

# **Business and Human Rights: Enhancing Accountability and Access to Remedy**

**An OHCHR initiative to contribute to a  
fairer and more effective system of  
domestic law remedies, in particular in  
cases of gross human rights abuses**

Analysis of written submissions received in  
response to the call for submissions by OHCHR to  
the report “Corporate Liability for Gross Human  
Rights Abuses: Towards a fairer and more effective  
system of domestic law remedies”

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## 1. Background and call for submissions

The study “Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies” (the “Study”) was commissioned by OHCHR in May 2013 as a first step in a process to contribute towards conceptual, normative and practical clarification of key issues arising from the present system of domestic law remedies for gross human rights abuses. The Study took the form of a review of evidence relating to (a) the legal substance of domestic law regimes (relying principally on empirical evidence collected for the purposes of the 2006 study *Commerce, Crime and Conflict*)<sup>1</sup> and (b) evidence relating to the way that domestic remedies are used in practice, gathered during the course of the mandate of the United Nations Secretary General’s Special Representative on Business and Human Rights, Professor John Ruggie, and supplemented by a database of case histories compiled and maintained by the Business and Human Rights Resource Centre.<sup>2</sup>

The key finding of the Study is that the current system of domestic law remedies (both criminal and civil) for business involvement in gross human rights abuses is not working well for victims at a practical level. While companies may be subject to an “expanding web of liability” in theory, this is not yet translating into an effective and accessible system of remedies in practice. The Study identifies a number of areas where lack of clarity and consensus with respect to key aspects of law and policy is likely to hold back legal development and therefore recommends a *consultative, multi-stakeholder process of clarification* in two parts; i.e.:

- A process aimed at clarifying key issues of principle and policy, including elements of corporate liability under private and public law regimes and the respective roles and responsibilities of home and host states in relation to prevention, investigation and enforcement; and
- A process to identify models of best State practice in relation to the functioning of domestic remedial mechanisms, covering a range of practical and technical issues, which could be used to help identify priorities for future technical assistance and capacity building.

The Study also identifies the need for a renewed focus on the area of criminal law enforcement, given the apparently very low levels of activity by domestic law enforcement bodies. It therefore includes recommendations for additional work to be undertaken specifically with domestic law enforcement and prosecution bodies, to better understand the legal, political and practical challenges they face, and to help build better local enforcement know-how and capacity.

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<sup>1</sup> See Ramasastry and Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law* (FAFO, 2006). <http://www.fafo.no/pub/rapp/536/536.pdf>.

<sup>2</sup> These case histories can be viewed at <http://www.business-humanrights.org/LegalPortal/Home>.

Following publication of the Study in February 2014,<sup>3</sup> OHCHR called for written submissions from all interested stakeholders on the issues identified in the Study as requiring further clarification (see chapter 5, section 5.2.1). The deadline for written submissions was 30 June 2014.

At its twenty-sixth session, on 27 June 2014, the Human Rights Council passed a resolution which requests the UN High Commissioner for Human Rights to “continue the work to facilitate the sharing and exploration of the full range of legal options and practical measures to improve access to remedy for victims of business-related human rights abuses, in collaboration with the Working Group, and to organize consultations with experts, States and other relevant stakeholders to facilitate mutual understanding and greater consensus among different views.” The UN High Commissioner for Human Rights is requested to publish a progress report of its work at the twenty-ninth session of the Human Rights Council and then to present a final report for consideration by the Human Rights Council at its thirty-second session.<sup>4</sup>

## 2. Overview of submissions received

As of Wednesday, 16 July 2014, twenty (20) written submissions had been received by the OHCHR comprising:

- Six (6) submissions from states and regional organisations (United States, United Kingdom, France, Greece, Italy and the European Union);
- One (1) submission from business and/or employers organisations (International Organisation of Employers);
- Six (6) submissions from non-governmental organisations (“NGOs”) and coalitions of NGOs (the Global Initiative for Economic, Social and Cultural Rights; the Amutah for NGO Responsibility; SOMO; Privacy International; the RAISE Health Initiative for Workers, Companies and Communities; and International Corporate Accountability Roundtable);
- Three (3) submissions from lawyers and law firms (Richard Meeran of Leigh Day; Deighton Pierce Glynn; a submission from Doug Cassel in the form of an advance version of an article submitted to the Notre Dame Law Review on the implications of the *Kiobel* decision on the future application of the Alien Tort Statute in the US);
- Two (2) submissions from Universities and academics (Assistant Professor Urska Velikonja, Emory University School of Law; a joint submission from the University of Utah’s S.J. Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston);

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<sup>3</sup> Zerk, *Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies*, February 2014, copy available at <http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx>. (Referred to in this report as the “Original Study Report”).

<sup>4</sup> See Human Rights Council Resolution, A/HRC/26/L.1, paragraph 7.

- Two (2) submissions from other not-for-profit organisations working in the field of business and human rights (Institute for Human Rights and Business; Shift).

### 3. A summary of key issues emerging from submissions

The submissions, coming from a range of different stakeholder groups, reflect a variety of interests, viewpoints and concerns. However, a number of themes emerged, which were reflected in a significant proportion of the responses and which were taken up, in different ways, across different stakeholder groups.

