficking are not taking place in their supply chains and own businesses.⁶⁵ This law also reflects the trend in corporate reporting towards disclosure of information in the public interest. The UK Government’s guidance on the application of the Act states that: “*It is important for large organizations to be transparent and accountable, not just to investors but to other groups including employees, consumers and the public whose lives are affected by their business activity.*”⁶⁶

However, no provision for sanctioning is provided nor are incentives for improving reporting practices. Under the Act, businesses are able to state that they have taken no steps to ensure that slavery is not taking place in their supply chains. Beyond the reputational damage that this may entail, there are no further consequences. It is also unfortunate that the law did not establish a system of incentives to promote good practice such as by conditioning the award of public sector contracts to effective reporting of due diligence steps. The UK Government and other states considering similar legislation should contemplate such a system. In addition, the UK Government should publish and maintain an updated list of companies that are required to report under the Act, as there currently is no mechanism for the public to know which companies are subject to the reporting requirements.

⁵⁹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0095>

⁶⁰ At the time of writing, 23 member states had transposed the Directive into national law and the European Commission had begun assessing these laws.

⁶¹ Article 1 (new Article 19a.1 of Directive 2013/34/EU).

⁶² The Directive applies to “public interest entities” with over 500 employees. Article 1 (new Article 19a.1 of Directive 2013/34/EU). This has been estimated to be about 6000 EU companies.

⁶³ Article 3 of the Directive.

⁶⁴ <http://www.legislation.gov.uk/ukpga/2015/30/section/54/enacted>

⁶⁵ The Business & Human Rights Resource Centre provides a free registry of companies’ statements at: <http://www.modernslaveryregistry.org/>

⁶⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_A_practical_guide_fina_l_.pdf

IV. Access to Information and Discovery Rules

Outstanding Challenges

Challenges and opportunities for accessing information through legal discovery rules vary greatly across jurisdictions. While some legal systems are more open and permissive, others present real challenges that restrict discovery requests. One challenge, for example, is when evidence rules require that requests for information be very specific as to the type of document or piece of evidence sought. In reality, this level of detail may not be fully known in advance. Another difficulty is when the relevance of evidence for purposes of disclosure must be substantiated to a level almost as high as that required to prove the claim.

A better balance must be struck between the need to discourage a “claims culture” and “fishing expeditions” on the one hand, and the need of victims of corporate abuse to access the information and evidence they need to pursue legitimate claims on the other. Evidence rules must better consider the inherent inequality in access and control of information that exists between claimants and corporate defendants in human rights cases. Ultimately, this engages the state’s own duties to guarantee access to justice, fair trial, equality of arms and knowledge of the truth. Evidence rules and the way in which they are interpreted by courts must seek to redress the difficulties in accessing critical information by establishing broad and permissive discovery regimes.

1. Enacting broad discovery procedures

Establish permissive and flexible discovery procedures that allow for broad disclosure and inspection of evidence, based on principles of transparency and knowledge of the truth.

Legislative reform can ensure a less restrictive approach by the courts and guarantee greater access to information. The extent of legislative reform needed will depend on the particular legal system. Some discovery regimes, such as that in the UK,⁶⁷ allow for broad access to information in the hands of either defendants or third parties and might only need smaller amendments. In jurisdictions with a more restrictive approach to disclosure,⁶⁸ new discovery procedures will be needed.

Policy and law-makers should draw from existing discovery regimes that are more responsive to the needs of victims of corporate abuse. For example, pre-action discovery where a reasonable threshold for advancing a request exists can be particularly useful and should be promoted in jurisdictions where it does not exist. This allows claimants to access evidence ahead of and in preparation for lodging a claim. Mandatory listing of all relevant information held by the parties is also particularly useful.

Dutch modernisation of civil evidence law

The Dutch Government, led by the Ministry of Security and Justice, has embarked on a promising process to modernise its procedural rules on evidence. On 7 June 2017, the Ministry sent advice on “Modernisation of civil evidence law” to the Dutch parliament. This advice includes a proposal to introduce a pre-procedural evidence gathering phase which could lead to easier, greater and timelier access to information necessary for a fuller understanding of the facts of a case. According to the proposal, the parties would have an obligation to collaborate with each other in the identification and disclosure of all relevant information, except where “serious reasons” justify non-disclosure. Depending on how the legal reforms are crafted, this could be highly beneficial to claimants who, in the past, have struggled to access critical information because of the restrictive disclosure rules in the country.

2. Strengthening existing discovery procedures

Address limitations in existing discovery procedures that are having a detrimental effect on the ability of claimants to access evidence.

⁶⁷ CPR Part 31. Disclosure and Inspection of Documents. Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31>

⁶⁸ For example in Germany, Switzerland and in the Netherlands, as explained further below.

Even in the absence of a more comprehensive reform, small amendments to existing rules can help. For example, amending civil procedure rules on evidence to allow for disclosure of information that is relevant, but not decisive or critical, for the substantiation of the claim could facilitate access to documents that would otherwise be unobtainable. This would be relevant, for example, in the Netherlands.⁶⁹

Amendments to existing discovery rules or guidance are also needed to address current weaknesses and limitations even in strong discovery regimes. For example, under the principle of “proportionality” in the UK, a UK court can limit the period or scope of discovery.⁷⁰ This can lead to a limitation in the amount or type of evidence a claimant can access even though it may still be highly relevant for pursuing or substantiating the claim. Changes in the relevant rules and guidance should seek to ensure that these decisions take into account the needs of claimants and the challenges they face in human rights litigation against corporations.

Access to documents in *Alfred Akpan v. Royal Dutch Shell*

Changes in judicial practice are possible, even in restrictive regimes. A ruling by a Court of Appeal in The Hague on 18 December 2015 overturned a first instance court decision that had denied access to internal company documents to four Nigerian farmers and Friends of the Earth Netherlands claiming damages against Shell.⁷¹ The Court of Appeal ordered the company to disclose certain internal documents that could prove critical for substantiating the claim.⁷²

This case demonstrates that what is sometimes needed is a shift in legal culture. Even in cases where provisions allow for broader discovery, courts can be reluctant to grant disclosure requests. Narrow interpretations of discovery rules can render them useless or highly restrictive in practice. This issue is compounded by companies deliberately hiding documents and obfuscating evidence. The Court of Appeal’s decision in this case proves an important point; that positive change can also happen through more progressive interpretations of existing law.

3. Complementarity with broader reforms

Changes to discovery rules should be part of a comprehensive programme of reform that seeks to promote transparency, access to information and equality of arms through mandatory disclosure requirements, effective FOIAs and fairer rules on burden of proof.

There should not be a need to seek disclosure of certain important information involving human rights abuses through formal legal claims. Much of the information often sought by claimants through lawsuits or by petitioners through FOIA requests is information that should be in the public domain as a consequence of mandatory disclosure rules (see discussion under section III on Mandatory Collection and Disclosure of Information). Automatic disclosure laws should be complemented by changes in other relevant legal regimes governing the collection and disclosure of information, including FOIAs, discovery rules and allocation of the burden of proof in legal proceedings

⁶⁹ Section 843a of the Dutch Code of Civil Procedure allows a party with a “legitimate interest” to demand disclosure of documents that relate to a legal relationship to which he or she is a party. The requested documents must be specified. Courts normally interpret that a “legitimate interest” exists when the documents sought contain critical or decisive evidence for the litigation. The threshold is very high (see *Injustice Incorporated*, page 166, for an illustration of how these restrictions can play out in real cases). Provisions that broadened the interpretation of what amounts to “legitimate interest” or relaxed the need for high levels of specificity as to the documents sought would allow for greater access to evidence.

⁷⁰ CPR Part 31. Disclosure and Inspection of Documents. Available at: <https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part31>

⁷¹ For a summary of the case, see *Injustice Incorporated*, page 166.

⁷² Press Release. Friends of the Earth Netherlands, 18 December 2015: Outcome appeal against Shell: victory for the environment and the Nigerian people. See <http://www.foei.org/news/outcome-appeal-shell-victory-environment-nigerian-people-friends-earth-netherlands>

Annex – Expert papers[♦]

Fictitious Separation, Real Injustice: Why and How to Tame the Twin Principles of Corporate Law?

By Surya Deva*

I. Introduction

Injustice Incorporated rightly highlights several reasons which make it imperative for the victims to sue parent companies for human rights violations committed by their subsidiaries.¹ For example, the victims may not understand complex corporate group structures or may not see any real distinction between a parent company and its subsidiaries in view of intertwined decision making processes. In some other instances, a subsidiary may lack financial resources to compensate adequately all the victims of a mass disaster. Alternatively, the legal system of the country where a subsidiary is incorporated may not provide victims a sound legal basis to hold the said company accountable. Therefore, “there will be cases in which a claim against a parent company may be the only way of securing an effective remedy for the human rights impacts of a subsidiary’s activities”.²

However, whenever the victims try to sue parent companies in view of the practical or legal necessities alluded above, parent companies invariably rely, among others, on two principles of corporate law: “separate corporate personality”³ and “limited liability”. One of the consequences of the legal separation is that a company is generally not liable legally for the conduct (both acts and omissions) of its subsidiaries. On the other hand, the principle of limited liability would limit the liability of a parent company for the wrongful conduct of its subsidiary company to the extent of its investment in the subsidiary.

The twin principles were developed during a period when ordinarily only human beings could be shareholders in companies. This meant that unless authorised by a specific charter issued by the Queen or the King, artificial legal entities like companies were neither allowed to hold shares in other companies nor establish their own subsidiaries.⁴ Without fully appreciating the differences between “natural” shareholders and “corporate” shareholders, companies were allowed to reap benefits of the principles of separate corporate personality and limited liability. The enjoyment of limited liability for parent companies is regarded more problematic in tort cases (as opposed to contract cases) in which non-consenting victims may suffer from corporate activities.⁵

These corporate law principles have served a useful purpose in that they encouraged investment, innovation and the spirit of entrepreneurship. However, the twin principles also had a negative effect: over a period of time, parent companies started to rely on these principles as a “shield” to deny, avoid or delay legal liability for human rights violations committed by their subsidiaries. Such a shield would be effective unless courts disregard the separate personality of a subsidiary company by lifting the corporate veil on certain limited grounds. The corporate veil may be pierced if the court finds that a given subsidiary is a sham or a puppet of the parent company in view of the extensive control exercised by the latter over the subsidiary. The veil may also be pierced if a subsidiary is used by the parent company to commit fraud, avoid tax or for some other illegal purposes.

[♦] These papers were commissioned by Amnesty International and Business & Human Rights Resource Centre to discuss and elaborate on the proposals in *Injustice Incorporated*. While there is broad convergence of opinion, the papers reflect the views of their authors while the briefing reflects the views and recommendations of the two organizations.

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¹ Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Rights to Remedy* (London: Amnesty International, 2014), 117-18. See also Surya Deva, “Corporate Code of Conduct Bill 2000: Overcoming Hurdles in Enforcing Human Rights Obligations against Overseas Corporate Hands of Local Corporations” (2004) 8 *Newcastle Law Review* 87, 97-99.

² Human Rights Council, ‘Improving Accountability and Access to Remedy For Victims of Business-Related Human Rights Abuse: Report of the United Nations High Commissioner for Human Rights’, A/HRC/32/19 (10 May 2016), para 22 (‘OHCHR Guidance’).

³ There are different theories explaining or justifying the idea of separate corporate personality, e.g., legal fiction, state concession, aggregate, natural entity, and the nexus of contracts. See David Millon, “Theories of the Corporation” (1990) *Duke Law Journal* 201.

⁴ Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (New York: Oxford University Press, 1993), 52.

⁵ See Gwynne Skinner, *Parent Company Accountability: Ensuring Justice for Human Rights Violations* (ICAR, 2015), 7-8.

In practice, however, it is not easy for victims of corporate human rights abuses to pierce the corporate veil and hold a parent company accountable for human rights abuses committed by its subsidiary.⁶ Courts tend to expect a very high degree of proof in satisfying the threshold of control to lift the corporate veil. Another key hurdle is posed by the exercise of judicial discretion in piercing the corporate veil in an unprincipled, incoherent and unpredictable manner. Then there is the problem of inefficiency: whether the corporate veil could be lifted or not is known on a case by case basis after a long vexatious litigation over this procedural issue. Studies have also pointed that the corporate veil is pierced less often (i) in tort cases as compared to contract disputes and (ii) in situations when the shareholder behind the veil is an individual instead of an artificial company.⁷

In short, as parent companies ordinarily keep “distance by design” from their subsidiaries, it is almost impossible for victims to hold parent companies accountable for corporate human rights violations. The legal idea of separate corporate personality, thus, does not really match with the economic reality of multinational corporations (MNCs) or the social perception about them. Consequently, we must find a way to minimise the misuse of the twin principles of corporate law as a matter of routine in order to provide victims of corporate human rights abuses access to effective remedies.

This paper briefly reviews the suggestions advanced in *Injustice Incorporated* and then analyses four direct options to tame the principles of separate corporate personality and limited liability. It also discusses four indirect options – as part of the goal to humanise corporate laws – to mitigate the adverse impact of the twin principles. The paper then outlines ways to implement these options and the challenges inherent in this exercise. It concludes with a few suggestions as to what could and should be done to move the project forward despite these challenges.

II. Suggestions mooted by *Injustice Incorporated*

Injustice Incorporated outlines three theories to attribute liability to a parent company: primary liability, secondary liability, and piercing the corporate veil.⁸ A parent company will have primary liability when it was directly involved in the given wrongdoing. On the other hand, secondary liability is engaged when a parent company assisted, abetted, induced or authorised another company to commit the wrongdoing. While a broad division between these two forms of liability makes sense, the distinction may not be so clear in certain cases and a set of facts might give rise to both primary and secondary liabilities.⁹ As far as the third theory of liability (piercing the corporate veil) is concerned, this should perhaps be treated only as one of the tools to hold parent companies accountable.

Injustice Incorporated makes two key recommendations to build a new framework to hold parent companies legally responsible for human rights abuses occurring in the context of their global operations: (i) placing parent companies under an express duty of care towards individuals and communities whose human rights may be affected by their global operations; and (ii) establishing a rebuttable presumption of the concerned parent companies being accountable in certain situations, such as in cases of ‘large-scale human rights disasters or of severe or systematic human rights abuses’.¹⁰

These two recommendations overlap in some ways with the four options that I articulate in the next part. However, before articulating these options, let me flag a few important aspects that come out from *Injustice Incorporated*’s recommendations. The report underscores the need of due diligence or standards of care to be determined with reference to certain “international standards”. This desire may be driven by concerns that applicable standards in certain jurisdictions may not be adequate. Clarifying the relationship between due diligence and the duty of care under law of tort is another issue which deserve attention. The report also stresses a regulatory aspiration of treating companies of a multinational corporate group as one business enterprise.

⁶ Gwynne Skinner, Robert McCorquodale and Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (ICAR, CORE and ECCJ, 2013), 11, 59-64. See also Phillip Blumberg, “Asserting Human Rights against Multinational Corporations under United States Law: Conceptual and Procedural Problems” (2002) 50 *American Journal of Comparative Law* 493; Jennifer Zerk, Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law remedies, a report prepared for the Office of the UN High Commissioner for Human Rights (2013).

⁷ See Robert B Thompson, “Piercing the Corporate Veil: An Empirical Study” (1991) 76 *Cornell Law Review* 1036.

⁸ Amnesty International, *Injustice Incorporated*, note 1, 118-22.

⁹ In a non-legal context, the UN Guiding Principles on Business and Human Rights, for instance, contemplate very similar responsibility for a company which “causes” or “contributes to” an adverse human rights impact”.

¹⁰ Amnesty International, *Injustice Incorporated*, note 1, 143-9.

Furthermore, the report points out why it may be desirable to raise a rebuttable presumption, at least in some cases, to alleviate hardships of victims in proving liability of parent companies for human rights abuses committed by their subsidiaries or suppliers.

III. Reviewing potential “direct” options

In my view, there are at least four “direct” options as to how the obstacles posed by the twin principles of corporate law in holding a parent company accountable for human rights violations committed by its subsidiaries could be overcome.¹¹ These options are direct in the sense that they would have a direct impact on the scope of the twin principles. Before a review of these four direct options, three riders should be noted. First, these options are proposed *only* in relation to civil liability of companies, as different considerations apply regarding criminal liability. Second, while legitimate issues do arise regarding the liability of a company for human rights violations taking place within its global supply chain (through independent contractors or otherwise), these options may not be suitable for application in entirety to the supply chain context.¹² Third, whichever of these options is adopted by states, the principle of “joint and several liability” should also be applied. Doing so would allow a parent company to compensate all the victims in the first instance and then seek contribution from its subsidiaries, if necessary.

1. Specify and clarify corporate veil piercing exceptions

As the corporate veil piercing exceptions are fairly common and well-established across various jurisdictions, one option may be that states provide a statutory recognition to these exceptions and also clarify the circumstances in which each exception could be satisfied.

In theory, this option should be easy to implement as the veil piercing exceptions are widely recognised, judicially or in a statutory form, in both common law and civil law countries. However, this option might not prove very much beneficial to victims of corporate human rights abuses: despite specification of the variables of each exception, litigation in each case and uncertainty in judicial interpretation would be inevitable. Corporate lawyers may also advise companies in advance on how to operate in such way that the exceptions to the corporate veil are not attracted.

2. Recognise the principle of enterprise liability

Under this option, states may be encouraged to recognise all companies of a group as one “enterprise” for the purposes of litigation involving human rights. If adopted, this option would avoid the need for litigation as to whether the corporate veil should be lifted or not, thus bringing more legal certainty for all parties.

Although the enterprise principle may be recognised by some states in certain situations,¹³ this is more like an exception than a norm. Moreover, this option is likely to face resistance from business enterprises on the ground that the adoption of the enterprise principle will nullify all the advantages of the principles of separate corporate personality and limited liability. This option, which would bring the legal reality of corporate groups closer to their economic reality, will be clearly advantageous to victims as compared to the first option. This option should also encourage the parent company of a group to consider human rights issues more holistically for the entire group, rather than move risky or hazardous businesses to its distant or under-funded subsidiaries.

¹¹ Skinner examines five options: agency theory in addition to the four options examined in this paper. Skinner, *Parent Company Liability*, note 5, 14-23. Agency theory is not considered as a separate option here, because establishing agency would normally allow a plaintiff to pierce the corporate veil. See Olivier De Schutter, “Towards a New Treaty on Business and Human Rights” (2015) 1 *Business and Human Rights Journal* 41, 48-9.

¹² Some scholars though tend to combine both situations and propose identical regulatory solutions. See, e.g., Radu Mares, “Legalizing Human Rights Due Diligence and the Separation of Entities Principle” in Surya Deva and David Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge: Cambridge University Press, 2017), 266. Such an approach, however, glosses over the different role played by a company in relation to human rights violations committed by subsidiaries versus suppliers.

¹³ The enterprise principle, for example, is applied in areas of tax and anti-competition regulations. It is arguable that two recent laws – UK’s Modern Slavery Act 2015 and French Duty of Vigilance Law 2017 – also embrace the enterprise principle in determining the ‘target’ companies.

3. Statutory adoption of the direct duty of care approach

Courts in the UK,¹⁴ Canada¹⁵ and Australia¹⁶ in certain cases have held that a parent company may owe a direct duty of care to its subsidiary's employees or others in certain circumstances. For instance, in *Chandler v Cape*, the UK Court of Appeal laid down these circumstances in the form of four conditions: "(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."¹⁷ If the conditions to invoke the direct duty of care principle are satisfied, then there would be no need for the victims to pierce the corporate veil in order to target the parent company. The direct duty of care principle can thus operate as a "legal bypass" to the veil piercing problem.

If the direct duty of care is accorded a statutory recognition, this should be beneficial to victims as compared to proving any of the exceptions to the separate corporate personality under the first option. However, it would be critical that the benefit of the direct duty of care principle is not limited to subsidiaries' employees (as proposed in *Chandler*): rather its protection should be extended to all people affected by the conduct of subsidiaries, otherwise this option will have a very limited scope and beneficial impact.

4. Raise rebuttable presumption about the liability of a parent company

Under this option, the law could raise a "rebuttable presumption" about the liability of a parent company for human rights violations by its subsidiaries as a matter of legal principle. The parent company will be liable unless it can show that it did not know (or had no reasons to know) about the human rights violations in question, or that the violations took place despite the parent company taking appropriate due diligence steps.

One obvious advantage of this option over the direct duty of care option will be that the victims would need to establish merely human rights violations linked to the activities of the parent and/or subsidiary company. Once the injury and causation are prima facie established, the burden will shift on the parent company to demonstrate that either it had no knowledge about human rights abuses committed by its subsidiary or that violations took place despite the parent company adopting reasonable due diligence measures. It should be noted though that as compared to the option based on the enterprise principle, this option will be better for companies too, as this would not result in an automatic liability for the conduct of their subsidiaries.

IV. "Indirect" options and the project of *humanising corporate law*

In addition to the direct options considered above, some indirect pathways may be used to dent the twin corporate law principles, especially the principle of separate corporate personality. These indirect reform options are part of what I call the wider goal of "humanising corporate law": that is, to inject human rights considerations into all stages of corporate law decision making processes by limiting allegiance to the shareholder primary model.¹⁸

Corporate reforms in many parts of the world indicate at least four evolving models of humanising corporate laws. These four models are not mutually exclusive and there may be variations within each model amongst states. The four models currently in voyage are:

- 1) the *duty* model, which imposes an obligation on the company and/or its directors to take into account the non-financial interests of non-shareholders;
- 2) the *purpose* model, which stipulates that one of the objects of the company is to fulfil social responsibilities;
- 3) the *composition* model, which institutionalises a system that allows non-shareholders to raise their concerns to various decision making bodies; and

¹⁴ *Chandler v Cape plc* [2012] EWCA Civ 525; *Connelly v Rio Tinto Zinc Corporation* (1999) CLC 533. See also Richard Meeran, "Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States" (2011) 3 *City University of Hong Kong Law Review* 1, 7-10.

¹⁵ *Choc v Hudbay Minerals Inc* 2013 ONSC 1414 (Ontario, 2014).

¹⁶ *CSR v Wren* (1998) 44 NSWLR 463.

¹⁷ *Chandler v Cape plc* [2012] EWCA Civ 525, para 80.

¹⁸ See Surya Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (London: Routledge, 2012) 211-14.

- 4) the *reporting* model, which requires companies to disclose regularly to their stakeholders how they are fulfilling their social responsibilities.¹⁹

While none of these four models directly limit the principles of separate corporate personality and limited liability, they – once mainstreamed into corporate law – could assist in different ways in holding a parent company accountable for human rights abuses committed by its subsidiaries. For example, the purpose model could be relied on by courts as an interpretative tool to pierce the corporate veil. Similarly, whereas the duty model could be invoked to impose a direct duty of care on the parent company towards employees or consumers of its subsidiaries, the reporting model may assist victims in articulating better the interrelationship amongst various companies of a corporate group.

I will consider a few examples of the duty model to show how they could reduce the adverse impact of the principle of separate corporate personality. Section 172 of the UK's Companies Act 2006 offers an early example of the duty model. This provision provides that in promoting the success of the company for the benefit of its members as a whole, a director of a company should have regard, amongst other matters, to “(a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, [and] (d) the impact of the company's operations on the community and the environment”. To “inform members of the company and help them assess how the directors have performed their duty under section 172”, directors should prepare a strategic report, which should include information about ‘(i) environmental matters (including the impact of the company's business on the environment), (ii) the company's employees, and (iii) social, community and human rights issues’.²⁰

Although a director's duty under Section 172 cannot be enforced by non-shareholders,²¹ this provision will still encourage companies to look beyond their own operations and consider more than solely financial variables. Doing so will in turn mean that while making business decisions, directors might have to operate outside strict legal separation between a company and its subsidiaries and suppliers.

More recent-cum-robust examples of the duty model are mandatory human rights due diligence laws. The UK's Modern Slavery Act 2015 is a case in point. Section 54(1) of this Act requires a commercial organisation which supplies goods/services or has a minimum turnover of £36million to “prepare a slavery and human trafficking statement for each financial year of the organisation”. This provision further provides that such a statement should list “the steps the organisation has taken during the financial year to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, and (ii) in any part of its own business”. Otherwise, the organisation should declare in the statement that “the organisation has taken no such steps”. In theory, there is a possibility of a company facing legal consequences if it breaches its due diligence obligation under Section 54.²²

While the UK Act is clear about imposing a due diligence obligation in relation to the behaviour of independent suppliers, there is less clarity about a similar obligation in relation to subsidiaries. Even if the Act does not explicitly include subsidiaries, it would be anomalous if a parent company only focused on slavery and human trafficking within its supply chain but ignored such practices linked to its subsidiaries. In fact, the Guide issued by the UK government to comply with Section 54 provides that if “a foreign subsidiary is part of the parent company's supply chain or own business, the parent company's statement should cover any actions taken in relation to that subsidiary to prevent modern slavery. Where a foreign parent is carrying on a business or part of a business in the UK, it will be required to produce a statement.”²³ The UK government also offers the following advice in this regard:

¹⁹ Surya Deva, ‘Socially Responsible Business in India: Has the Elephant Finally Woken Up to the Tunes of International Trends?’ (2012) 41:4 *Common Law World Review* 299, 303-7.

²⁰ UK Companies Act 2006, Sections 414A and 414C.

²¹ Surya Deva, “Sustainable Development: What Role for the Company Law?” (2011) 8 *International & Comparative Corporate Law Journal* 76.

²² If a company fails to produce a slavery and human trafficking statement for a particular financial year, the Secretary of State may seek an injunction through the High Court requiring the company to comply. Failure to comply with the injunction will amount to contempt of a court order, which is punishable by an unlimited fine. UK government, *Transparency in Supply Chains etc.: A Practical Guide*, 6, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/471996/Transparency_in_Supply_Chains_etc_A_practical_guide_final.pdf (last accessed 14 August 2017).

²³ *Ibid.*, 8.

If a parent company is seen to be ignoring the behaviour of its non-UK subsidiaries, this may still reflect badly on the parent company. As such, seeking to cover non-UK subsidiaries in a parent company statement, or asking those non-UK subsidiaries to produce a statement themselves (if they are not legally required to do so already), would represent good practice and would demonstrate that the company is committed to preventing modern slavery. This is highly recommended, especially in cases where the non-UK subsidiary is in a high-risk industry or location.²⁴

In short, it is clear that while the UK's Modern Slavery Act does not completely or clearly override the principle of separate corporate personality, it makes a hole in the veil of separation in terms of the types of companies as well as the conduct it targets.

In early 2017, the French parliament enacted a duty of vigilance law, which obligates companies above a certain size to elaborate, disclose and implement a "vigilance plan" in relation to serious violations of all human rights and fundamental freedoms, the health and safety of people, and the environment.²⁵ The law imposes a duty on any company incorporated or registered in France for two consecutive fiscal years if it employs at least 5,000 people by itself and through its French subsidiaries, or it employs at least 10,000 people by itself and through its subsidiaries in France or abroad.²⁶ The duty of vigilance envisaged under this law applies to the activities of a parent company and its subsidiaries as well as subcontractors/suppliers with whom it maintains an established business relationship.²⁷ It is notable that this law also allows people with locus standi to approach a court to order a company to establish, publish or implement – as the case may be – the vigilance plan.²⁸

The French law again dents indirectly the principle of separate personality in two ways. First, in determining the threshold to apply the law, it includes the number of employees hired not only by a parent company but also by its subsidiaries, thus treating a given corporate group as one entity. Second, the vigilance plan should also include the activities of one's subsidiaries, subcontractors and suppliers. This implies that a parent company would have some due diligence responsibility regarding its subsidiaries too.

V. Role of states in reforming corporate laws

As the obstacles posed by the twin principles stem from corporate law, the solution should primarily be found out therein. As discussed below, states should be encouraged to amend their corporate laws to limit the principles of limited liability and separate corporate personality. However, other specialised branches of law may also be used to limit the scope of the twin principles. For instance, an environmental law statute may stipulate that a parent company will be responsible – based on the principle of strict liability or vicarious liability – for pollution caused by any of its subsidiaries. A tax statute may similarly rely on the enterprise principle to ensure that parent companies incorporated in a jurisdiction do not avoid payment of taxes simply by incorporating subsidiaries offshore.

Regarding the need for corporate reforms, the Guiding Principles on Business and Human Rights remind states to ensure that "laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights."²⁹ States are also expected to remove barriers in access to effective remedy, including barriers related to the "way in which legal responsibility is attributed among members of a corporate group under domestic criminal and civil laws".³⁰

Apart from legal scholars, bodies tasked with law reforms at the domestic level as well as human rights advocacy groups are well-suited to initiate discussions to trigger such reforms at the national level. Such reform proposals, in order to be viable, should provide "concrete guidance" to states and be "alive to diversity" amongst states. The Office of the High Commissioner for Human Rights (OHCHR) in its 2016 report has provided guidance to

²⁴ Ibid.

²⁵ Sandra Cossart et al, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All" (2017) 2:2 *Business and Human Rights Journal* 317, 320.

²⁶ ECCJ, "French Corporate Duty Of Vigilance Law: Frequently Asked Questions", <https://business-humanrights.org/sites/default/files/documents/French%20Corporate%20Duty%20of%20Vigilance%20Law%20FAQ.pdf> (last accessed 14 August 2017).

²⁷ Ibid.

²⁸ Sandra Cossart et al, note 25, 321.

²⁹ Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), Principle 3(b).

³⁰ Ibid, Commentary to Principle 26.

states to improve corporate accountability and access to judicial remedy for business-related human rights abuse. The OHCHR report acknowledges “structural and managerial complexity of business enterprises” as one of the three cross-cutting issues and provides the following guidance:

Domestic public law regimes communicate clearly the standards of management and supervision expected of different corporate constituents of group business enterprises with respect to the identification, prevention and mitigation of human rights impacts associated with or arising from group operations, on the basis of their role and position within the group business enterprise, and take appropriate account of the diversity of relationships and linkages through which business enterprises may operate, including equity-based and contract-based relationships.³¹

While such a guidance is helpful, it does not really unpack much for states as to the changes they might make to their corporate laws. It may, therefore, be desirable to develop draft model corporate law provisions, which may assist not only legislatures but also courts in developing suitable remedial principles to mitigate the adverse impact of the twin principles on victims’ quest for justice. Considering that states have different legal systems, traditions and cultures, a range of reform options should be developed for an informed debate and further consideration by states. The ongoing process to negotiate a legally binding international instrument “to regulate, in international human rights law, the activities of transnational corporations and other business enterprises” can also play a role in this regard by requiring states to reform their corporate laws.³²

The success of both direct and indirect options mooted in this paper depends upon legislative action, which might not take place in many states despite a compelling legal case. In such a scenario, courts – especially belonging to common law traditions – have a special duty to develop new principles or craft exceptions to the old principles to meet evolving needs of justice in the twenty-first century.³³ Without overriding the principles of separate corporate personality and limited liability, they should be willing to either relax the high threshold required to pierce the corporate veil, or develop alternative principles that in effect bypass the need to pierce the corporate veil (as done in the *Chandler* case).

VI. Challenges to legal reforms and solutions

Many states may not show a political will even to initiate a legislative reform process – even if aimed at improving access to effective remedies for victims of human rights abuses – to limit the principles of separate corporate personality and limited liability. Even if some states like France show the courage to initiate the process, any such legislative attempt is likely to face stiff opposition from business organisations.³⁴ On the other hand, a progressive response from courts is not only unpredictable but is also likely to be incremental. The chances of successfully negotiating an internationally binding instrument are equally uncertain.

To overcome these challenges to direct or indirect reform of the twin corporate law principles, three inter-related steps should be taken. First, an online database should be created to catalogue (and update continuously) statutory developments or judicial attempts that in some way limit the rigour of the twin principles of corporate law. This would enable a more informed debate about the potentials and limitations of various reform options.

Second, human rights organisations and advocacy groups should join hands at national, regional and international levels to push states to reform corporate laws to strike a balance between business needs served by the principles of separate corporate personality and limited liability on the one hand and the adverse impact of these twin principles on victims’ quest for access to justice on the other. Such reforms will be consistent with what Principle 3(b) of the Guiding Principles.

³¹ OHCHR Guidance, note 2, Annex, para 1.5. See also para 12.3.

³² Some elements of the proposed instrument should be available before the 3rd session of the open-ended intergovernmental working group in October 2017. See <http://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IWGOnTNC.aspx> (last accessed 14 August 2017).

³³ See Doug Cassel, ‘Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence’ (2016) 1:2 *Business and Human Rights Journal* 179.

³⁴ See, for example, the corporate lobbying against the pending French Bill that seeks to impose mandatory due diligence requirement on selected big companies. Helene Fouquet, ‘French Business Seeks to Kill Bill on Liability for Units’, (21 October 2015), <http://www.bloomberg.com/news/articles/2015-10-21/french-business-seeks-to-kill-bill-on-liability-for-remote-units> (last accessed 30 November 2015).

Third, pending statutory reforms canvassed above, a group of experts should draft several alternative Model Laws on Liability within Corporate Groups. Such Model Laws – the inspiration for which could be drawn from other non-state centric initiatives such as the 2010 International Code of Conduct for Private Security Providers and the 2011 Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights – should provide legislatures as well as courts a concrete basis to make appropriate modifications to the principles of separate corporate personality and limited liability.