#### 3.1 The scope of the study

Several of the respondents queried the rationale for limiting the scope of the study to *gross* human rights abuses.<sup>5</sup> Richard Meeran of Leigh Day makes several arguments as to why the scope of the study should be extended to encompass a wider range of human rights abuses.<sup>6</sup> First, the term “gross human rights abuses” potentially excludes a range of serious abuses that can result in serious harm.<sup>7</sup> Second, this approach tends to exclude the human rights impacts that flow directly from business activity to focus instead on cases of “corporate complicity” where the primary wrong-doer is in many cases a state entity. This, he argues, is “counter-intuitive”. Moreover, addressing abuses of economic, social and cultural rights is of some importance in preventing the gross abuses that can occur in situations of conflict over the human rights impacts of business activities.<sup>8</sup> Third, as the methods for obtaining redress for gross human rights are the same or similar to the methods for obtaining redress for other kinds of human rights abuses, valuable lessons arising from the latter category could be overlooked.<sup>9</sup>

These points are echoed in other submissions. The Global Initiative for Economic, Social and Cultural Rights suggests that focussing on gross human rights abuses may cause economic, social and cultural rights (“ESC rights”) to become neglected as the extent to which ESC rights are covered by definitions of gross human rights abuses is less well understood (i.e. than in relation to civil and political rights).<sup>10</sup> This submission also expresses concern about the problem of “impunity” for violations of ESC rights, arguing that these can have a disproportionate effect on people who are already marginalized and vulnerable. The submission from the Amutah for NGO Responsibility

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<sup>5</sup> Submissions of Richard Meeran, Leigh Day; Global Initiative for Economic, Social and Cultural Rights; the Amutah for NGO Responsibility; Utah College of Law/Center for International Law and Policy; RAISE Health Initiative for Workers, Companies and Communities); International Corporate Accountability Roundtable.

<sup>6</sup> Richard Meeran, e-mail dated 19 May 2014.

<sup>7</sup> Ibid.

<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> Global Initiative for Economic, Social and Cultural Rights, *Submission to the UN Office of the High Commissioner for Human Rights on the Zerk Report on Corporate Liability for Gross Human Rights Abuses*, May 2014. See further the discussion on the definition of “gross human rights abuses” at section 3.2 below.

criticises what it sees as the focus on cases arising in the context of armed conflict, arguing that because of this “billions of people subjected to daily gross abuses are ignored in the studies and excluded from efforts to craft effective remedies”.<sup>11</sup>

The joint submission from the University of Utah’s S.J Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston argues that there are “risks” in focussing on the most egregious abuses “to the exclusion of other transgressions that could culminate in egregious harms”,<sup>12</sup> arguing that this seems at odds with the approach taken in the UNGPs. Their joint submission argues that more account should be taken of “issues related to labour and employment, environmental concerns and other situations that harm individuals and communities”.<sup>13</sup> RAISE Health Initiative for Workers, Companies and Communities argues that more attention should be given to worker health issues, including labour brokering.<sup>14</sup>

Concerns about the scope of the study were also raised by two of the state/regional organisation respondents (European Union; United States). The United States submission argues that “focussing on the severity or nature of the conduct and not necessarily the degree of corporate involvement, risks overlooking the ways in which corporations, as a particular form of organization, may be most likely to have human rights impacts”.<sup>15</sup>

**Author’s comments:** It is the OHCHR’s view that, for the purposes of progressing the work identified in the Study as necessary to improve the performance of domestic judicial mechanisms, the present focus on gross human rights abuses remains valid. First, as will be discussed in the next section, gross human rights abuses are a well established category under international law, even though it is not precisely clear, as a matter of international law, what is and is not included. As discussed in the Study itself, the UN General Assembly has adopted a set of basic principles on rights to remedy for victims of gross human rights abuses.<sup>16</sup> At the domestic level, gross human rights abuses are criminalized in many jurisdictions under specific regimes and specific criminal law provisions, at least as far as individual perpetrators are concerned. Second, while the liability of individual offenders may have been clarified under the laws of many domestic

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<sup>11</sup> The Amutah for NGO Responsibility, *Submission of the Amutah for NGO Responsibility to the Office of the High Commissioner for Human Rights for the Study of Domestic Law remedies for Corporate Involvement in Gross Human Rights Abuses*, 1 June 2014, at p. 14.

<sup>12</sup> University of Utah’s S.J Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston, *Commentary on the OHCHR’s Study on Domestic Law Remedies: Corporate Liability for Gross Human Rights Abuses*.

<sup>13</sup> Ibid.

<sup>14</sup> RAISE Health Initiative for Workers, Companies and Communities, *Recommendations for OHCHR Corporate Liability for Gross Human Rights Abuses*, June 30, 2014.

<sup>15</sup> US Government Submission in Response to the Office of the High Commissioner for Human Rights’ Study on “Corporate Liability for Gross Human Rights Abuses, July 8, 2014.

<sup>16</sup> United Nations General Assembly Declaration 60/147 on the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, adopted 16<sup>th</sup> December 2005, UN Doc. A/Res/60/147.

jurisdictions, the liability of corporate entities is still uncertain in many cases, making the clarification of corporate liability for gross human rights abuses a logical next step in terms of legal development. In the meantime there are, for this category of very serious abuses, existing domestic criminal regimes and institutions that are sufficiently well developed and well defined to enable meaningful comparative analysis and meaningful conclusions to be drawn about the effectiveness of different approaches and strategies. Third, prevention and punishment of gross human rights abuses is an area in which states are prepared to exercise and tolerate some degree of extraterritorial regulation and enforcement, making this a good starting point for discussion and consensus-building on the regulatory roles and responsibilities of different interested states in the B&HR sphere.<sup>17</sup> Fourth, while the mandate given to the OHCHR under paragraph 7 of A/HRC/26/L.1. is not limited to gross human rights abuses, in view of the timetable envisaged in that mandate it makes sense to prioritise for study and action those abuses which are most egregious in nature and which carry the severest consequences for victims.