An Inconvenient (But Unavoidable) Doctrine: Reforming the Doctrine of *forum non conveniens* in Transnational Human Rights Cases Involving Corporate Defendants

By Dr François J Larocque*

I. General comment

As convincingly demonstrated in *Injustice Incorporated*, the doctrine of *forum non conveniens* “has had a damaging impact on the ability of often poor plaintiffs to access courts in human rights-related cases”.¹ Accordingly, it is proposed that, “[g]iven that the elimination of *forum non conveniens* in certain jurisdictions has not led to legal difficulties, the total elimination of this rule, at least in corporate-related human rights cases, would significantly benefit the right to remedy.”²

Calls for the abolition of the doctrine of *forum non conveniens* in transnational human rights cases involving corporations are hardly novel.³ To that extent, Amnesty International’s proposal is neither surprising nor overly controversial, especially when one considers that most of the world appears to function quite well without the benefit of the doctrine of *forum non conveniens*. Indeed, most of the world’s civil law jurisdictions do not apply the doctrine of *forum non conveniens* (with Quebec⁴ and China⁵ as notable exceptions) and, in Europe, the *Brussels Convention* has effectively barred its application in EC litigation.

The Classic Rule

“The plea [of *forum non conveniens*] can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice”.

Lord Kinear
Sim v Robinow
(1892), 19 R 665 at 668

That being said, it is unlikely that Canada, a common law jurisdiction where the doctrine of *forum non conveniens* is an established – and increasingly codified – feature of the legal landscape, will abandon the use of *forum non conveniens* any time soon. Far from entertaining calls for abolition, Canadian provinces and territories are collaborating to enact uniform rules governing judicial jurisdiction, rules that invariably include some iteration of the doctrine of *forum non conveniens*.

However, Amnesty International’s alternative proposal for courts to “bring human rights considerations” and “consider whether internationally recognised human rights are at stake in the case” in their evaluation of *forum non conveniens* can have some traction in Canadian legislation. This could be done through new or amended model legislation and special provisions for properly grounded transnational human rights claims against corporate defendants. Such amendments might provide for the outright exclusion of the doctrine in rare cases where jurisdiction is assumed on the basis of necessity. In regular cases where jurisdiction is asserted on the basis of territoriality (such as presence or “real and substantial connection”), the doctrine of *forum non conveniens* ought to be codified in accordance with first principles, namely, by emphasising its discretionary and exceptional character and by giving proper weight to contemporary public interest factors, such as the imperative that human rights victims be allowed the opportunity to obtain a remedy in a court of law.

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¹ Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to a Remedy* (London: Amnesty International), 2014 at 151.

² *Ibid.*

³ See for example, Hilmy Ismail, “Forum Non Conveniens, United States Multinational Corporations, and Personal Injuries in the Third World: Your Place or Mine?” (1991) 11 Boston College Third World LJ 249; Kathryn Lee Boyd, “The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation” (1998) 39 Va J Int’l L. 41; Philippa Webb, “The Inconvenience of Liability: The Doctrine of *Forum Non Conveniens* in International Environmental Litigation” (2001) 6 Asia Pacific of Environmental Law 377.

⁴ *Quebec Civil Code*, CQLR c C-1991, article 3135 (*Forum non conveniens* was introduced in the 1994 revisions to the Quebec Civil Code.)

⁵ Guangjian Tu, “*Forum Non Conveniens* in the People’s Republic of China” (2011) 11 Chinese Int’l L J (The author explains that while *forum non conveniens* is not statutorily mandated, Chinese courts apply a version of the doctrine following a 2005 directive from the Supreme People’s Court.)

II. Elaborate the proposed solutions further

In Canada, the common law doctrine of *forum non conveniens* is based on the English rule laid down by the House of Lords in *Spiliada*.⁶ It is routinely applied in provinces such as Ontario and Alberta. Moreover, a codified version of the doctrine is gaining widespread acceptance throughout Canada. Indeed, since 1918, the Uniform Law Conference of Canada (ULCC) – an annual gathering of federal and provincial policy analysts, government lawyers and civil servants – has worked to harmonise the laws of the various Canadian provinces in specific areas of concern such as wills and estates, trusts, family law, consumer protection and commercial arbitration.⁷ The ULCC enjoys considerable influence and its recommendations, which typically take the form of “uniform statutes”, are widely taken as comprehensive and progressive statements of the law in a given field. In the area of judicial jurisdiction, which includes *forum non conveniens*, the ULCC produced a *Uniform Court Jurisdiction and Proceedings Transfer Act* (CJPTA) in 1994 which has since been enacted in five (5) Canadian provinces and territories, though it is presently in force in only three provinces.⁸ In the provinces where the CJPTA is not in force or has not been tabled in the legislature (such as Ontario), courts still look to the Uniform CJPTA as a faithful and forward looking account of the common law on judicial jurisdiction and *forum non conveniens*.⁹ Quebec, Canada’s only civil law province, has adopted and codified the doctrine in 1994.¹⁰ In the short time since its introduction in Quebec law, the doctrine of *forum non conveniens* has solidly taken root and is now raised “systematically” in nearly all interprovincial and international cases.¹¹

The purpose of the foregoing is to show that, in Canada at least, the doctrine of *forum non conveniens* is very well-established, increasingly codified and not at any risk of being discarded anytime soon. One can speculate as to the reasons for the doctrine’s growing popularity. One plausible theory, as the Supreme Court of Canada observed, is that *forum non conveniens* “serves as an important counterweight to the broad basis for jurisdiction” available to Canadian and foreign plaintiffs at common law, under the CJPTA and the *Quebec Civil Code*.¹² Because plaintiffs can access Canadian courts on a variety of permissive jurisdictional grounds, it is generally thought that judges should enjoy a commensurate discretion to dismiss cases that can be adjudicated more appropriately in another forum. As a result, *forum non conveniens* is likely destined to remain an unavoidable hurdle for plaintiffs in Canadian transnational human rights claims involving corporate defendants.

While the doctrine of *forum non conveniens* is not likely to be jettisoned in Canada, I believe that opportunities for law reform exist through the ULCC and more specifically, by amending the Uniform CJPTA’s provision relating to *forum non conveniens*.

As it currently stands, the s 11 of the CJPTA provides as follows:

11. (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside [enacting province or territory] is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

⁶ *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, which adopted the rules set out in *Spiliada Maritime Corp v Cansulex Ltd.*, [1987] AC 460.

⁷ Uniform Law Conference of Canada, <http://www.ulcc.ca/en/>

⁸ *Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1 (in force since 2004); *Court Jurisdiction and Proceedings Transfer Act*, SPEI 1997, c 61 (not yet in force); *Court Jurisdiction and Proceedings Transfer Act*, SY 2000, c 7 (not yet in force); *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 29; and *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd sess) c 2. See generally, Vaughan Black, Stephen GA Pitel and Michael Sobkin, *Statutory Jurisdiction: An analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell) 2012 at pp 27-39 [Black, Pitel & Sobkin].

⁹ See *Piscedda Mining Construction International Inc v Crew Gold Corp*, 2011 YKSC 79 at §42 (court holding that provisions of not-yet-in-force CJPTA should guide its application of the common law doctrine); *Van Breda v Village Resorts Limited*, 2010 ONCA 84 (court explicitly develops common law rules of territorial competence consistently with CJPTA); *West Van Inc v Daisley*, 2014 ONCA 232 (court develops common law rules on forum of necessity jurisdiction with explicit reference to the CJPTA).

¹⁰ *Quebec Civil Code*, CQLR c C-1991, article 3135

¹¹ JA Talpis & SL Kath point out in their article “The Exceptional as Commonplace in Quebec Forum Non Conveniens Law: Cambior, a Case in Point” (2000), 34 RJT 761 at p 773 (The author argues that Quebec’s “engouement” with *forum non conveniens* has led to the deformation of Quebec’s comparatively permissive jurisdictional rules.)

¹² *Spar Aerospace Ltd v American Mobile Satellite Corp.*, 2002 SCC 78 at §57.

- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- (b) the law to be applied to issues in the proceeding,
- (c) the desirability of avoiding multiplicity of legal proceedings,
- (d) the desirability of avoiding conflicting decisions in different courts,
- (e) the enforcement of an eventual judgment, and
- (f) the fair and efficient working of the Canadian legal system as a whole.

A version of this provision is currently the law in British Columbia, Saskatchewan and Nova Scotia. As the ULCC commentary to section this makes clear, the section was drafted in language that closely tracks the Supreme Court of Canada's judgment in *Amchem* and, by extension, in *Spiliada*. To avoid the injustices that the *Spiliada* approach to *forum non conveniens* has produced in transnational human rights claims, this section could be amended to include the following features: (1) the mandatory sequencing of jurisdictional issues; (2) the addition of language emphasising the exceptional character of *forum non conveniens*; (3) the exclusion of *forum non conveniens* when jurisdiction is asserted on grounds of necessity; and (4) the addition of new public interest factors to be considered and applied in transnational human rights cases.

1. Mandatory sequencing of jurisdictional issues

To avoid the premature and improper dismissal of meritorious lawsuits, any codified version of *forum non conveniens* should make it clear that the doctrine may only apply once the court has determined that it has jurisdiction to adjudicate the plaintiff's claim. In practice, because *forum non conveniens* is increasingly and systematically raised at the outset of the proceedings, courts sometimes eschew the logically prior jurisdictional question and jump straight to the determination of whether the claim ought to be dismissed in favour of another more convenient forum.¹³ This practice is illogical and contrary to first principles. The starting point must be jurisdiction. Only once jurisdiction is established can there be any question of whether or not it ought to be exercised. The Supreme Court of Canada has consistently insisted on the proper sequencing of jurisdictional issues¹⁴.

By contrast, the US Supreme Court has indicated that federal courts may "dispose of an action by a *forum non conveniens* dismissal, bypassing questions of subject-matter and personal jurisdiction, when considerations of convenience, fairness, and judicial economy so warrant"¹⁵, reversing its ruling 60 years earlier that "the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction".¹⁶ The US practice should not be followed because it unhappily results in the discretionary dismissal of cases that otherwise should have been adjudicated as a matter of law.

2. Emphasising the exceptional character of *forum non conveniens*

Any codified version of the rule of *forum non conveniens* should emphasise that the judicial discretion to dismiss a matter in favour of an alternative forum must be exercised exceptionally, in rare circumstances and only when the alternative forum is "clearly more appropriate".¹⁷ As the Supreme Court of Canada noted, "the words 'clearly' and 'exceptionally' should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed."¹⁸ Where plaintiffs properly seize a court of their claim on the basis of territorial competence, they are legally entitled to a determination of their rights by that court, subject only to overriding concerns of order and fairness. As Lord Ordinary Low stated in *Sim v Robinow*, one of the seminal Scottish cases on *forum non conveniens*, "the court *must* exercise its jurisdiction unless there are very

¹³ See for example, *Jordan v Schatz*, [1999] BCJ No 260 at §6 (SC); *Unifund Assurance Co v Insurance Corp of British Columbia*, [2000] OJ No 3212 at §§31-32 (SCJ); *Bouzari et al v Islamic Republic of Iran*, [2002] OJ No 1624 at §§16-19 (SCJ).

¹⁴ *Chevron Corp v Yaiguaje*, 2015 SCC 42 at §77; *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at §101; *Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCSC 40 at § 122.

¹⁵ *Sinochem International Co Ltd v Malaysia International Shipping Corp*, 549 US 422 at 431-432 (2007).

¹⁶ *Gulf Oil Corp v Gilbert*, 330 US 501 at 504 (1947).

¹⁷ *Spiliada Maritime Corp v Cansulex Ltd.*, [1987] AC 460 at p 478.

¹⁸ *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at 109.

clear and weighty grounds for refusing to do so.”¹⁹ Simply put, jurisdiction is the rule, *forum non conveniens* the exception.

Accordingly, courts should explicitly be reminded to be slow to dismiss cases of which they have proper cognizance. For example, article 3135 of the *Quebec Civil Code* provides as follows: “Even though a Québec authority has jurisdiction to hear a dispute, it may, exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another State are in a better position to decide the dispute.” Interpreting this article of the *Quebec Civil Code*, the Supreme Court of Canada “emphasize[d] the exceptional quality of the *forum non conveniens* doctrine” and cautioned that “by ignoring the ‘exceptionality’ requirement, courts may unwittingly create uncertainty and inefficiency in cases involving private international law issues, resulting in greater costs for the parties. In my opinion, such uncertainty could seriously compromise the principles of comity, order and fairness, the very principles the rules of private international law are set out to promote.”²⁰

The Uniform CJPTA should be amended to reflect the “exceptional” character of the discretion to dismiss in favour of a “clearly more appropriate forum”.

3. The exclusion of the doctrine when jurisdiction is asserted on the basis of necessity

The Uniform CJPTA should be amended to explicitly bar motions to dismiss on *forum non conveniens* where courts have exercised their discretion to serve as the forum of necessity. At common law, as well as under the Uniform CJPTA and *Quebec Civil Code*, Canadian courts have a residual discretion to adjudicate claims that are minimally connected to Canada if they conclude that there is no other court outside Canada where proceedings can be commenced or when the commencement of proceedings elsewhere cannot reasonably be required.²¹ If a plaintiff succeeds in demonstrating that there is no place in which he or she can sue, then, necessarily, there cannot be another “clearly more appropriate” forum.

Extraordinary circumstances that make it unreasonable to require the commencement of proceedings elsewhere include “the breakdown of diplomatic or commercial relations with a foreign State, the need to protect a political refugee, or the existence of a serious physical threat if the debate were to be undertaken before the foreign court.”²² Transnational human rights claims involving corporate defendants might, in certain circumstances, fall within this category of exceptional cases, as was suggested by the Quebec Superior Court in *Anvil Mining*.²³ In that case, however, the court found jurisdiction on the basis of domicile, a finding that was overturned on appeal.²⁴

In 2011, the Ontario Superior Court found it was the forum of last resort in a civil claim against a defendant living in England with respect to acts of torture that occurred in Iran.²⁵ The defendant’s motion to set aside default judgment and decline jurisdiction on the basis of *forum non conveniens* was properly dismissed.²⁶

4. The addition of human rights oriented and broad public interest factors

The Uniform CJPTA provides an open-ended list of six (6) factors that courts must consider when deciding whether another court is the “most appropriate forum”. The listed factors mirror the language used by the Supreme Court of Canada in *Amchem*, which in turn, substantially followed *Spiliada*. While this list of factors should remain open ended, it should be modified to explicitly include specific human rights imperatives, such as (a) the plaintiff’s right to an appropriate and adequate remedy; or (b) the forum’s public interest in upholding international human rights norms and vindicating grave violations of human rights.

¹⁹ *Sim v Robinow*, (1892), 19 R 665 at 666 (Ct Sess), cited with approval by Lord Kinear on appeal.

²⁰ *Spar Aerospace Ltd v American Mobile Satellite Corp.*, 2002 SCC 78 at §81.

²¹ *Van Breda v Village Resorts Ltd*, 2010 ONCA 84 at §54 and §100; *Quebec Civil Code*, CQLR c C-1991, art 3136 ; Uniform CJPTA, s 6 ; *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 29, s 6; *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd sess) c 2, s 7.

²² *West Van Inc v Daisley*, 2014 ONCA 232 at §40, citing with approval *Lamborghini (Canada) Inc v Automobili Lamborghini SPA*, [1996] JQ No 4175 at § 44 (CA).

²³ *Association canadienne contre l'impunité c Anvil Mining Ltd.*, 2011 QCCS 1966 at §39.

²⁴ *Anvil Mining Ltd v Association canadienne contre l'impunité*, 2012 QCCA 117.

²⁵ *Bouzari v Bahremani*, [2011] OJ No 5009 (SCJ).

²⁶ *Bouzari v Bahremani*, 2013 ONSC 6337.

Strong agreement is expressed with the recommendation that “[c]ourts should consider whether internationally recognized human rights are at stake in the case – specifically, if the tort which the plaintiffs allege would also constitute a human rights abuse, there should be a presumption in favour of hearing the case.”²⁷ When injuries in a law suit are framed as torts, such as assault or battery, rather than human rights violations, courts should remain particularly attentive the context in which the causes of action arose and properly characterise the impugned conduct of the corporate defendants. This entails careful consideration of the risk of unfairness in the foreign jurisdiction in light of that forum’s human rights record or social problems such as corruption and impunity.²⁸

Additionally, courts may consider the forum’s own public interest in dutifully vindicating international human right violations because such conduct not only breaches the standards of international law but also, as a consequence, violates the domestic law of the forum. To this end, courts should take judicial notice of those international norms that form part of the domestic legal order, of existing enforcement mechanisms, as well as the forum’s public policy on the right of victims to a remedy and on the prevention of denials of justice.