For all these reasons, the present focus on gross human rights abuses is considered to be the best way forward both practically and from the point of view of substantive legal development.

The concerns of some respondents about the possible neglect of ESC rights, or of labour and environmental cases can be addressed by further clarifying the scope of “gross human rights” for the purposes of future work. This is discussed in more detail in the next section of this paper.

The concerns raised by some respondents that the focus on gross human rights abuses could cause valuable lessons from other fields of regulation (e.g. tort law, environmental law and labour law) to be overlooked should be addressed in the more detailed work plans relating to each of the priority areas for future work. It will be important for the work on best practice models for future state action to take account of developments in other fields of law and of practical experiences of implementing and applying innovative solutions in respect of issues such as legal funding, criminal sanctions and civil remedies.

Similarly, the issues raised in the submission from the United States – that there should be a greater focus on the degree of corporate involvement (as opposed to the severity of the abuse) – would be addressed in the work plan envisaged for Recommendation 1(Part 1), a key aim of which is indeed to clarify the circumstances in which, and the conditions in which, corporate liability for gross human rights abuses would arise under different domestic law regimes. This would naturally include a consideration of the relevant management, organisational and contractual issues.

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<sup>17</sup> See n. 3 above, Recommendation 1 (Part 1), pp. 111-112.

### 3.2 The lack of a universal definition of “gross human rights”

Several respondents expressed concern about the decision not to adopt a precise legal working definition of gross human rights abuses for purposes of the study. The submission from the Amutah for NGO Responsibility argues that this is a serious deficiency, claiming that the apparent lack of remedies for business involvement in gross human rights abuses is a direct result of the lack of clarity as to what is proscribed.<sup>18</sup> The submission from International Corporate Accountability Roundtable notes “*a lack of clarity and/or inability to define “gross human rights abuses” in international human rights law*” and suggests that “*how the OHCHR project will evolve based on this formulation is unclear and will present difficulties from a human rights perspective*”.<sup>19</sup>

The Global Initiative for Economic, Social and Cultural Rights, too, argues that “*if ... the scope is limited to ‘gross human rights abuses’ it will be critical to properly define this term in order to know what situations are being addressed and which are not*”.<sup>20</sup> Specifically, the Global Initiative for Economic, Social and Cultural Rights asks for greater clarity as to whether, and to what extent, violations of economic, social and cultural rights are to be addressed in future work.

The United States submission states that “*while we agree that there is a practical need to focus initially on a core-set of human rights abuses, we believe that there must be a deliberate, open discussion about what should constitute that core set*”.<sup>21</sup>

The submission from the Institute for Human Rights and Business makes a more general, forward-looking point, arguing that the study should avoid developing B&HR-specific definitions of gross human rights abuses “*for that would create an exclusive category of violations, whereas such violations are prevalent in the wider human rights sphere, and may occur in instances that involve state and other non-state actors, including armed groups religious organisations*”.<sup>22</sup>

**Author’s comments:** The lack of a precise legal working definition of gross human rights abuses was highlighted as a potential problem by around a quarter of the respondents. The decision to adopt the flexible definition that appears in the OHCHR’s own interpretative guide to the UNGPs<sup>23</sup> was a deliberate one for the purposes of the Study and the reasons for this are explained in the Study itself.<sup>24</sup> This is not to suggest that precise definitions are not important in the context of domestic regulation and law enforcement. On the contrary, the Study argues that greater clarity of domestic legal

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<sup>18</sup> See n. 13 above, p. 2.

<sup>19</sup> Submission of the International Corporate Accountability Roundtable, 15 July 2014, p. 1.

<sup>20</sup> See n. 12 above.

<sup>21</sup> See n. 18 above.

<sup>22</sup> Institute for Human Rights and Business, *Submission to OHCHR on the Study “Corporate Liability for Gross Human Rights Abuses”*, 30 June 2014, p. 4.

<sup>23</sup> See n. 3 above, pp. 28-29.

<sup>24</sup> See n. 3 above, pp. 25-29.

standards is absolutely necessary (for the proper functioning of domestic judicial mechanisms, for access to justice and for legal certainty) and identifying and building consensus around the relevant standards is a fundamental aim underlying the Study's recommendations.

In light of previous unsuccessful efforts to develop a precise universal definition, and taking account of the comments of some respondents about the potential pitfalls of developing a "B&HR-specific" definition of gross human rights, the OHCHR considers that it would not be advisable to devote a great deal of effort to these definitional issues at this point in time. Attempting to resolve all of the definitional issues at this stage will very likely turn out to be a time-consuming and ultimately unproductive distraction. Moreover, such an exercise is not critical to the progression of any of the various work streams envisaged in the recommendations laid out in the study report. Precise legal definitions of "gross human rights abuses" are not necessary pre-conditions for either of the two main work streams envisaged under Recommendation 1(Part 1); namely (i) clarification of various tests for corporate liability under domestic law and (ii) a conversation about the roles and responsibilities of different interested states. Neither are they necessary for the work envisaged in relation to the development of "good practice models" for states in relation to practical issues (see Recommendation 1(Part 2).