Conclusion

Rather than abolishing *forum non conveniens*, it is proposed that model legislation codifying the doctrine be adopted or amended, as the case may be, so as to make special provisions for properly grounded transnational human rights claims against corporate defendants. Such legislation might provide for the outright exclusion of the doctrine in rare cases where jurisdiction is assumed on the basis of necessity. In regular cases where jurisdiction is asserted on the basis of territoriality (such as presence or “real and substantial connection”), the doctrine of *forum non conveniens* ought to be codified in accordance with first principles, namely, by emphasising its discretionary and exceptional character and by giving proper weight to contemporary public interest factors, such as the imperative that human rights victims be allowed the opportunity to obtain a remedy in a court of law.

Using the Uniform CJPTA as a starting point, such model legislation might read as follows (new text appears in **bold**):

(1) **Once it asserts jurisdiction**, after considering the interests of the parties to a proceeding and the ends of justice, a court may **exceptionally** decline to exercise its territorial competence in the proceeding on the ground that a court of another state is **clearly** a more appropriate forum in which to hear the proceeding.

(2) No application to dismiss the proceeding on the ground that a court of another state is clearly a more appropriate forum shall be brought where a court asserts jurisdiction in the proceeding on grounds of necessity. For greater clarity, a court may assert jurisdiction on grounds of necessity if proceedings cannot reasonably be instituted elsewhere or where the institution of such proceedings cannot reasonably be required.

(3) A court, in deciding the question of whether it or a court outside [enacting province or territory] is clearly the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

- a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
- b) the law to be applied to issues in the proceeding,
- c) the desirability of avoiding multiplicity of legal proceedings,
- d) the desirability of avoiding conflicting decisions in different courts,
- e) the enforcement of an eventual judgment, ~~and~~
- f) the fair and efficient working of the ~~Canadian~~ legal system as a whole, and
- g) the interest of the forum in protecting and enforcing international human right law and preventing denials of justice.**

²⁷ Amnesty International, *Injustice Incorporated: Corporate Abuses and the Human Right to a Remedy* (London: Amnesty International), 2014 at 151.

²⁸ *Garcia v. Tahoe Resources Inc.*, 2017 BCCA 39 at para 96-127. See also *Araya v. Nevsun Resources Ltd.*, 2016 BCSC 1856.

Meaningful Access to Information in Business and Human Rights Cases

By Lisa Chamberlain*

I. Introduction

The importance of access to information

This note seeks to interrogate and advance the recommendations made in *Injustice Incorporated* in relation to access to information. As a starting point, the inclusion of this issue in the book is welcome and appropriate. Access to information is an important precondition to the realisation of a whole host of other rights and is particularly important in the context of environmental harm. Information is important both as a practical tool in uncovering and proving human rights violations, but is also a key component of the power disparities that exist between the multinational corporations that commit human rights violations and the communities that experience them. Information is power, and in order to make powerful arguments about the way in which natural resources *should* be used, communities need information about the ways in which they are *required* to be used (through regulatory information like licences), *are* being used (through compliance data) and the ways in which those communities are being *impacted* (through environmental assessment information). Simply put, a lack of information perpetuates harm and corporate dominance, while access to it gives communities a fighting chance in obtaining redress and perhaps even preventing human rights violations before they occur.

The recommendation

Injustice Incorporated makes the following primary recommendation in relation to access to information:

“That companies be required by law to generate and disclose information that relates to the impact of their operations on the environment, public health or any other matter of public interest, where the availability and accessibility of the information is critical for the effective enjoyment of human rights.”

The recommendation also includes several nuances including special categories of threshold for disclosure and appeal mechanisms. This recommendation is discussed below, together with some additional ideas for addressing information asymmetry.

Structure of this note

This analysis will primarily traverse the following issues: imposing an obligation to *generate* information on companies, in what *form* information should be disclosed in order for disclosure to be meaningful to affected communities, *desirable features* of an access to information law requiring disclosure by companies, *non-legislative mechanisms* to advance transparency and the importance of seeing *communities as holders of valuable information* in their own right. But first there are a few introductory issues which merit brief comment.

Maintaining a perspective grounded in community experiences

Amnesty International and its partners at the Business & Human Rights Resource Centre should be commended for casting the spotlight on the responsibility of “home states”¹ to play a role in developing solutions to corporate human rights violations. The best solutions will always be those that are firmly grounded in, and informed by, the experiences of communities in “host states”.² This will ensure that the problematic global power dynamics and privilege that often give rise to the very human rights violations we are talking about (with companies primarily from the global North committing rights violations primarily in the global South and so-called developing world) are not perpetuated as we seek to develop responses and solutions.

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¹ Countries where the companies committing the human rights violations come from.

² Countries where the human rights violations actually take place.

Tailoring a response mechanism to the kind of information concerned

Injustice Incorporated refers to a range of different kinds of information that communities need access to. These include information about the structure of the corporation concerned, information about the nature of the planned activities and their impact, baseline data, monitoring information during the lifecycle of the project and information on opportunities for redress. However, the recommendation seems to focus on information on impact. This is appropriate as it is this category of information which is probably most critical but it should be noted that the strategies for facilitating disclosure of information relating to corporate structure may differ from those necessary to address the dearth of information available about impact.

Role of information in PREVENTING harm

Injustice Incorporated is focussed on access to remedy and therefore it is natural for the focus on access to information to be viewed through the prism of the relevance of information at the stage when things have already gone wrong (and when human rights violations have likely already occurred). Nevertheless, it is important to also acknowledge that transparency is not just about mitigation and damages. It is also a preventative mechanism. It is therefore useful to take a lifecycle approach i.e. information and disclosure is necessary and valuable at every stage of a development or corporate activity.

II. The obligation to GENERATE information

The recommendation is interesting because it includes both an obligation to disclose information but also an obligation to generate information. This goes further than most existing access to information laws enforceable against the private sector. The point is well made though, because often the problem is not only that companies refuse to disclose any studies that they may have conducted, but also that they may not have conducted the studies necessary to assess impact in the first place. This concern is particularly prevalent in countries where the government lacks the capacity and expertise to generate this data itself.

This aspect of the recommendation could be strengthened by some additional specificity as to what kind of information must be generated. For example, this could include both baseline and monitoring data i.e. what the environment looked like before the development began, and then how the activity concerned is impacting on a range of environmental indicators. This will allow communities to track impact with specificity and provide the hard scientific evidence of experienced harms which is needed for legal redress. Although an obligation to generate baseline data seems to go beyond the recommendation (which is limited to an obligation to generate information on impact of activities), strategically, including this obligation may provide a useful entry point for obtaining company commitment to transparency, as baseline data may also serve to exonerate a company from liability for pre-existing harm.

One of the more difficult questions is where a legal obligation to generate information should be located. Two of the primary possibilities are either to locate such an obligation in a generic access to information law, or to situate it in sector-specific legislation such as legislation which regulates environmental impact assessment. There are a number of reasons to prefer the latter option. Firstly, on a practical level, not all jurisdictions have an access to information law (or indeed some kind of constitutional right of access to information) but there may well be access to information provisions in sector-specific (in this context, likely environmental) laws.³ In addition, on a conceptual level, the kind of information that would need to be generated is likely to be quite sector specific. For example, baseline data about the levels of toxins and pollutants in water would be very specific to water governance and might thus be better housed in water legislation than in broad access to information legislation.

³ Malawi for example does not have an access to information law but section 52(1) of the Environmental Management Act, 1996 provides that: “[E]very person shall have access to any information submitted to the Director or any lead agency relating to the implementation of the provisions of this Act”.

This will allow for a level of nuance about what kind of technical data is required to be generated and in what circumstances.

It is arguable that an obligation to generate baseline data is already implicit in the environmental impact assessment (EIA) process. A baseline assessment of the state of the area in which a development is proposed is required in order for a company to project the impact of the development with any accuracy. In many cases, companies are therefore probably already generating this kind of data. The significance of an obligation to generate then, would be to require companies to be transparent about that kind of data. For this reason, an explicit obligation to *generate* information (whether in a general access to information law or sector-specific legislation) would make it much easier to attach an obligation to *disclose* onto an obligation to *generate*.

III. The obligation to DISCLOSE information - what kind of information and in what form?

Another set of interesting questions arise as to the form in which information should be disclosed. The kind of 'impact-related' information relevant to environmental harm is often of a technical, scientific nature. Human rights litigation concerning environmental issues often requires analysis of things like air quality models, site water balances and biodiversity offsets. Disclosing this kind of information, without more, doesn't necessarily assist affected communities who are then faced with having to make sense of complex graphs and statistics. Does this mean that information should not only be disclosed but should also be disclosed in an accessible format? And if so, what does an accessible format look like?

It is not desirable to cast companies in the role of "interpreter" thus filtering the information and repackaging it for public consumption. In this light, it may be best for raw data to be disclosed. Nevertheless, for the receipt of raw data to be meaningful, communities will still need to access their own experts to assist with the interpretation of that data. Raw data and an interpretation of that data go hand in hand. An interpretation without raw data to support it lacks credibility, while raw data without interpretation lacks accessibility. A possible response to these challenges may be to craft an obligation on companies to disclose both their raw data and an interpretation of it. This would allow communities without access to their own scientific experts a better chance of being able to use the information available, whilst also allowing them the scope to conduct their own analysis on the raw data if they are able to. This kind of solution is appropriate if we understand that a right of access to information is never fully realised if you are only given a slice of the pie.

Another possible solution is to require government departments or agencies to assist. Ideally, relevant government agencies should have the resources and capacity to conduct their own independent testing so that they can respond to and verify company-generated information. Nevertheless, government actors may well themselves also lack the necessary expertise to do this. In addition, in cases where government is not acting in the best interests of communities (such as many of those discussed in *Injustice Incorporated*), assistance from government may be viewed with considerable suspicion or outright rejected by affected communities. A possible way around this challenge, would be to require the relevant government agency to manage a pot of ring-fenced money available to communities to brief independent consultants. This kind of funding could be supported by channelling money received through compliance and enforcement action (such as fines) into such a fund. Because this kind of solution is very sector specific, it would be appropriate for this kind of legislative obligation to be contained in sector specific laws, rather than in a generic access to information law.

A further issue to reflect on regarding the form in which information is disclosed, is the language in which that information is presented. It is critically important that information be available to communities in a language that they understand. Decoding the science as discussed above is complicated enough without having to tackle the science in your second or third language. It may therefore be useful to consider attaching an obligation to translate information into at least one other official language of the country concerned.

IV. Access to information legislation

The global status quo

As mentioned above, the primary conduit through which *Injustice Incorporated's* recommendations around corporate transparency could be implemented is through an access to information law enforceable against the private sector. Almost half of the world's countries have enacted some form of access to Information (ATI) law. Of these, only a handful of countries have enacted ATI laws which allow information to be requested from private parties.⁴ Moreover, even those ATI laws which do facilitate requests to private bodies, do not do so in respect of *all* kinds of private bodies. For example, the Liechtenstein law extends the right of access to information from only private individuals who perform public tasks. Angolan, Armenian and Peruvian laws allow access to records of only those private companies which are performing public functions. The laws in Czech Republic, Dominican Republic, Finland, Trinidad and Tobago, Slovakia, Poland, and Iceland limit this right only to private organisations that receive public funds. Estonia, France and the UK have adopted a programmatic approach by including private bodies in selected sectors.

In contrast, the African Commission on Human and Peoples' Rights has prepared a model access to information law that permits unqualified requests from private bodies where the information is necessary for the protection of a right.⁵ South Africa is one of the only countries that appears not to qualify access to information from private bodies on the basis of a relationship with the state.⁶ For this reason, as well as because it is the context with which I am most familiar, I will draw on the South African experience to assess whether an ATI law of this nature does in fact achieve the desired level of corporate transparency.

The South African example

The South African Constitution includes a right of access to information enforceable against the private sector.⁷ This right is fleshed out in the Promotion of Access to Information Act 2 of 2000 (PAIA).⁸ Having this kind of legal protection of access to information can be a powerful tool for communities seeking to hold corporations accountable for human rights abuses. This is clearly demonstrated in a recent decision of the South African Supreme Court of Appeal (*Company Secretary of ArcelorMittal South Africa and Another v Vaal Environmental*

⁴ These countries include Antigua and Barbuda, Angola, Armenia, Colombia, Czech Republic, Dominican Republic, Estonia, Finland, France, Iceland, Liechtenstein, Panama, Poland, Peru, South Africa, Turkey, Trinidad and Tobago, Slovakia, and the United Kingdom. See M Siraj 'Exclusion of Private Sector from Freedom of Information Laws: Implications from a Human Rights Perspective' *Journal of Alternative Perspectives in the Social Sciences* (2010) Vol 2, No 1, 211.

⁵ Section 12, Model Law for African States on Access to Information available at <http://www.achpr.org/instruments/access-information/>

⁶ Siraj (note 5 above) at 223. See also T Mendel 'Freedom of Information: A Comparative Legal Survey' UNESCO at 15 available at <http://unesdoc.unesco.org/images/0015/001584/158450e.pdf>

⁷ Section 32 of the Constitution of the Republic of South Africa, 1996 provides that:

"(1) Everyone has the right of access to –
 (a) any information held by the state; and
 (b) any information that is held by another person and that is required for the exercise or protection of any rights.
 (2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state."

⁸ PAIA sets out the nuts and bolts of how to go about actually submitting or responding to a request for access to information, including the appointment of personnel to process requests for information (section 17), the publication of a manual designed to make submitting requests easy to do (sections 10, 14 and 51), time periods (sections 20, 56 and 57), redaction of confidential material (sections 28, 37, 59 and 65) and what legitimate grounds for refusal may exist (section 33-46 and 62-70). Importantly for this discussion, PAIA also contains a chapter regulating the submission of access to information requests to private bodies. Section 50(1) provides that "[a] requester must be given access to a record of a private body if –

(a) that record is required for the exercise or protection of any rights;
 (b) that person complies with the procedural requirements in this Act relating to a request for access to that record; and access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of this Part."

The relationship between the constitutional right in section 32 and PAIA is succinctly summed up by Hoexter (Cora Hoexter *The New Constitutional & Administrative Law* vol II (2001) 57) who explains that PAIA does not replace the constitutional right, but because it purports to "give effect to" it, parties must now assert the right via PAIA. For further discussion of the operation of access to information in South Africa, see *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) para 63; L Chamberlain "Assessing enabling rights: striking similarities in troubling implementation of the rights to protest and access to information in South Africa" *AHRLJ* (2016) 16 365; I Currie & J Klaaren *The Promotion of Access to Information Act commentary* (2002); E Mureinik "Reconsidering review: Participation and accountability" 1993 *Acta Juridica* 35; R Calland "Turning right to information law into a living reality: Access to information and the imperative of effective implementation" (2003) publication of the Open Democracy Advice Centre 2.

Justice Alliance)⁹ which represents an important vindication of communities' right of access to information held by the private sector. This case is the story of the struggles of the Vaal Environmental Justice Alliance (VEJA) – an alliance of community-based organisations, affected communities and environmental activists¹⁰ - to obtain documents necessary in their struggles to hold ArcelorMittal (AMSA) accountable for widespread pollution in an area known as Vanderbijlpark in South Africa.¹¹

VEJA has spent more than a decade trying to get hold of the results of an environmental impact study commissioned by Iscor (AMSA's predecessor) in 1999. The results of this study were written up in a document known as the Environmental Master Plan which mapped pollution levels caused by AMSA's activities as well as the company's plan to remediate this damage over a 20 year period. VEJA sought access to the Master Plan in order to establish the extent to which their health problems and the threats to their livelihoods were being caused by AMSA, and to assist them in playing a role in ensuring that AMSA complied with the pollution remediation measures that the company itself had outlined. When other channels proved unsuccessful, in 2011 VEJA eventually resorted to submitting a request for the Master Plan in terms of PAIA. The initial PAIA request was refused by AMSA including on the basis that the Master Plan was technically flawed, out of date and irrelevant.¹²

In November 2014, the South African Supreme Court of Appeal ordered AMSA to hand over the Master Plan. The Court made a number of critical findings in relation to AMSA's lack of good faith in its engagement with VEJA and the discrepancies between AMSA's shareholder communications and its actual conduct.¹³ Regarding the role of civil society, the Court confirmed that the regulatory framework applicable to the environmental sector envisages a form of collaborative corporate governance in relation to the environment, based on the notion that environmental degradation affects us all.¹⁴ The Court also emphasised the importance of corporate transparency in relation to environmental issues, stating that '[c]orporations operating within our borders, whether local or international, must be left in no doubt that, in relation to the environment ... there is no room for secrecy and that constitutional values will be enforced'.¹⁵

The judgment has rightly been hailed as an important vindication of communities' right of access to information and clearly demonstrates the 'enabling' nature of the right to information. In the context of the discussion in this report, this case yields a number of useful insights. Firstly, the communities most affected by pollution and other forms of environmental degradation, often do not have the financial resources necessary to brief their own army of scientists to conduct impact assessment studies. Therefore if such studies have already been conducted by experts contracted by either the state or the corporation involved, then an access to information system is an important conduit for accessing the knowledge that already exists.¹⁶

Secondly, the case illustrates just how long it can take to access the kind of information necessary to realise environmental (and other) rights. It took VEJA the better part of 15 years to finally get their hands on the Master Plan - and this in a legal system which has a constitutionally enshrined right of access to information enforceable against the private sector, buttressed by dedicated legislation. A conducive regulatory system is therefore not enough. VEJA's experience signals loud and clear that the existence of a right of access to information alone,

⁹ *Company Secretary of Arcelormittal South Africa and Another v Vaal Environmental Justice Alliance* 2015 (1) SA 515 (SCA).

¹⁰ For more information on VEJA see <https://www.facebook.com/pages/Vaal-Environmental-Justice-Alliance-VEJA/322703054542182>

¹¹ ArcelorMittal is one of the world's largest steel suppliers. This case is the subject of a documentary produced by the Centre for Applied Legal Studies, the South African Human Rights Commission and One Way Up Productions which is available at <https://www.wits.ac.za/cals/about-us/law-and-film/>

¹² This position is interesting given that it was on the basis of this Plan that AMSA was awarded various licences by the state (see for example the reference to the water use license that was granted on the basis of the Master Plan in VEJA's answering affidavit in the High Court at para 37). Ultimately the case also became about whether civil society has a role to play in assisting government in monitoring environmental harm caused by the private sector and monitoring compliance with obligations to deal with that harm. This is because, after its other arguments failed, AMSA also took the position that VEJA was not entitled to the Master Plan because they sought somehow to inappropriately usurp the compliance monitoring and enforcement role assigned to government.

¹³ For more information and discussion of this case, see <http://cer.org.za>

¹⁴ *AMSA v VEJA* (note 10 above) para 71.

¹⁵ *AMSA v VEJA* (note 10 above) para 82.

¹⁶ Of course the problem of the independence of experts contracted by a corporation remains.

does not change corporate behaviour. More is needed to trigger a shift from a default of secrecy to one of transparency.¹⁷

The issue of time and delay also has particular implications in the environmental context. In this case, AMSA tried a whole series of arguments to frustrate the process.¹⁸ If access to information requests take too long however, the harm may well occur before the process is resolved. In the environmental sector, there is often a window in which damage to the environment (and thereby to people's health and livelihoods) can be prevented. After that window closes, mitigating the extent of the damage is the best you can do. Timing is thus critical. This is not just a technical matter of legal process.

The South African experience is thus a useful touch point because it provides evidence of the fact that a progressively crafted access to information law is not necessarily the solution, or at least not the entire solution. Despite a progressive regulatory system, the experience of communities and civil society organisations in South Africa using PAIA over the years has shown that in fact PAIA has often been more of an impediment to access to information than a tool for providing effective access.¹⁹ The civil society experience is characterised by information requests being met with attitudes of extreme suspicion, very poor levels of understanding of PAIA, and general disregard for the access to information rights of communities.²⁰

There are perhaps two problems it is useful to diagnose from the South African experience. The first is that the existence of a progressive ATI is not enough if it is not implemented satisfactorily. The second is that an ATI law can also result in unintended overreliance on a request system.

Implementation of an ATI law

The point here is not a novel one. Law is a blunt instrument and laws are only meaningful if they are effectively implemented. In the context of access to information, it is absolutely critical that first, companies are subject to ATI laws, even when a relationship between the state and company is absent, and second, companies properly understand how an ATI law operates and that they devote the necessary resources to its implementation. This means investing in knowledge management systems so that information is organised and accessible, and can therefore be disclosed in a meaningful way. It also requires the designation of certain people within a company to deal with access to information requests. This could be tackled by requiring an indication of such measures at the stage of company registration and structuring the regulation of companies such that registration is not possible without these measures in place. Additionally, there may well be a role for shareholders to play here in holding company structures accountable for the provision of adequate measures to ensure the ability to respond to access to information requests. Furthermore, national human rights institutions might also be able to assist companies in developing the necessary capacity – by providing training on access to information laws or developing a template manual, for example.

Problem of overreliance

Perhaps the biggest problem associated with a legal system which incorporates a request system, is that this request system becomes the focus. The unintended consequence of this can be that communities find

¹⁷ See further L Chamberlain "Accessing Information from the Private Sector to enforce Environmental Rights: Lessons from the *VEJA v AMSA* case in South Africa" *SUR* 2016 (23).

¹⁸ These included that CER was not properly authorised to represent VEJA, that the Master Plan was flawed and out of date and therefore irrelevant, and that VEJA were not entitled to the Master Plan because in seeking access to it they were trying to usurp a government function. See for example AMSA's admission in para 32.4.1 of its answering affidavit in the High Court case (*Vaal Environmental Justice Alliance v Company Secretary of ArcelorMittal South Africa Ltd and Another* South Gauteng High Court, Case No: 39646/12).

¹⁹ See for example D Cote & J van Garderen "Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest" (2011) 27(1) *South African Journal of Human Rights* 167 172.

²⁰ This experience is documented in an annual report on civil society's experience of using PAIA produced by the PAIA Civil Society Network. These reports are available at http://www.saha.org.za/projects/national_paia_civil_society_network.htm. For an insightful discussion of the experiences of civil society organisation and communities in dealing with access to information struggles in the environmental sector see the series of reports produced by the Centre for Environmental Rights available at <http://cer.org.za/programmes/transparency>.

themselves having to submit formal requests for information that should be readily available. Information that ‘relates to the impact of a company’s operations on the environment, public health or any other matter of public interest’ is precisely the kind of information which should be freely available in the public domain.

That is not to say that there are not innovative ways that an access to information law can try to shift attention away from the necessity for submitting formal requests. One option here is for such a law to include a provision which declares certain kinds of information or documents to be automatically available (i.e. without the need for the submission of a request). In South Africa, section 52 of PAIA does just this by providing a mechanism for the head of a private entity to submit to the relevant government minister a description of the categories of records of the private body that are automatically available without a person having to submit a request. The minister is then required to publish these descriptions.²¹ Unfortunately however, the compilation of this list of automatically available information is discretionary.²² Hence the value of a mandatory requirement on private entities of this nature may be worth exploring.

Grounds of refusal and special categories of disclosure obligation

Injustice Incorporated acknowledges that legitimate grounds of refusal might exist but should be kept to a minimum. In the context of accessing information from the private sector, probably the most relevant ground of refusal to mention is that of “confidential information”. Perhaps an obvious point, but it is critical that access to information laws frame disclosure and transparency as the default position so that companies wishing to argue confidentiality for any reason bear the onus of proof. *Injustice Incorporated* suggests that refusal should be subjected to the “harm test” which takes into account whether non-disclosure would undermine the human rights of the individuals or communities affected by the given activity.

One way to accommodate both a need to allow business entities legitimate space for confidentiality whilst also ensuring the transparency of any information relating to possible harm to communities, is for an ATI law to ensure that the default position is disclosure, then allow for an exemption on the basis of confidentiality (available to companies), but then also allow for an exemption to the exemption in certain circumstances (available to communities). This is what the South African law tries to do. Section 68(1) of PAIA allows a private body to “refuse a request for access to a record of the body if the record –

- (a) contains trade secrets of the private body;
- (b) contains financial, commercial, scientific or technical information, other than trade secrets, of the private body, the disclosure of which would be likely to cause harm to the commercial or financial interest of the body;
- (c) contains information, the disclosure of which could reasonably be expected –
 - (i) to put the private body at a disadvantage in contractual or other negotiations; or
 - (ii) to prejudice the body in commercial competition; or
- (d) ...”

However section 68(2) goes on to prescribe that:

“A record may not be refused in terms of subsection (1) insofar as it consists of information about the results of any product or environmental testing or other investigation supplied by the private body or the results of any such testing or investigation carried out by or on behalf of the private body and its disclosure would reveal a serious public safety or environmental risk.”²³

Injustice Incorporated recommends a higher obligation on companies working with toxic or hazardous substances. The attractiveness of this proposal is that it allows for nuance linked to the specific nature of the

²¹ Section 52(2) of PAIA.

²² Unlike the equivalent requirement on state entities in PAIA which is mandatory.

²³ Note that this subsection is curtailed by section 68(3) which provides that “[f]or the purposes of subsection (2), the results of any product or environmental testing or other investigation do not include the results of preliminary testing or other investigation conducted for the purpose of developing methods of testing or other investigation.”

harm. However, possible disadvantages include that if the nature of the harm is specified in too much detail, “deserving” circumstances may fall outside the scope of this kind of obligation. For example, if new kinds of toxic or hazardous substances are discovered that haven’t previously been defined as such. In addition, there is also a danger that the focus of the fight will then become about the definition of “toxic or hazardous” and divert attention and energy away from ideas of disclosure and transparency.

An access to information law which allows for special treatment for certain circumstances but defines those circumstances broadly may ameliorate the problem of under-inclusion. For example, a law that requires disclosure of information relating to “environmental and other health risks” as oppose to when “toxic or hazardous substances” are involved. Of course the downside of this kind of formulation is that it may exacerbate the focus on definitional fights mentioned above, so there is a trade-off to be weighed here. It is however useful to think about framing a ‘special category of disclosure obligation’ as a counter to the corporate cry of confidentiality.

Appeal mechanisms

Injustice Incorporated makes the important point that refusals of information requests should be subjected to review. The kind of review is worth considering. In South Africa, although PAIA provides for an internal appeal against a refusal by a *public* body to grant access, there is no equivalent internal appeal mechanism if your request is denied by a *private* body. For many years in that instance, the only recourse was to approach the courts (as VEJA did). While in theory it should be possible to do so without the assistance of a lawyer, in reality courtrooms and legal processes remain inaccessible and intimidating across the globe.

Thankfully, this problem is now being addressed. For several years, civil society activists in South Africa have been calling for some kind of information ombud to make accessing information a quicker, cheaper and generally more accessible process. The Protection of Personal Information Act 4 of 2013 has now introduced an Information Regulator which will have jurisdiction to hear appeals against unsuccessful PAIA requests.²⁴ The Regulator is currently in the process of being established and will hopefully operate in such a way that communities are able to challenge attempts by either government or the private sector to block access to information, without the need for assistance from a lawyer.

The take-home point here is that some form of opportunity to challenge a refusal which does not require litigation in court makes an access to information system much more accessible for communities. Potentially this could take the form of an internal appeal mechanism. However, it seems rather unlikely that the CEO of a company would compel disclosure in circumstances where those lower down in her corporate hierarchy had refused it. Some kind of information regulator in the style of an ombudsman may therefore be the way to go. Of course, the insertion of an additional stage prior to recourse to court also has the potential to prolong community struggles to access information should they lose at the level of ombud as well. Again, the particular time sensitivity relevant to environmental harm is relevant. Nevertheless, the advantage of enhanced accessibility would seem to outweigh this problem which will only occur in a smaller category of cases (i.e. where the request is refused by the ombud as well).

V. Alternative solutions not involving an access to information law

In addition to considering the desirable features of an access to information law, it is also useful to think creatively about alternative mechanisms to promote transparency. Some ideas in this regard are outlined briefly below.

²⁴ See chapter 5 of the Protection of Personal Information Act 4 of 2013.

Publication as a license requirement

One way to avoid the necessity of submitting requests for information is to design mechanisms for automatic disclosure. One version of this has already been discussed (an obligation to publish lists of automatically available information contained in an access to information law). Another concrete way to achieve this is to require disclosure as a license condition. Much of the kind of information we are talking about here (such as environmental impact assessments) arises in the context of applications to the state for permits and licenses. There is thus an opportunity for the state to compel automatic disclosure by incorporating into a license that a company needs to make certain documents, including the license itself, available on its website, and potentially in other ways as well.

One example of this kind of regulatory feature is a recent amendment to the Environmental Impact Assessment regulations in South Africa promulgated in terms of the National Environmental Management Act 107 of 1998. Regulation 26(h) provides that:

“An environmental authorisation must specify a requirement that the environmental authorisation, EMP, any independent assessments of financial provision for rehabilitation and environmental liability, closure plans, where applicable, audit reports including the environmental audit report contemplated by regulation 34, and all compliance monitoring reports be made available for inspection and copying-

- (i) at the site of the authorised activity;
- (ii) to anyone on request; and
- (iii) where the holder of the environmental authorisation has a website, on such publicly accessible website”.

It is still too early to assess the efficacy of this mechanism but it is certainly one to watch.

Voluntary mechanisms

In addition to binding legislative obligations at the national level, there are also a range of voluntary transparency mechanisms operating in the international sphere. These include the Extractive Industries Transparency Initiative,²⁵ Publish What You Pay²⁶ and the Open Government Partnership.²⁷ A proper discussion of these mechanisms is beyond the scope of this paper but it is worth noting that mechanisms like these can play a useful role in promoting transparency.

Collaborative compliance monitoring and information generation

A useful adjunct to discussions about disclosure obligations, particularly in the context of environmental harm which impacts severely on communities, is the role that collaborative compliance monitoring structures might play in relation to access to information. Typically, the responsibility of monitoring a company’s compliance with its legal obligations and licenses falls on either the company itself (through self-reporting mechanisms) or the government (for example using a compliance monitoring and enforcement unit). This means that transparency is only prioritised if the company and/or government agents believe in its importance and have the capacity to drive transparency initiatives. If however compliance is monitored by a range of stakeholders which include civil society representatives, in addition to the company concerned and government regulators, then transparency is far more likely to be realised.

One example of such a model is the Environmental Management Committee established to watchdog the Vele Colliery near the Mapungubwe World Heritage site in South Africa. Again, a full discussion of this kind of model is beyond the scope of this paper.²⁸ However models like this provide useful learning about the issue of the

²⁵ See <https://eiti.org/document/new-accountability-agenda-human-rights-and-eiti>

²⁶ See <http://www.publishwhatyoupay.org/>

²⁷ See <https://www.opengovpartnership.org/>

²⁸ See further L Chamberlain “Beyond litigation: the need for creativity in working to realise environmental rights” 13/1 *Law, Environment and Development Journal* (2017) 1, as well as the reports published by the Centre for Applied Legal Studies entitled “The Mapungubwe Story: A Campaign for Change” and “Changing Corporate Behaviour” available at <https://www.wits.ac.za/cals/our-programmes/environmental-justice/>

availability of raw data versus interpreted data, the role of independent consultants, and establishing structures in which knowledge can be shared rather than used in a more antagonistic, litigious setting. The model has great promise given its potential to be a proactive (i.e. prevent non-compliance) vehicle for inclusive multi-stakeholder governance, where the perspectives of a wide range of stakeholders (the mine, government departments and agencies, affected communities, civil society and experts) can be brought to bear to ensure full compliance with human rights standards, environmental laws and disclosure obligations.²⁹

VI. Broadening our understanding of who holds information

Lastly, it is important to comment on who we identify as repositories of information. *Injustice Incorporated* seems to be focussed on the company (and to a lesser extent the state) as the holder of information. There is no question that the state and the private sector possess information critical for communities to challenge corporate human rights violations. Nevertheless, it is useful to remember also that communities themselves possess important information. Part of why this is important is that it speaks to what kind of information is valued. For example, communities will not always be “information poor”, particularly when environmental issues are implicated. Traditional communities in particular have very strong connections to their land which comes with acute knowledge of issues such as seasonal availability of water, climatic cycles and the merits of particular land use choices (often referred to as ‘indigenous knowledge systems’).

This is relevant because if we understand that communities themselves hold valuable information, then information can be sought from those same communities, who are far more predisposed to transparency and sharing than corporate entities and governments. One way to capitalise on this is the model of community learning exchanges where a community likely to be impacted by development (such as mining) in the future makes contact with and learns from a community that has already lived through such experiences.³⁰ Another mechanism is social auditing where communities themselves are involved in the generation of data in a way which acknowledges lived experience.³¹

VII. Conclusion

Access to information is without doubt a critical issue to be tackled in the context of addressing human rights violations committed by the private sector. A number of key issues have been discussed including an obligation to generate information and the form in which information should be disclosed. The primary mechanism for advancing community access to information is an access to information law. This note has highlighted the following desirable features of an access to information law:

- A law enforceable against the private sector without qualification as to the type of private entity that falls within the ambit of the law;
- A default position of transparency;
- An obligation to disclose information in at least two official languages;
- Clear time periods for the processing of access to information requests which take into consideration the “environmental window” to prevent damage;
- The need for a mandatory mechanism to promote automatic disclosure without the need for the submission of a request for information;

²⁹ For another possible alternative to reliance on a request system in an access to information law, see the discussion of the value of an obligation to meaningfully engage in K Bentley & R Calland “Access to information and socio-economic rights: A theory of change in practice” in M Langford, B Cousins, J Dugard & T Madlingozi (eds) *Socio-Economic rights in South Africa: Symbols or substance?* (2014) 349.