Nevertheless, it would be helpful, for the purposes of OHCHR's next phase of work on access to remedies for business involvement in gross human rights abuses, to provide more detail about the kinds of abuses that would be covered by the OHCHR's flexible definition. This should help to allay concerns expressed in a number of submissions that the OHCHR's project is primarily (or indeed only) concerned with civil and political rights, or abuses that take place in conflict zones. Moreover, from a methodological perspective, greater clarity with respect to the types of abuses covered will lead to better and more transparent criteria for the selection of empirical evidence for future study, enabling a more objective and accurate picture to be gained of the effectiveness of domestic judicial mechanisms overall.<sup>25</sup>

For the purposes of future work it should be made clear that the category of gross human rights abuses will indeed include all of the abuses listed in the definition that appears in the OHCHR's Interpretative Guide to the UNGPs, i.e. "*genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, enforced disappearances, arbitrary and prolonged detention, and systematic discrimination*".

This definition includes abuses such as forced and bonded labour and extra-judicial killing. It is not limited to violations that take place in conflict zones. A good case can be made for the inclusion, insofar as they are not already covered by the above, of abuses that fall within the ILO's definition of the "worst forms of child labour".<sup>26</sup>

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<sup>25</sup> See further comments on methodological issues at section 3.4 below.

<sup>26</sup> See the 1999 ILO Convention (No. 182) on the Worst Forms of Child Labour, Article 3.



In addition, it should be made very clear, going forward, that violations of ESC Rights – such as rights to just and favourable conditions of work, rights to the highest attainable standard of physical and mental health and rights to adequate food, clothing and housing – do indeed come within the ambit of this project when *“they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.”*<sup>27</sup>

### 3.3 Extraterritorial versus local solutions

The respondents had different views on whether (a) removing barriers for extraterritorial remedies or (b) improving capacity at local level should be the priority of future work. However, most appear to favour the idea that more effort needs to be put into the longer term project of developing local capacity so that victims are better able to access justice locally (i.e. a place that is geographically close to where they reside or where the abuses took place).

The Study explicitly rejects the idea that one should be given priority over the other, *“taking the view that both have a role to play”*.<sup>28</sup> It questions the sustainability of the present system of domestic remedies precisely because of the apparent over-reliance of extraterritorial solutions at the possible expense of the development of greater capacity and responsiveness at local level.<sup>29</sup> The additional costs, complexity and legal risk for claimants involved in pursuing extraterritorial cases is raised as a concern in several places in the Study.<sup>30</sup> Underlying the Study recommendations themselves<sup>31</sup> is recognition of the need to put more effort and resources into the development of local capacity and expertise, and of the likely need for technical assistance to facilitate this.

Despite this, a number of the respondents felt that there was an over-emphasis on extraterritorial solutions in the study report. The submission from the United States expresses the view that *“the scope of this study goes beyond that of the Guiding Principles at times, and as a result focuses more on extraterritorial contexts than the Guiding Principles themselves.”*<sup>32</sup> This submission goes on to recommend that *“the consultation and clarification process employ a more balanced approach with substantial attention to the use of domestic and/or local mechanisms for providing remedies for human rights abuses involving corporations, since such mechanisms may be the most accessible forums for the majority of victims”*.<sup>33</sup>

The submission from the International Organisation of Employers states that *“it is very unfortunate that the study still focuses mainly on access to remedies*

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<sup>27</sup> OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretative Guide*, United Nations, 2012, HR/PUB/12/02, copy available at [http://www.ohchr.org/Documents/Publications/HR.PUB.12.2\\_En.pdf](http://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf), p. 6.

<sup>28</sup> See n. 3 above, p. 12.

<sup>29</sup> Ibid, p. 104.

<sup>30</sup> Ibid, see for instance section 4.3.

<sup>31</sup> Ibid, section 5.2.1

<sup>32</sup> See US Government submission, n. 18 above.

<sup>33</sup> Ibid.

*through extraterritorial jurisdiction*".<sup>34</sup> The submission goes on to say that *"the study does not sufficiently identify and explore the shortcomings of extraterritorial jurisdiction, for instance the challenge of "forum shopping and the legal uncertainty for companies this brings, the issue of tremendously higher costs, the challenge of complicated issues of choice of law and procedure, including the divergent norms on gathering of evidence and substantive approaches to questions of liability, and, most importantly, that extraterritorial jurisdiction is mainly open for allegations against multinationals. In view of the fact that a vast majority of companies are purely domestic, this approach is therefore very limited and will not improve access to remedy and justice for the majority of people"*.<sup>35</sup>

To other respondents, however, taking steps to build capacity for addressing gross human rights abuses at host state level would form only part of a "multi-pronged" approach to improving access to remedy. According to the submission of the Institute for Human Rights and Business,<sup>36</sup> *"strengthening domestic remedies would provide the most immediately accessible means of accessing justice, while also strengthening the rule of law in countries ... an approach that supports national systems rather than bypassing them whenever possible is a more sustainable approach and consistent with the principle of state sovereignty and with the state obligation to protect human rights."*<sup>37</sup> However, the submission goes on to argue that there will still be an important role for extraterritorial jurisdiction in certain cases: *"Given that many of the cases involve corporate complicity in abuses by governments, there is an even stronger reason for exploring other options for seeking remedies"*.<sup>38</sup>

The submission by Deighton Pierce Glynn takes a similar line, i.e. *"that a priority must be strengthening the rule of law in developing countries"*.<sup>39</sup> However *"the rule of law also requires that legal systems in the countries where corporations are domiciled and operate regulate the activities"*. The respondents add that *"there is no inconsistency in overlapping jurisdictions in this respect"*.