³⁰ See further L Chamberlain “Beyond litigation: the need for creativity in working to realise environmental rights” 13/1 *Law, Environment and Development Journal* (2017) 1 and Centre for Applied Legal Studies “The Mapungubwe Story: A Campaign for Change” at 88.

³¹ See in this regard how a social audit was used to target the inadequate delivery of sanitation services by a company contracted by the South African Government available at <http://internationalbudget.org/budget-work-by-country/ibps-work-in-countries/south-africa/the-social-justice-coalition-uses-social-audit-to-clean-up-sanitation-issues-in-cape-town/>

- Using a special category of disclosure obligation to counter corporate claims of confidentiality; and
- Incorporating an appeal to an information ombud/regulator to avoid the need for recourse to litigation.

In some instances, it will also be useful to have access to information provisions embedded in sector specific legislation. The following additional measures in other kinds of legislation have also been suggested:

- An obligation to generate baseline data coupled with an obligation to disclose both baseline data and an interpretation of it;
- The creation of a fund administered by government that communities can access to pay for their own scientific experts to interpret company data (or generate their own); and
- An obligation to make provision – both financially and in terms of personnel – for the resources needed for companies to process access to information requests (possibly at the stage of company registration).

Some complementing non-legislative mechanisms have also been suggested in the form of training on access to information provided to companies by national human rights institutions, and shareholder involvement in ensuring company accountability for transparency commitments. Furthermore, there are a number of creative ways to embed transparency without a reliance on legislation. These alternative ideas are particularly relevant given the South African example which illustrates that legislation alone does not achieve transparency. Possible alternative mechanisms include requiring disclosure as a license condition, exploring models of collaborative compliance monitoring, promoting voluntary international mechanisms and the use of community learning exchanges based on an acknowledgment communities themselves are a source of information. The discussion in this note is by no means a comprehensive treatment of these complex issues, but will hopefully be of use to Amnesty International as it continues its critical work in advancing accountability for corporate human rights violations

Access to Information through Discovery in Business and Human Rights Claims

By Channa Samkalden*

I. Introduction - access to information

In *Injustice incorporated*, Amnesty International rightly concludes: "Ensuring communities have access to information is key to enabling people to claim and defend their rights. Information helps level the playing field, and it must be accessible to people by right". The report distinguishes between pre-investment information and information on impacts. Both types of information are of a primarily technical character. While companies may be expected to keep such data and thoroughly investigate the (potential) impact of their activities, the (potential) victims of their operations generally lack the knowledge and means to do so.

Besides pre-investment and post-impact information, in litigation another, non-technical category of information has proven to be of importance. If the parent company is to be held liable for damage following the operations of a subsidiary, claimants must usually prove that it assumed a duty of care and breached that duty. They can only do so if they have access to information (communication, minutes etc.) relating to the knowledge and involvement of the parent company. Notably in the Dutch legal system, jurisdiction with regard to foreign subsidiaries can only be established in the context of a liability claim against the parent company. In the case of four Nigerian farmers and Friends of the Earth Netherlands v Shell, Shell argued that the claim against the parent company was manifestly ill-founded and could consequently not serve as a basis for jurisdiction *vis-a-vis* the Nigerian Shell subsidiary. For this purpose, Shell submitted that the parent company had played no role relevant to the spills whatsoever; an argument it could easily maintain since Shell was under no obligation to disclose any information on the subject. Had the District Court accepted Shell's argument (which it did not), the lack of access to information would have *de facto* led to a lack of jurisdiction. The court of appeal will deliver its judgment on this issue in December 2015. Whatever the outcome, the example shows how much the issues of parent company liability, jurisdiction, access to information and burden of proof are intertwined.

Lacking access to information, victims are in no position to prevent infringement of their rights, whereas - once the harm has been done - they might be unable to sufficiently substantiate their case with factual evidence in court if the burden of proof rests on them as claimants. In this regard, the Amnesty report suggests two reforms: firstly, mandatory disclosure requirements on companies and on the parent company in respect of global operations and, secondly, reforms to civil procedure laws to ensure disclosure of corporate material relevant to matters of public concern.

There is quite an important difference in the scope and effect of these proposed reforms. The second proposal relates strictly to litigation. The desirability and effect thereof depends largely on the forum where a case is being conducted. In the Netherlands, less restrictive rules on disclosure could form a major improvement for victims of human rights infringements indeed; in other countries, adjustments to civil procedure may be merely a matter of nuance. The first proposed reform has a more general nature, obliging corporations to inform the public about the impacts of their activities. As such, it may enable individuals and communities (or even States) to prevent or mitigate such impacts both in and outside of court. Obviously, one major advantage of such reform is that it does not rely solely on litigation and instead offers a much wider range of options to influence corporate behaviour. Adequate information is not only of value to victims of human rights infringements or environmental impacts, but also to shareholders and public authorities - to mention a few. Moreover, the proposed reform - particularly as pertaining to parent companies - reflects the reality of highly centralised multinational institutions; something the law until now has hardly caught up with. Finally, unlike rules of civil procedure, such obligation is pre-eminently suitable to be arranged through international instruments. Pulling it out of the realm of national legal systems is likely to increase its efficacy.

As was already briefly pointed out, the issue of disclosure and access to information cannot be regarded separately from the burden of proof. The monopoly of corporations on relevant information should be somehow corrected to guarantee the principle of equality of arms. If the burden of proof in litigation rests on the victims

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and they do not have access to the required evidence, the right to fair trial is truly at risk. That was briefly the situation in the Dutch case of the four Nigerian farmers and Friends of the Earth Netherlands v Shell, also mentioned in *Injustice incorporated*. A system of obligatory disclosure of information, similar to that in many Anglo-Saxon countries, could solve this problem; reversal of the burden of proof could have largely the same effect. In the Dutch Shell-case for example, the Court could have required evidence from Shell that the oil pollution was *not* a consequence of its negligence, or that the parent company had *not* assumed a duty of care. If the burden of proof is reversed, the risk of not being able to provide such evidence would rest on the corporation. This shifts the balance to the extent that an obligation to disclose information might not be needed anymore from the perspective of equality of arms. Reversal of the burden of proof would in practice require from corporations that they keep accurate records to avert liability, while it is not unthinkable that mandatory disclosure serving claimants in litigation would have an opposite effect. Although reversal of the burden of proof thus comes to the direct benefit of victims, it could be a bit too far-fetched for the near future, as it in fact creates a form of risk liability. It might be more realistic to start with an alleviation of the burden of proof, not substantially changing the liability framework all at once. Within that existing framework, safeguarding access to information in the ways proposed by Amnesty International is both practicable and highly necessary.

II. Suggested reforms

Reforms concerning access to information should aim at i) inciting corporations to collect and maintain information on the possible consequences of its activities and ii) making this information available to the public and specifically to (potential) victims. In my view, these objectives can only be successfully pursued if iii) legal obligations concerning access to information are not limited to national legal systems only, but can be effective in the international reality of multinational corporations. An exception may be formed by rules of civil procedure, which by their nature are a matter of national law.

a. Mandatory disclosure of information

While this paper primarily focuses on reforms to civil procedure laws on disclosure, some attention should be paid to the more general mandatory disclosure of information as proposed in Amnesty's report. Both the OECD Guidelines for Multinational Enterprises and the Guiding Principles on Businesses and Human Rights extensively describe the obligation of corporations to assess human rights impacts, carry out due diligence and to communicate or disclose this information to stakeholders. As long as the Guidelines and Principles are not enforceable in litigation, they remain recommendations, indicators of good practice, but ultimately rather useless in a liability context. A binding treaty would solve that problem, as it would presumably require States to adopt legislation implementing these requirements, while still leaving some room for policy considerations. In my view, an international treaty (or other binding source of international law) is the only truly effective way to ensure greater access to information on a global scale. Problems relating to corporate abuse and access to justice are closely linked to the corporate legal framework, and rules of national legislation could be avoided under the corporate veil. International coordination of some kind is necessary to overcome that obstacle. An international treaty could (indirectly) apply to subsidiaries as well, but would have as a main advantage that it pins down the responsibility of the parent company to ascertain that information is disclosed both centrally and locally. While it may not be fair or workable to expect that the parent company holds or shares highly detailed information concerning the activities of its subsidiaries, the parent company may be expected to know and share more general information on (potential) human rights impacts (even if these impacts are local), as well as to ensure that its subsidiaries keep adequate records and make those available. In effect then, a duty of care would be created for both the subsidiary and the parent company.

Hence, turning existing principles into a binding legal instrument would be an effective way to implement mandatory disclosure as proposed by Amnesty. An obligation to share relevant information with local communities - as laid down for example in the US Emergency Planning and Community Right-to-know Act - could also be part of such international binding instrument. A provision to that extent would significantly strengthen the position of local communities and other stakeholders toward the company. As the problem seems to be that particularly the activities of subsidiaries in low-income countries with fragile legal systems are likely to

infringe on human rights, it is unlikely that purely national provisions could have the desired effect.

b. Reforms to civil procedure laws on disclosure

In the introduction to this paper I set out that under Dutch rules of civil procedure, access to information is very difficult to the extent that the right to a fair trial might be at risk. A reform of civil procedure is necessary to establish better balance, or equality of arms, in litigation between corporations and affected communities or victims. In order to examine the possible ways wherein this could be effectuated, it may be useful to have a closer look at the different types of information distinguished, and the role these could play in civil litigation. As such, Amnesty's report mentions: a) pre-investment information and b) information on impacts, to which I added c) documents on (parent) company involvement and decision-making.

Disclosure of pre-investment information (a) serves primarily to prevent human rights abuse by enabling stakeholders to influence the decision-making process before activities start. Obviously, in order to do so, factual information about the envisaged corporate activities and their potential risks should be available. But as a rule, there will be no damage or harm in this preliminary phase. This type of information therefore would not usually be disclosed as part of civil litigation, unless - particularly in case of baseline data - such harm ultimately occurs.

This is different for the second type of information (b), relating to impacts. Here, harm is already done and it is primarily the causality between such harm and corporate behavior, which must be proven. This is the core area wherein claimants need access to corporate information, as most of the time they do not have the opportunity or the means to gather this type of evidence. A clear example is the already mentioned case of the Nigerian farmers against Shell in the Netherlands. The claimants refuted Shell's defense that the spills were caused by sabotage, but did not get access to technical documents concerning the state of the pipelines or spills in order to substantiate their claim that the spills were in fact caused by equipment failure. Similarly, without access to baseline data and information on previous cleanup activities, they were in no position to prove that the oil pollution was in fact a result of the disputed spills. Another example could be employees in electronics who may have been exposed to benzene, which was probably the cause for their leukemia. They will not be able to prove causality if the corporation is not forced to disclose information on the substances they were exposed to, and the likelihood that harm would occur. In order to be able to deliver a judgment based on facts rather than strategic litigation, information on materials or substances used, safety measures provided and possible health risks should as a rule be disclosed in litigation.

Obligatory disclosure of information on management or parent company involvement plays a slightly different role in litigation. A preceding question is whether a duty of care could be established for the parent company. If that is the case, it may be argued that claimants should also be entitled to take note of information on the measures that were taken. But in many legal systems, the question whether a duty of care for the parent company exists, depends on its factual behavior. The question is then whether corporations should disclose this information in order to be able to establish whether indeed they adopted a duty of care - and, eventually - whether they breached that duty. This may be one bridge too far in some systems of civil law, where disclosure is traditionally limited. In the Dutch case of the Nigerian farmers against Shell, Shell submitted that the claimants' request for documents on the role and involvement of the parent company was merely a "fishing expedition". The District court subsequently did not oblige Shell to reveal these documents. While access to information is vital to determine liability of the parent company, a (more) logical first step may be that its duty of care is explicitly recognised.

III. Allowing greater access to information in litigation

Reform of civil procedural rules on disclosure most importantly regard the second category described above, and potentially the third. With a view to the Dutch legal system, there are two conceivable ways in which disclosure in civil litigation could be improved. One option is to adapt the current legal framework in order to facilitate access to information in these cases. Another option is reshape that system by adopting provisions creating a general right to disclosure similar to that in Anglo-Saxon systems. One could conceive these changes to apply solely to human rights abuse by multinational corporations rather than civil cases in general.

In the Netherlands, three legal provisions are of importance in the context of disclosure in litigation. Section 21 of the Dutch Code of Civil Procedure (DCCP) requires that parties bring forward fully and truthfully all facts that are of importance for the case; Section 22 DCCP holds that the court can oblige parties to produce documents or evidence in the interest of the case. Finally, Section 843a DCCP allows a party who is considered to have a justified interest to demand inspection or a copy or extract of identifiable documents that relate to a legal relationship to which it is a party. In order to succeed, a) a party must prove that he has a legitimate interest, which is normally interpreted by courts as a need for critical evidence in litigation; b) the requested documents must be specified - hence general information cannot be requested and c) the documents must relate to an existing legal relationship. A potential claim based on tort or breach of contract is usually sufficient; it is not necessary that litigation is actually pending. If these criteria are fulfilled, disclosure may still be denied for compelling reasons (e.g. if the documents are of a confidential character) or if the proper administration of justice is also sufficiently guaranteed when no access is granted.

It should be noted that, despite its restricted scope, this provision in theory suffices to guarantee access to information concerning corporate abuse. In the case of the Nigerian farmers against Shell, the District Court could have concluded that the farmers - given their liability claim and the legal grounds thereof - had a legitimate interest in documents concerning, for example, the state of the pipelines in order to substantiate their claim that the spills were caused by equipment failure. However, the District Court was not convinced that the requested documents contained evidence decisive for their claim, thus altogether denying access to those documents.

The first, least intrusive way to improve access to justice would consequently be a wider interpretation of the requirement of “legitimate interest” by Dutch courts. A landmark judgment by the Supreme Court expanding the applicability of article 843a Rv would have that effect. However, this is not the current state of affairs and in the Dutch legal system there is no way to enforce a change in jurisprudence e.g. by guidance to magistrates. If case law does not sufficiently reflect certain principles of law, the way to deal with that problem is by changing legislation.

The second option then, is to broaden the scope of Section 843a DCCP by adapting legislation. This could be done simply by adding a provision, holding that a justified interest is assumed to exist if the circumstances of the case have taken place largely within the sphere of activities or the knowledge the other party. In conjunction therewith, the requirement that “specific documents” may be requested should be broadened to include documents that may contribute to the establishment of the truth, even when not necessarily containing crucial evidence for the claim. Both ways allow for broader access to information, while simultaneously maintaining the generally strict character of Dutch procedural law on disclosure to avoid “fishing expeditions”. Requiring that this type of disclosure can only be requested within the context of pending litigation could, if necessary, further reduce the always-present fear for ‘fishing expeditions’. Section 843a DCCP already sufficiently addresses issues of confidentiality, stating in its fourth limb that a party who has the documents at his disposal need not comply with this request if there are compelling reasons for not doing so and if it may reasonably be assumed that the proper administration of justice is safeguarded even if the information requested is not provided.

In *Injustice Incorporated*, Amnesty International has suggested broadening civil procedure laws to allow disclosure “relevant to matters of public concern”. While I sympathize with that idea, I think its implementation might be more complicated than the suggestions mentioned above. Civil litigation, at least in the Netherlands, is characterized by the specific interests of the parties involved. General interests, or matters of public concern, have always played a somewhat complicated role in private litigation in the Netherlands. The option to litigate in a representative capacity or on behalf of a general interest for example (Section 3:305a of the Dutch Civil Code), is still relatively young. As a rule, arguments brought forward in civil litigation must trace back to a personal interest. Whereas a right to disclosure concerning documents of general interest is likely to cause resistance, the suggestions above in combination with article 3:305a DCP could have largely the same effect.

Besides changes to the Code of Civil Procedure, news substantive laws on corporate responsibility could also effectively result in broader access to information. If such law, for example, would specify a duty of care of (parent) companies in specific situations, a justified interest as required by Section 843a SDCP could be more easily assumed. That said, since access to information is a critical requirement in human rights abuse cases,

any such new law in my opinion should contain a provision specifying the duty of a corporation to collect and disclose relevant data. Article 843a DCCP then would basically remain a fallback option. Obviously, the effect would be quite the same if these obligations were addressed primarily in an international treaty as discussed in the previous chapter.