Other respondents argue for a greater use of extraterritorial jurisdiction as a way of increasing corporate accountability. In contrast to the submission by the International Organisation of Employers (see above), the submission by SOMO argues that more efforts need to be made to strengthen the role of home states (including their capacity and willingness to take action in relation to extraterritorial cases). The SOMO submission characterises work to build legal and judicial capacity in host states as a longer term development issue, but argues that *"placing too much emphasis on capacity building and how this contributes to effective remedy in the long run may undermine the need for*

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<sup>34</sup> IOE comments on the OHCHR study on "Corporate liability for gross human rights abuses: towards a fairer and more effective system of domestic law remedies", 22 May 2014, p. 1.

<sup>35</sup> Ibid, p. 2.

<sup>36</sup> See n. 25 above.

<sup>37</sup> Ibid, p. 2.

<sup>38</sup> Ibid, p. 2.

<sup>39</sup> Deighton Pierce Glynn, *Response to the OHCHR Consultation on Corporate Liability for Gross Human Rights Abuses*.

*effective remedy today*".<sup>40</sup> The submission goes on: "*while important, strengthening domestic systems of host states is not sufficient to ensure effective remedy in cases of gross human rights abuses.*" Instead, solutions need to take account of "*transnational systems of corporate decision-making and power*".

**Author's comments:** There is a spectrum of responses to this issue, ranging from those who would prefer to see a much greater role for home states to those who see strengthening the capacity of host states (and particularly developing host states) as the sounder long term strategy. However, most respondents take the view that both have a role to play in ensuring that victims of gross human rights abuses have proper access to remedy.

This is also the position taken in the Study. However, a key finding of the Study is that, in cases where businesses become involved in gross human rights abuses, there is still considerable uncertainty and confusion surrounding the appropriate balance of regulatory and enforcement responsibilities between different interested states. There is urgent work to be done to clarify the underlying issues of principle and policy and to build consensus around these issues in such a way that takes account of the very real challenges that victims face in bringing their claims in local courts, particularly where abuses take place in conflict zones or where state authorities are themselves involved in the abuse.

The impression that the Study has already taken a position in favour of extraterritorial solutions may stem from the sample of cases chosen for analysis (which, as one respondent correctly points out, is comprised largely of extraterritorial cases).<sup>41</sup> This may have caused some readers to believe that the OHCHR would be focussing in particular on problems associated with bringing *extraterritorial* cases against companies (and multinationals in particular).

The submission from the International Organisation of Employers is correct to point out the need to "*look at examples of allegations against purely domestic companies and judicial proceedings which were undertaken in the national context*".<sup>42</sup> For the purposes of future work, it will be necessary to step up efforts to gather empirical data relating to attempts to achieve legal redress for business involvement in gross human rights at local level. This is needed to gain a better understanding of the way different factors operate to influence the choice of different legal strategies and venues for claims (e.g. local versus extraterritorial legal action), enabling future law reforms, capacity-building projects and other access to justice initiatives to be targeted where they will be most effective.

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<sup>40</sup> SOMO, *Submission to the UN Office of the High Commissioner for Human Rights on the Report on Corporate Liability for Gross Human Rights Abuses and Effective Domestic Law Remedies*, June 2014, p. 2.

<sup>41</sup> See submission of the International Organisation of Employers, n. 37 above, pp. 1-2.

<sup>42</sup> *Ibid.*, p. 2.

### 3.4 Methodological issues

Several respondents raised concerns about the methodology and, specifically, whether the empirical evidence used for the purposes of the study is truly representative.

The submission from the Amutah for NGO Responsibility takes issue with the cases chosen for analysis, arguing that many of these were weak (i.e. on facts and/or in law) in the first place. It cannot be therefore assumed that the failures of these cases were the result of “barriers to justice” put in the way of claimants. Instead, their failure may just indicate that the justice system working correctly. The submission argues that courts are understandably wary of getting involved in cases that call into question the political and foreign policy decisions of other states.<sup>43</sup>

In addition to the selection of cases, the Amutah for NGO Responsibility also criticises the lack of balance and diversity in the choice of jurisdictions for the analysis of the substance of domestic judicial remedial systems.<sup>44</sup> The submission by the International Organisation of Employers makes a similar point, arguing that *“the geographical scope of the study is too narrow ... the research focuses mainly on the judicial systems of developed countries. The legal frameworks in the global South are not sufficiently explored ... it is a missed opportunity that the study focused so much on the OECD countries, whilst human rights issues mainly occur in developing countries”*.<sup>45</sup>

As noted above (see section 3.3) the sample of cases used for the study has also been criticised because of its over-emphasis on extraterritorial cases. It is argued in the submission from the International Organisation of Employers, in particular, that not enough effort has gone into collecting data relating to the current levels of use of host state remedial mechanisms, and successes at local level. Without this information, it is argued, the claim that claimants are turning to extraterritorial remedies because they are pessimistic about obtaining remedies at home, is speculative.<sup>46</sup>

The joint submission from the University of Utah’s S.J Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston makes some additional suggestions for future work which are relevant to mention here. This submission suggests that more original studies will need to be commissioned to *“identify, digest and analyze new cases that illustrate how domestic remedies in civil and criminal law have been employed to hold companies accountable. This new phase of study would also address potential limitations of the current report which focuses more on U.S cases, in particular the Alien Tort Statute (ATS) which may have less legal relevance for claimants seeking remedy in U.S. federal courts in light of recent U.S. Supreme Court rulings ... much of the study is based on*

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<sup>43</sup> Ibid, p. 13.

<sup>44</sup> Ibid, p. 14.

<sup>45</sup> See submission of the International Organisation of Employers, n. 37 above, p. 2.

<sup>46</sup> Ibid, p. 1.

*analysis of older cases prior to rulings that significantly limit the ability to seek remedy through litigation in U.S. federal courts ...*<sup>47</sup>

**Author's comments:** These criticisms of methodology and empirical evidence are legitimate and they will need addressing in the course of the next phase of OHCHR's work.

The Study was prepared over a period of only three months. There was neither the time nor the resources to invest in the collection of new empirical information specifically for the purposes of this study. As a consequence, it was necessary to rely on empirical information collected by other researchers and organisations for other purposes. With respect to the data on domestic judicial remedial systems, the data collected by Ramasastry, Thompson and Taylor and for the purposes of the *Commerce, Crime and Conflict* project<sup>48</sup> was highly relevant and useful but, as was acknowledged at the Meeting of Experts in October 2013, was limited in terms of type and geographic spread of jurisdictions, as well as being dominated by OECD countries. With respect to the information on case histories, the Study relied on the information collected by the Business and Human Rights Resources Centre for the purposes of its legal accountability portal which, though arguably the best and most comprehensive database of its kind, may have an in-built bias in favour of extraterritorial cases involving large corporate groups working in specific "high risk" sectors, as these are the ones which tend to attract the most attention from both the media and campaigners.

To rectify these problems, and to develop a sound and properly informed basis for the consultative process going forward, OHCHR will need to develop (either by itself or in partnership with others) systems for proactively pursuing, collecting and storing information relating to a much wider range of domestic jurisdictions (in terms of legal culture and traditions, levels of development and geographic location) than has been done so far. In addition to continuing to monitor the "extraterritorial" cases, OHCHR will need to find ways to collect and record information on attempts (successful and unsuccessful) to prosecute allegations of business involvement in gross human rights abuses at local (i.e. "host state") level. The aim should be to build up a more accurate and objective picture of how domestic judicial mechanisms are being used in practice based, as far as is possible, on first hand information from the users of these mechanisms. This should also take account of the reality that in some cases victims and their representatives may rely on causes of action that do not explicitly declare themselves to be concerned with human rights issues. Instead, these may be based on other regulatory provisions and legal fields (e.g. general criminal law, administrative law, consumer law, trade practices law, environmental law, and labour law, as well as tort law).<sup>49</sup>

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<sup>47</sup> See the joint submission of the University of Utah's S.J. Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston, n. 14 above, p. 2.

<sup>48</sup> See n. 1 above

<sup>49</sup> See further comments at section 3.2 above. See also comments in the joint submission of the University of Utah's S.J. Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston, n. 14 above, p. 3-4. The

The comments of the Amutah for NGO Responsibility relating to the relative legal merits of certain cases highlight a further methodological problem. What should we make of cases that do not succeed? Should we assume, as many do, that the fact that cases do not succeed is automatically evidence that there are “barriers to justice” at work? The Study does not attempt to evaluate the merits of any of the cases that make up the sample of case histories selected for the purposes of the study for the reason that it would not be appropriate for OHCHR to second-guess judicial proceedings. A study of this kind can only look at patterns of overall allegations and outcomes (as an indication of how well the system of domestic remedies is working) without pronouncing on the merits of individual cases. This is the approach taken in the Study.

On the other hand, the lack of a clear, agreed and objective understanding of what constitutes a “barrier to justice” in practice does create problems for the evaluation of domestic remedial systems. It creates space for subjectivity or, worse, the claim that any obstacle faced by a claimant in the course of bringing a claim, is a “barrier to justice”.<sup>50</sup> This is not a sound or realistic basis for future dialogue on improving access to remedy. This lack of clarity and consensus is one of the problems the recommended two-part consultative process<sup>51</sup> would seek to address (see further comments at section 4 below). However, it has to be acknowledged that, in the meantime, there are likely to be dilemmas and controversies over the choice of cases for analysis. Developing a clearer criteria for the selection of cases for empirical analysis (see section 3.2 above) and putting more effort and resources into expanding the pool of knowledge about the use of domestic remedial mechanisms, beyond the sources of information relied upon for the purposes of the Study, and particularly in relation to the way different legal routes to remedy are weighed up in practice,<sup>52</sup> may help to alleviate some of these concerns over balance and emphasis as well as provide a more solid foundation of evidence for future work.