Finally, access to information could be enhanced by changing civil procedure altogether, introducing a system of disclosure similar to that in the United Kingdom. Personally, I would be very much in favor of such approach. Much to my regret, establishing the truth is simply not the primary focus in Dutch litigation. But the Dutch approach has strong roots in history and legal tradition, and it seems overly ambitious to call for such radical shift at once. An approach wherein first the most negative consequences of the current system are addressed in one of the ways described above seems more realistic.

IV. Conclusion

It is hardly possible to look at the issue of access to information separately from that of the burden of proof, a duty of care, or jurisdiction. Substantial changes in any of these spheres are likely to affect the extent wherein access to information is granted. Regardless however of potential changes in these other categories, it should be clear that a civil law system as in the Netherlands must allow wider access to information for the sake of justice. Particularly in human rights cases, the autonomous position and rights of parties in litigation should be subordinate to the interest of establishing the facts. Combining that starting point with a pragmatic approach, I have suggested legal changes on two levels. Firstly, integrating existing principles of soft law concerning a duty of care of corporations, as well as concerning the collection and disclosure of data etc. in a (preferably international) legally binding instrument. This will by itself create substantial changes in accessibility of information. Secondly, adjusting national laws of civil procedure in order to create a right to disclosure of documents relevant (but not: decisive) for the assessment and establishment of the truth in human rights cases against corporations.

While objections of confidentiality etc. may - at least in the Dutch legal system - be easily dealt with under current legal provisions, the key objection usually made to pleas for broader disclosure is that it would lead to fishing expeditions and a could lead to a floodgate of cases. In the approach here suggested, that would be hardly the case, as it emanates from the strict (Dutch) framework for disclosure in civil procedure. Most importantly however, awareness of human rights abuses and the desire to facilitate access to justice for the victims of these abuses should always prevail above fear for substantial changes in civil litigation. That is even more the case if such changes do not imply some kind of risk liability, but in merely guarantee a better establishment of the truth. One might almost forget that the facts disclosed could also lead to a conclusion wherein corporations are found not to have breached their duty of care.

V. *Postscript*

Since this paper was written, a few developments show a tendency toward a potentially more flexible approach to the access of information in the Netherlands in the future. Firstly, on 18 December 2015, the Court of Appeal of The Hague ordered Shell to disclose most of the documents that had been requested in the case of the four Nigerian farmers and Friends of the Earth Netherlands v Shell. Secondly, plans have been announced to “modernize” the law of evidence, which would - at least in theory - considerably increase the access of parties to information.

In its December 2015 judgment, the Court of Appeal set aside the judgment of the District Court in so far as the claim pursuant to art. 843(a) CCP was dismissed, ordering Shell to allow inspection of the requested

documents.¹ In response to Shell's argument that the documents were highly confidential, the Court of Appeal ordered that "this inspection should be allowed by making them available, for the account of Milieudefensie et al., at the offices of a civil-law notary appointed by mutual agreement (and, lacking agreement, appointed by the Court of Appeal on the request of the parties' attorneys), under the stipulation that only the parties' attorneys, court-appointed experts, if any, and the members of this Court of Appeal dealing with this case may take cognizance of the contents". Furthermore, the Court of Appeal also suggested that "if [the parties] decide by mutual consultation that it is expedient to have an expert examination carried out (at the beginning of stage 2) (preferably by three experts), the Court of Appeal will render assistance by delivering, on principle, an interlocutory judgment". The judgment thus reveals a much more active and investigative approach toward establishing the facts than the District Court had previously adopted, bringing the plaintiffs to a more balanced evidentiary position toward Shell.

It should be pointed out that, unfortunately, factual access to information has remained complicated despite the Court of Appeal judgment. Since December 2015, the appeal has barely progressed, partially due to disputes concerning the execution of the judgment. Firstly, Shell had at its own motion blackened words, paragraphs and even whole pages in the documents it had been ordered to disclose, stating that those sections were confidential and not related to the litigation. When plaintiffs complained about this with the Court of Appeal, the Court ordered an independent expert to assess whether the blackened sections were relevant for the procedure at stake. His report is expected shortly. Secondly, whereas parties agreed that - as the Court of Appeal had suggested - it would be a good idea to conduct expert investigations on the cause of the spills, physical inspection of the spills turned out impossible when Shell submitted that (i) it could not facilitate a mission to the location of the spills for safety reasons and (ii) excavation of the pipelines and isolation of the relevant parts would cost approximately half a million dollars. Those costs are normally borne by the party who loses (most part of) a case; a financial burden the plaintiffs for obvious reasons cannot carry. The contemplated expert research was then limited to existing documentation only. Disputes and complications in the appointment of experts and the questions they should be asked have led to further delays and the experts are still waiting to be appointed today.

Shell's uncooperative attitude is not uncommon in litigation against multinational corporations. The developments described above show that in cases like this one, which are characterized by an imbalance between parties and a general unwillingness from one party to cooperate, a strong and guiding role of the court is indispensable to advance litigation. In this regard, it remains to be seen whether the proposed new framework for evidentiary law will create more solutions or new complications. In general however, those plans would mean a great improvement to the law of evidence and access to information.

The government had already announced that it would broaden the scope of section 834a DCCP, but at the request of parliament conducted a general review of the Dutch rules of evidence. The minister of Justice has embraced the conclusions and suggestions from an appointed expert group, announcing a breach with the system currently in place.² The starting point of the proposed system is that parties have all relevant information at hand when starting litigation. In a "pre-procedural phase" comparable to the discovery or disclosure in Anglo-Saxon systems, parties must exchange relevant documentation. This pre-procedural phase is in principle conducted without judicial intervention, but the guidance of a court can be sought when needed. Parties are obliged to cooperate, although exceptions may be made in case of "weighty reasons". Since the plans have not been converted into legislation yet, it is a bit too early to discuss them here at length. In general however one may conclude that the Netherlands are slowly moving in the right direction as regards access to information for plaintiffs in cases against corporations.

¹ The judgments can be found here: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2015:3586>; <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2015:3588>; <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHDHA:2015:3587>.

² The report, in Dutch, can be found here: <https://www.rijksoverheid.nl/documenten/rapporten/2017/06/07/tk-bijlage-modernisering-burgerlijk-bewijsrecht>

Corporate-State Nexus: The Political Element Hindering Victims' Access to Justice

By Elodie Aba & Sif Thorgeirsson*

*Injustice Incorporated*¹ identified corporate-state relationships as a major obstacle to access remedy for victims of corporate human rights abuse, along with legal hurdles to extraterritorial legal action and victims' lack of information.

Over the years, companies have become very powerful: "Fifty-one of the world's one hundred largest 'economies' are now corporations."² In some developing countries, corporations are even more powerful than the state itself. They can influence policies, legislation and court decisions, creating unequal access to justice for affected communities.

This paper presents some of the current issues regarding corporations' influence on states and provides suggestions to overcome them to ease access to justice for victims.

I. Issues

1. Influence on state policies

The line between private ownership and the state is blurred when a member of the government owns parts of a company. Perceptions of bias emerge when the government does not take action to prevent abuses or fails to investigate allegations of abuse against this type of company. In the [Koh Kong sugar plantation lawsuit in Cambodia](#),³ villagers claim that they were violently evicted from their lands and relocated involuntarily to make room for a sugar plantation run by the Koh Kong companies, which have ties to the Cambodian Government. According to their complaints and testimony, finding land for these sugar plantations took priority over protection of the communities' rights from the impacts of displacement.

An extension of the blurred lines between private and state ownership in companies can be seen in the "revolving door" issue - where high-ranking employees from the public sector move to jobs in the private sector or vice versa. Some legislators end up working for the industry they were regulating, and some influential corporate executives are named to key governmental posts. This revolving door leads to undue private sector influence on government policy and to the government failing to legislate in the public interest. Crucially, this phenomenon exists in both developed and developing countries. For example, the US Food and Drug Administration (FDA) has been accused of acting in the interests of the agricultural and pharmaceutical companies at the expense of public health. Journalists have [highlighted](#)⁴ the links between the FDA and Monsanto over the safety of the bovine growth hormone rBGH. According to them, three FDA officials involved in its approval were previous employees of Monsanto, including one working directly on rBGH. Absolute transparency regarding previous affiliations, and stricter rules governing the conflict-of-interest impediments and "cooling off-period" necessary to work with the other side would be essential to counteract this trend.

Development finance institutions can also have an influence on state policies. Human rights advocates have stressed that these institutions have had a private sector bias which then translates into advice and policies recommended to states that rarely give priority to the interests of the communities, such as water privatisation

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¹ *Injustice incorporated: Corporate abuses and the human right to remedy*, Amnesty International, 7 March 2014, <https://www.amnesty.org/fr/documents/POL30/001/2014/en/>

² *Corporations are more powerful than governments*, Jason Saul, 21 February 2011 <http://archive.skoll.org/2011/02/21/corporations-are-more-powerful-than-governments/>

³ <https://business-humanrights.org/en/koh-kong-sugar-plantation-lawsuits-re-cambodia>

⁴ *Lies and Deception: How the FDA Does Not Protect Your Best Interests*, Mark Gold, Aspartame Toxicity Information Center on Smart Publications, 2014 <http://www.smart-publications.com/articles/lies-and-deception-how-the-fda-does-not-protect-your-best-interests>

and mega hydro power projects. At state level, the need for external funding many times takes precedence over the project's impact on communities and the environment. For instance, in the case of the [Biwater-Tanzania arbitration](#)⁵ about the right to access to water, Tanzania was required to award the water system operation and management work to a private contractor to receive funding from the World Bank. In 2003, the project was awarded to BGT (a joint venture between the British company Biwater International and the German company HP Gauff Ingenieure). In May of 2005, Tanzania terminated the contract with BGT for allegedly damaging the water supply services instead of improving them. BGT brought a case before the World Bank's International Centre for Settlement of Investment Disputes (ICSID), stating that Tanzania's termination had breached their agreements and resulted in an illegal expropriation of BGT's investment, in violation of the Tanzania-UK bilateral investment treaty (BIT). In the amicus brief in support of the Tanzanian Government, NGOs highlighted the heightened level of responsibility of investors in the water sector because of the direct impact of their actions on the achievement of an essential human right: the right to clean and safe water. They also argued the termination of the contract by a government to prevent the worsening or abuse of human rights should not be considered a breach of contract. On 24 July 2008, the arbitral tribunal declared that the Tanzanian Government had violated the terms of its BIT with the UK. However, the tribunal declined to award BGT the monetary damages requested. In another instance, the Inter-American Development Bank called for Guatemala to double its energy production, while the government was trying to attract foreign investments. In 2011, the government approved two hydro projects (Vega I and Vega II) in the Ixil territory and granted licences to the Spanish company Hidroxil. In 2012, community leaders filed a case in Guatemala against the authorities that approved the projects. On 10 September 2015, [the Constitutional Court ordered the suspension of the Hidroxil's hydroelectric Vega I project due to the lack of consultation with indigenous communities](#)⁶ and required the Ministry of Energy and Mining to ensure that the consultation are held in accordance with international standards.

There are also instances in which states and companies join efforts to overcome "obstacles" to investment, real or perceived, such as human rights defenders campaigning for accountability for corporate abuses. In its recent [report⁷ on risks faced by defenders](#) working in the business and human rights field, International Service for Human Rights (ISHR), found: "Through our analysis as a broad coalition we were able to present the [Inter-American Commission on Human Rights] with evidence of a pattern of attacks against defenders of the rights of land, territory and the environment across the Americas..." The report and submission to the Inter-American Commission gave examples of government and business taking joint action "aimed at silencing defenders". In its report "[Open for Business? Corporate Crime and Abuses at Myanmar Copper Mine](#)",⁸ Amnesty International showed evidence of collusion between the Myanmar Government and companies in abuses around the Monywa copper mine complex. Amnesty cites forced evictions and pollution harmful to locals and their livelihoods. The companies cited in the report [denied](#)⁹ the allegations.

A dominant but flawed narrative has led some governments to narrow civic freedoms in their countries in the name of pleasing companies and attracting investments. This is done indirectly through funding laws or citing national security and counterterrorism measures, or directly by banning certain activities and organizations. In India, Greenpeace has been banned from receiving foreign funding: "The government also accuses it of damaging the country's economic interests by campaigning against mining and nuclear projects...[A] secret report by the main intelligence agency recently warned that delays to key development projects being sought by Greenpeace and other activist groups could knock up to three percentage points off India's annual growth rate."¹⁰ In 2013, the parliament of Azerbaijan [passed a law](#)¹¹ that regulates grants, donations and activities of NGOs among others. Many NGOs saw this move as a crackdown on critical voices, including those raising questions

⁵ *Biwater-Tanzania arbitration*, Business & Human Rights Resource Centre <http://business-humanrights.org/en/biwater-tanzania-arbitration>

⁶ *The power to defend our territory: indigenous communities win consultation law in Guatemala*, Jeff Abbott, Upside Down World, 18 November 2015 <http://business-humanrights.org/en/guatemala-constitutional-court-orders-suspension-of-hidroxils-hydroelectric-projects-due-to-lack-of-consultation-with-indigenous-communities>

⁷ *New regional report highlights risks for land rights defenders working on business violations in Americas; Commission President calls situation 'a total disgrace'*, International Service for Human Rights, 20 October 2015 <http://www.ishr.ch/news/new-regional-report-highlights-risks-land-rights-defenders-working-business-violations-americas>

⁸ *Myanmar: Foreign mining companies colluding in serious abuses and illegality*, Amnesty International, 10 February 2015 <https://www.amnesty.org/en/latest/news/2015/02/myanmar-foreign-mining-companies-colluding-serious-abuses-and-illegality/>

⁹ <https://business-humanrights.org/en/myanmar-foreign-mining-companies-colluding-in-serious-abuses-illegality-in-monywa-mine-complex-says-amnesty-report>

¹⁰ *Greenpeace in India barred from receiving foreign funding*, AFP, 4 September 2015 <http://www.theguardian.com/environment/2015/sep/04/greenpeace-in-india-barred-from-receiving-foreign-funding>

¹¹ *Azerbaijan Restricts NGO Funding*, Mina Muradova, Central Asia-Caucasus Analyst, 20 February 2013 <http://www.cacianalyst.org/publications/field-reports/item/12654-azerbaijan-restricts-ngo-funding.html>

about the oil industry. There are unfortunately many other similar examples in the last three years alone around the world.

2. Influence on legal frameworks

Private sector pressure can lead a state to create specific treaties or laws with tax breaks in a bid to attract investments. In 1955, Malawi and the UK Government signed a tax treaty that enables UK companies to pay very low or even no taxes in Malawi. The treaty, still valid today, thus [prevents Malawi, a very poor country, from having the necessary funds to finance essential services](#)¹² such as health care and education for its citizens. In Nigeria, the government passed a special law in 1990, the Nigeria Liquefied Natural Gas Act, granting a [tax exemption period](#)¹³ to Nigeria Liquefied Natural Gas Company (NLNG), jointly owned by Nigerian National Petroleum Corporation (NNPC), Shell, Total, LNG Nigeria Limited and ENI; during this period it paid no taxes. Usually, tax exemptions are given for a period of three years, with a possibility of renewal for another two years. When the government tried to amend the Act in 2016 so that the company would pay the Niger Delta Development Commission levies, NLNG [opposed](#)¹⁴ it and said to the House of Representatives that it would “portray the country as one that does not honour agreements”. NLNG’s Managing Director highlighted that his company would be in a position to support the development of the Niger Delta only if promises made to investors were kept. According to Action Aid Nigeria, the country is losing \$2.9 billion a year as a result of tax breaks granted to companies operating in the country. Their impact on economic and social rights in Nigeria, a country where 60% of the population live in extreme poverty, is great. Action Aid’s Tunde Aremu [declared](#)¹⁵ that “a fair tax system through tax justice raises money to pay for public services like schools, hospitals and roads...[P]ublic services could help realise citizens’ rights...”.

Sometimes, corporations’ actions can have a positive influence on human rights. For instance, early in 2015 [companies mobilised](#) against US state laws that would permit discrimination against LGBT people.