### **3.5 Other issues raised in the submissions**

#### **3.5.1 The limitation of the scope of the study to judicial remedies**

Several respondents queried the focus on judicial remedies (i.e. as opposed to all possibilities for remedy, judicial and non-judicial). The joint submission of the University of Utah’s S.J Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston<sup>53</sup> argued that focussing exclusively on judicial mechanisms seems at odds with the approach of the UNGPs, which gives quite a bit of emphasis to non-judicial remedies. The submission of the RAISE Health Initiative for

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submission of the Amutah for NGO Responsibility makes a similar point. See n. 13 above, p. 2, second para.

<sup>50</sup> The problem is discussed in more detail in the study report, n. 3 above, section 4.1.3.

<sup>51</sup> See study report, n. 3 above, section 5.2.1.

<sup>52</sup> See section 3.3 above.

<sup>53</sup> See n. 14 above.

Workers, Companies and Communities<sup>54</sup> says that “[w]e understand that focus on gross abuse and legal structures, but we urge the OHCHR to [give] attention to alternative forms or extra-judicial remedy or redress.”, adding that for women, “judicial systems are often hostile to their claims”.<sup>55</sup> The same submission continues: “to place so much focus on judicial remedy is insufficient, when there are many forms of non-judicial remedy and redress that can do as much long-term”.<sup>56</sup> The submission from the United States also argues that “by focussing solely on judicial remedy, this study neglects other avenues through which remedies can be provided to victims of corporate involvement in human rights abuses”. The United States submission adds that “[t]he Guiding Principles themselves place a clear and important emphasis on non-judicial remedies, both state and non-state...”.<sup>57</sup>

**Author’s comments:** As the Study is concerned with the most egregious human rights abuses, it is considered appropriate to focus on state judicial processes (and particularly criminal processes). However, the role of non-judicial mechanisms in relation to gross human rights abuses and the interface between non-judicial mechanisms and judicial mechanisms is an issue that could potentially be explored as part of the process to identify examples of good state practice (see recommendations at section 5.2.1 of the Original Study Report, Part 2).

### 3.5.2 The need for binding international standards

Three respondents (the Global Initiative for Economic, Social and Cultural Rights; Deighton Glynn Pierce; SOMO) took the opportunity to express their support for proposals for a binding international instrument on business and human rights.

**Author’s comments:** The question of the precise mechanism to achieve greater access to remedy for victims of gross human rights abuses is beyond the scope of this Study. The recommendations in the Study do not seek to pre-empt future work on the question of the kinds of mechanisms that may be needed. The Study merely argues that there are a number of areas of policy and principle which need further clarification and dialogue before much headway can be made on the development of a sound and coherent reform agenda.

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<sup>54</sup> See n. 16 above.

<sup>55</sup> Ibid, p. 2.

<sup>56</sup> Ibid, p. 2-3.

<sup>57</sup> US Government Submission, n. 18 above, p. 2.

### 3.5.3 The question of the direct applicability of international law standards to companies and the problem of the lack of clarity of legal standards and uncertainty for companies

The submission from the Amutah for NGO Responsibility devotes several pages to a critique of the approach of claimants and their representatives in cases involving allegations of complicity by businesses in gross human rights abuses.<sup>58</sup> The argument is that these cases do not illustrate a lack of legal remedy, but rather that they are based on flawed legal arguments and concepts. The submission also raises the issue of whether human rights obligations are directly applicable to companies.<sup>59</sup>

**Author's comments:** The problem of lack of legal certainty for companies is already raised in the Study. While the critique of individual cases is interesting, this only really serves to reinforce the need for further clarification and consensus building in relation to the basic legal standards. It may indeed be possible to argue that certain cases should not have been brought in the first place under existing law. But it does not follow from this that the status quo should be preserved. Instead, the analysis seems to highlight the difficulties faced both by victims and companies as a result of the present lack of certainty and clarity. The analysis also helps to illustrate how arguments about direct applicability of human rights standards to companies have contributed to further confusion and uncertainty about the legal standards that should apply in a given case as a matter of domestic law. The Study does not make any arguments or claims with respect to the direct applicability of international human rights obligations to companies. It is concerned, instead, with domestic implementation of human rights standards by states; that is, state practice in relation to the State Duty to Protect and the effectiveness of domestic responses in this regard.

### 3.5.4 Individual versus corporate liability

The submission by SOMO<sup>60</sup> raised the issue of individual liability (as opposed to corporate liability). SOMO argues "*while the punishment of corporate actors may indeed have certain difficulties, it is imperative to emphasise the importance of doing so, in order to prevent shifting the focus solely to prosecuting and punishing individuals*".<sup>61</sup>

**Authors comments:** The Study is indeed concerned with corporate liability (rather than the liability of individual officers and managers). However, it is recognised that in many legal systems corporate and individual liability can be linked.<sup>62</sup> The inter-relationship between corporate and individual liability would be one of the issues of principle and policy to be explored and clarified under Part 1 of the processes recommended in section 5.2.1 of the Study report.

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<sup>58</sup> Submission of the Amutah for NGO Responsibility, n. 13 above, pp. 7-13.

<sup>59</sup> Ibid, p. 7.

<sup>60</sup> See n. 49 above.

<sup>61</sup> Ibid, p. 4.

<sup>62</sup> See n. 3 above, pp. 36-7.