Laws promoting foreign investments often go hand in hand with ones hindering freedoms of citizens, and companies invest in countries that are already repressive. In Myanmar, where the government is opening up for foreign investments, the new Peaceful Processions and Peaceful Assembly Act contains some provisions criminalising violations of its broadly worded restrictions on speech, changing the location of an assembly and failure to give 48 hours’ notice of a protest to the police.¹⁶ Protestors opposing the Letpadaung mine were [jailed](#)¹⁷ for holding an illegal demonstration. In Ecuador, where indigenous peoples, environmental and women’s organizations have opposed mining, oil and agribusiness projects, the government has created new legislation, such as the 2014 Integrated Organic Penal Code, that criminalise them for terrorism and rebellion for instance. Simultaneously, the government has been trying to attract foreign investment to exploit the country’s many natural resources. There are currently eight indigenous leaders charged for “paralysing public roads” that face a criminal trial. They were protesting against [mining and oil projects](#). Members of a women’s organization were arrested for breaking a police cordon and being aggressive with law enforcement authorities, but the real reason behind it was reportedly for their opposition to [IamGold’s Rio Blanco mining project](#).¹⁸ There are also instances where human rights defenders and journalists have been arrested for promoting transparency of government-business relationships. The independent Angolan journalist Rafael Marques wrote a book entitled “Blood Diamonds: Torture and Corruption in Angola” in which he details 500 alleged cases of torture and 100 killings in a diamond-mining district in Angola. He filed a criminal complaint against Angolan generals, several of whom

¹² *Malawi counts cost of tax avoidance in lost lives and crumbling public services*, ActionAid Malawi, on Guardian (UK), 9 February 2016 <https://www.theguardian.com/global-development/2016/feb/09/malawi-tax-avoidance-lost-lives-crumbling-public-services>

¹³ *How Shell, Total and Eni benefit from tax breaks in Nigeria’s gas industry*, Mark van Dorp, SOMO, 20 January 2016 <https://business-humanrights.org/sites/default/files/documents/How%20Shell-%20Total%20and%20Eni%20benefit%20from%20tax%20breaks%20in%20Nigerias%20gas%20industry.pdf>

¹⁴ *NLNG opposes legislators’ move to amend Act*, Femi Asu, PUNCH (Nigeria), 29 April 2016 <http://www.punchng.com/nlng-opposes-legislators-move-amend-act/>

¹⁵ *Nigeria loses \$2.9bn annually to tax incentives – ActionAid*, Abolaji Adebayo, National Mirror (Nigeria), 17 April 2016 <http://nationalmirroronline.net/new/nigeria-loses-2-9bn-annually-to-tax-incentives-actionaid/>

¹⁶ *Burma: Proposed Assembly Law Falls Short*, Human Rights Watch, 27 May 2016 <https://www.hrw.org/news/2016/05/27/burma-proposed-assembly-law-falls-short>

¹⁷ *Police charge seven for Letpadaung protests*, AFP, 2 January 2015 <http://www.mmtimes.com/index.php/national-news/12681-letpadaung-protestors-charged.html>

¹⁸ *Reporte sobre la investigación defensorial por la agresión a Defensoras de la Pachamama en protesta contra el proyecto minero Río Blanco: se espera resolución*, Frente de Mujeres Defensoras de la Pachamama, 12 May 2016 <http://defensoraspachamama.blogspot.fr/2016/05/reporte-sobre-la-investigacion.html>

are part owners of diamond mining companies in Angola. As a result of his investigation, Rafael Marques was counter-sued by them. In March 2015, 15 further charges of criminal defamation were brought against him, and the judge decided to hold proceedings behind closed doors. In May, he was [handed a six-month suspended sentence](#).¹⁹ This trial [mobilised the international community](#),²⁰ including diamond companies and NGOs that called for the charges to be dropped. In Russia, the Indigenous leader Sergey Nikiforov who was opposing the “Petropavlovsk” gold mining project on Evenk ancestral territories was [sentenced to five years of prison](#)²¹ in December 2015 for bribery. Locals and NGOs have protested against his conviction and claim these charges were fabricated.

[Investment treaties and Investor-State Dispute Settlement](#)²² (ISDS) mechanisms give the private sector indirect influence over a country’s legislation. ISDS is embedded in investment and trade agreements and allow investors to bring a claim against a state party hosting the investment if that state has allegedly breached a standard in the agreement. Many of these provisions allow health and safety laws to be challenged by investors, for instance, and hinders the ability of states to legislate for public interest reasons. For example, Germany lowered the environmental requirements of a power plant in order to avoid fighting Vattenfall’s ISDS [claim](#)²³ filed in 2009. In 2011, [Philip Morris Asia brought the Australian Government](#)²⁴ before an international arbitration tribunal, challenging the government’s tobacco plain packaging legislation. It claimed that the ban on trademarks breached a number of foreign investment provisions contained in the investment agreement between Australia and Hong Kong. In December 2015, the arbitration tribunal found that it did not have jurisdiction. Philip Morris was also involved in another arbitration procedure against Uruguay before the World Bank’s International Center for Settlement of Investment Dispute (ICSID). The company claimed that Uruguay’s anti-tobacco measures caused economic damage to the company. In July 2016, [the ICSID ruled that Uruguay has right to protect public health through tobacco regulation](#).²⁵ In 2014, the Canadian company [Infinito Gold filed a request for arbitration](#)²⁶ before the ICSID over the cancellation of the Crucitas gold mine project in Costa Rica. It argues that Costa Rica breached its obligations under the investment treaty signed with Canada. Costa Rica had cancelled the project due to environmental and health concerns of open-pit mining. The case is still pending. [Revelations](#)²⁷ by Greenpeace about the Transatlantic Trade and Investment Partnership (TTIP) provisions “confirm what we have been saying for a long time: TTIP would put corporations at the centre of policy-making, to the detriment of environment and public health,” according to Greenpeace’s Jorgo Riss. The international community criticises the disregard of the TTIP for EU laws that protect consumers in the area of health and environment, in particular the precautionary principle that says that “commercial products must be proven safe before being introduced to the market.”

3. Influence on the judiciary

Companies’ influence on the state can even extend to the judiciary branch where their power can weigh on judicial decisions where companies’ interests are at stake. In many cases, members of the government or of the judiciary with a stake in a particular company, or who received payments by a company for an electoral campaign or another reason, have authority over human rights and other legal claims or regulatory matters involving the company, but do not recuse themselves to avoid a conflict of interest. Perceptions of bias and lack of independence are often so strong that victims of abuse are reluctant to bring claims or pursue a case before their national institutions. For example, Foromo Frederic Loua, a lawyer and founder of the NGO “Les Mêmes

¹⁹ *Angolan journalist Rafael Marques de Morais receives six-month suspended sentence*, Vicky Baker, Index on Censorship, 28 May 2015 <https://www.indexoncensorship.org/2015/05/angolan-journalist-rafael-marques-de-morais-receives-six-month-suspended-sentence/>

²⁰ *Angola: Journalist Rafael Marques faces defamation charges over work exposing abuses in diamond industry*, Business & Human Rights Resource Centre, March 2015 <http://business-humanrights.org/en/angola-journalist-rafael-marques-faces-defamation-charges-over-work-exposing-abuses-in-diamond-industry>

²¹ *Russia: Evenk community leader opposing UK based gold mining company sentenced to 5 years*, International Work Group for Indigenous Affairs, 16 October 2015 http://www.iwgia.org/news/search-news?news_id=1271

²² <http://business-humanrights.org/en/investor-state-dispute-settlement-isds>

²³ *Power Plant Battle Goes to International Arbitration*, Sebastian Knauer, Der Spiegel (Germany), 15 July 2009 <http://www.spiegel.de/international/germany/vattenfall-vs-germany-power-plant-battle-goes-to-international-arbitration-a-636334.html>

²⁴ *Philip Morris international arbitration (re Australian plain packaging law)*, Business & Human Rights Resource Centre <http://business-humanrights.org/en/philip-morris-international-arbitration-re-australian-plain-packaging-law>

²⁵ *Phillip Morris loses tough-on-tobacco lawsuit in Uruguay*, Malena Castaldi & Anthony Esposito, Reuters, 8 July 2016 <http://www.reuters.com/article/us-pmi-uruguay-lawsuit-idUSKCN0Z02LZ>

²⁶ *Infinito Gold files lawsuit against Costa Rican government over canceled gold mining contract*, Zach Dyer, Tico Times (Costa Rica), 10 February 2014 <http://www.ticotimes.net/2014/02/10/infinito-gold-files-lawsuit-against-costa-rica-over-canceled-gold-mining-contract>

²⁷ *TTIP trade talks: Greenpeace leak 'shows risks of EU-US deal'*, BBC News, 2 May 2016 <http://www.bbc.com/news/world-europe-36185746>

Droits pour Tous” (Same Rights for All) in Guinea, [brought a case](#)²⁸ over the appropriation of land used by the villagers of Saoro before the Economic Community of West African States Court of Justice instead of his own national courts because of his mistrust in their independence. In the US, where judges are elected, companies donate money for their campaigns, with the risk of creating serious conflict of interests when a judge rules in lawsuits between alleged victims and companies, thus creating inequality in terms of remedy. In the [“kids for cash” scandal](#),²⁹ two Pennsylvania judges were convicted for accepting money from the co-owners of PA Child Care, a juvenile detention facility, in return for imposing harsh sentences on juveniles brought before their courts and ensuring that juvenile offenders were sent to PA Child Care. In 2012, 89% of Americans [responding to a poll](#)³⁰ “believe[d] the influence of campaign contributions on judges’ rulings is a problem.”

The risk of being sued for defamation or becoming the target of other legal action can be a massive disincentive for pursuing legal claims or campaigns against powerful companies. This risk is all too real as the following two examples demonstrate. After an investigation, the French NGO Sherpa [accused](#)³¹ Vinci and its Qatari subsidiary, QDVC, of using forced labour on their construction sites for the 2022 World Cup in Qatar, and filed a complaint in France in March 2015. The company denied the claims. In April 2015, [Vinci sued Sherpa and its staff for defamation](#), and the case is on-going. The company also sued the NGO for [undermining the presumption of innocence](#)³² and the case was dismissed the case in June 2017. Sherpa [criticised](#)³³ the lawsuits and said that with costly proceedings, the company is trying to discourage them from pursuing the claim. In 2015, a number of US states and territories [opened investigations](#)³⁴ to determine if ExxonMobil had misled investors and consumers over potential risks of climate change despite knowledge about its environmental and social impacts. In April 2016, ExxonMobil [challenged the investigation by the Virgin Islands Attorney General before the court](#).³⁵ In the [Texaco/Chevron lawsuits \(re oil pollution in Ecuador\)](#),³⁶ Chevron filed a racketeering lawsuit against the plaintiffs’ lawyers and representatives in US federal court in 2011. In August 2016, a US court of appeals agreed with a lower court’s ruling that the Ecuadorian plaintiffs and their lawyers had obtained a \$9.51 billion judgment in Ecuador for environmental damage by fraud and bribery.³⁷ In April 2017, the lawyers for the Ecuadorian plaintiffs requested the US Supreme Court to review a court decision barring enforcement in the US of the Ecuadorian judgment against Chevron. In June 2017, the Supreme Court declined to hear the case.³⁸

VI. Recommendations

To governments

- Enact legislation that requires politicians and civil servants to disclose all meetings with and payments received from corporate actors;
- Publish previous affiliations of high-ranking public sector employees to ensure transparency, and enact strict “cooling off periods” legislation and measures against pernicious effects of undue influence via the “revolving door” phenomenon;

²⁸ *Our legal actions tell companies they cannot abuse the rights of communities and remain unpunished*, Foromo Frederic Loua, Les Mêmes Droits pour Tous (Guinea), on Business & Human Rights Resource Centre, 16 July 2015 <http://business-humanrights.org/en/our-legal-actions-tell-companies-they-cannot-abuse-the-rights-of-communities-and-remain-unpunished>

²⁹ *PA Child Care lawsuits (re “kids for cash” scandal)*, Business & Human Rights Resource Centre <https://business-humanrights.org/en/pa-child-care-lawsuits-re-kids-for-cash-scandal-0>

³⁰ *Big Business Taking over State Supreme Courts - How Campaign Contributions to Judges Tip the Scales Against Individuals*, Billy Corriher, Center for American Progress, 13 August 2012 <https://www.americanprogress.org/issues/courts/report/2012/08/13/11974/big-business-taking-over-state-supreme-courts/>

³¹ *France: Vinci Construction investigated over Qatar forced labour claims*, Kim Willsher, Guardian (UK), 26 April 2015 <https://www.theguardian.com/world/2015/apr/26/france-vinci-construction-qatar-forced-labour-claims-2022-world-cup>

³² *French builder Vinci to sue over claims of forced labor in Qatar*, Dominique Vidalon & Gilles Guillaume, Reuters, 24 March 2015 <http://www.reuters.com/article/us-vinci-qatar-labour-conditions-idUSKBNOMK0OH20150324>

³³ *Legal action against Vinci in Qatar: Vinci institutes defamation proceedings, claiming exorbitant damages from Sherpa Organisation and its employees*, Sherpa, 16 April 2015 <https://www.asso-sherpa.org/legal-action-vinci-qatar-vinci-institutes-defamation-proceedings-claiming-exorbitant-damages-sherpa-organisation-employees>

³⁴ *Investigation raises concerns about ExxonMobil blocking climate action despite knowledge about environmental & social impacts of climate change*, Business & Human Rights Resource Centre, November 2015 <http://business-humanrights.org/en/investigation-raises-concerns-about-exxonmobil-blocking-climate-action-despite-knowledge-about-environmental-social-impacts-of-climate-change>

³⁵ *ExxonMobil Blasts Official on Climate Change*, David Lee, Courthouse News Service (USA), 14 April 2016 <http://www.courthousenews.com/2016/04/14/exxonmobil-blasts-official-on-climate-change.htm>

³⁶ *Texaco/Chevron lawsuits (re Ecuador)*, Business & Human Rights Resource Centre <http://business-humanrights.org/en/texacochvron-lawsuits-re-ecuador>

³⁷ <https://www.courthousenews.com/2nd-circ-shields-chevron-from-9-5b-verdict/>

³⁸ <https://www.reuters.com/article/us-usa-court-chevron-idUSKBN19A1V4>

- Enact strong anti-corruption legislation or ensure that existing laws are enforced to prevent undue influence;
- Ensure that human rights and environmental impact assessments on planned company projects are carried out or verified independently from the company, in full consultation with individuals and communities likely to be affected, and that these individuals and communities have timely access to all relevant information and expertise to guarantee their informed participation;
- Reform investment treaties to ensure companies cannot use them against states that take steps to safeguard the human rights of their citizens.

To civil society

- Raise awareness of affected communities about undue corporate influence and build capacity at the grassroots level to ensure communities know their rights and can document undue influence by corporations on states, including at the local level;
- Draw attention to the reputational risk for companies of being seen as colluding with states in the design and enactment of laws or other actions that result in an impairment of the effective protection or exercise of human rights;
- Highlight publicly companies' commitments and policies on human rights at odds with their inaction or continuation of business relationships with states that are resulting in human rights abuses.

To regional and international bodies and International Financial Institutions

- Harmonise legislation, at regional and global level, to avoid providing finance to companies for projects in legal contexts that do not provide effective remedies;
- Require that all efforts to shape foreign economic and investment policies, including via International Financial Institutions, are assessed against the potential impact on human rights, and are publicly disclosed;
- Reform internal complaints mechanisms and international arbitration mechanisms to allow for equality of arms between the disputing parties, recognition of human rights concerns over rights of investors and full transparency of proceedings and decisions;
- Ensure ISDS takes human rights into account, that public health and other relevant human rights concerns override rights of investors.

To companies

- Stress that stability, respect for human rights, and a healthy civil society is good for business and lead to a better investment environment;
- Increase transparency about relationship with governments, including with regard to employment of former high-ranking individuals; financing of campaigns and other costs of judges, legislators, and other political figures;
- Respect the rule of law and boundaries of influence on the judiciary;
- Avoid private lobbying of governments behind closed doors that may result in diminution of protection of human rights.

VII. Conclusion

As developed throughout this paper, the risks in an excessively close relationship between companies and states have great bearing on the broader theme of access to justice for victims of business-related human rights abuses. The recommendations detailed above are a good start to restore the imbalance between corporation and victims, but there is still a long way to go. There is deep secrecy around many companies' relationship with governments and their influence on policy and legislation. At present it is unlikely that the concerned states will pass laws to diminish the influence of companies on government, partly out of fear that companies and investors would withdraw from a country challenging their role. However, in the long term, long-sighted investors should always prefer environments that respect the rule of law, with a vibrant civil society, and with all the conditions

necessary to encourage good economic competition. Responsible states prefer to host the best quality and progressive-looking investors in their territories, rather than investors that only enrich a few and leave the majority more impoverished and more marginalised.

“A great leader must serve the best interests of the people first, not those of multinational corporations. Human life should never be sacrificed for monetary profit. There are no exceptions.”³⁹

³⁹ Suzy Kassem, *Rise Up and Salute the Sun: The Writings of Suzy Kassem*