### 3.5.5 Extraterritorial dimension of the state's duty to protect

Several respondents raised the issue of the extraterritorial dimension of the State's Duty to Protect against gross abuses of human rights by companies as a background issue to the study. Following a review of recent statements by various treaty bodies on the extraterritorial nature and scope of home state obligations with respect to human rights issues, the submission of the Global Initiative for Economic, Social and Cultural Rights argues that "*there have been developments in international law and it is now clear that States do have extra-territorial treaty obligations pursuant to, inter alia, the ICESCR and the ICCPR, including to take measures to ensure that the overseas activities of domiciled corporate entities respect human rights and to provide access to accountability and effective remedies in the event of violations. The UNGPs should be updated to reflect the current state of international law on this issue.*"<sup>63</sup> Similarly, the submission from SOMO expresses the view that, in view of the limitations of "nationally bounded systems of redress", "*it is therefore essential to further strengthen the extra-territorial application of human rights law by home states, which is in line with their duty to protect human rights [footnote omitted].*"<sup>64</sup> The submission of Deighton Pierce Glynn appears to suggest that the commentary to UNGP Principle 2, if not correctly interpreted, could operate to hold back the development of international law in this area.<sup>65</sup>

On the other hand, the submission from the United States says that "*it is our view that the scope of this study goes beyond that of the Guiding Principles at times, and as a result focuses more on extraterritorial contexts than the Guiding Principles themselves.*"<sup>66</sup> As noted above, the submission of the International Organisation of Employers also criticises what it sees as an over-emphasis on extraterritorial contexts.<sup>67</sup>

**Author's comments:** The identification of current and developing customary norms with respect to the extraterritorial regulatory responsibilities of states was beyond the scope of the Study. However, it does highlight the present confusion and lack of clarity surrounding the steps that home states can and should take in relation to business involvement in gross human rights abuses in other states in different contexts and factual situations. This is one of the issues of principle and policy that Part 1 of the process recommended at section 5.2.1 of the Original Study Report will seek to clarify. The insights gained from this consultative process should then inform (a) the work on identifying good practice that forms Part 2 of the consultative and clarification

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<sup>63</sup> Submission by the Global Initiative of Economic, Social and Cultural Rights, n. 12 above, p. 10.

<sup>64</sup> Submission by SOMO, n. 43 above, p. 2.

<sup>65</sup> See submission of Deighton Pierce Glynn, n. 42 above, p. 5.

<sup>66</sup> Submission of the United States Government, n. 18 above, p. 2.

<sup>67</sup> See discussion at section 3.3 above.

process (as explained further in the Study)<sup>68</sup> and (b) further work with prosecution bodies.<sup>69</sup>

### **3.5.6 Technical information on existing state practice and suggestions for future areas of legal reform**

Several of the submissions from states and regional organisations (Italy, France, Greece, United Kingdom and European Union) supply additional and clarifying information on state practice, technical legal rules and other initiatives to supplement and update the information on domestic legal regimes and substantive domestic legal standards laid out in the Study.

In addition, a number of the respondents (including International Corporate Accountability Roundtable; Privacy International; SOMO; Deighton Pierce Glynn; Richard Meeran, Leigh Day) make suggestions as to specific areas of domestic law and policy where, in their view, reforms are required.

**Author's comments:** This technical information will be incorporated into the data already gathered for the purposes of the Study and will be taken into account in future work; specifically the work to clarify domestic law approaches to corporate liability (Recommendation 1(Part 1)) and to develop good practice guidance for states (see Recommendation 1(Part 2)).

## **4. Comments relating specifically to the recommendations**

The recommendations laid out in sections 5.2.1 and 5.2.2 of the Study were broadly welcomed. Although there is appreciation from some respondents that the process is likely to be challenging, none of the respondents expressed any misgivings or fundamental disagreement as to the direction of future work, or the issues that should be covered. On the contrary, a number of respondents (including, among the state respondents, United States and United Kingdom) express in their submissions their general approval of the aims and recommendations and offer their support to the OHCHR's future work programme.

There were, in addition to expressions of support, a number of useful suggestions regarding how the consultation process could be refined and managed, and the issues that should be covered (see, in particular, the submission of the Institute for Human Rights and Business).<sup>70</sup>

### **4.1 General comments on overall approach and process**

***The need for a considered, evidence-led, incremental approach:*** The Institute for Human Rights and Business writes: "*The study itself is already a significant and very useful contribution to the evidence-based approach. We believe that it will not be possible to make progress in this area without such a*

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<sup>68</sup> See n. 3 above, pp. 112-13.

<sup>69</sup> Ibid, at section 5.2.2.

<sup>70</sup> See n. 27 above.

*grounding in factual analysis that explores the different types of legal systems and the challenges posed in each type of system. We therefore support an approach to addressing access to remedy that is grounded in research that highlights key challenges and possible solutions as a first step before moving straight into proposing solutions that may not be useful or appropriate in many legal systems”*<sup>71</sup>

**Transparency and inclusiveness:** Several respondents took the opportunity to stress, in their submissions, the need for inclusiveness and transparency surrounding future work by the OHCHR in this area. The United States submission says “*we would like to emphasise that for this process to be credible and practical, it must be accessible, inclusive and expert driven. Accessibility, in this instance, refers to the ability for diverse stakeholders to participate in a collaborative manner. This can be achieved by maximizing transparency and taking advantage of technological advances to allow remote participation, as well as allowing for well-advertised, open comment periods.*”<sup>72</sup> The Amutah for NGO Responsibility makes a similar point: “*...this inquiry should proceed from as broad a base as possible with as wide a stakeholder group as possible. It is not enough to simply rely upon the same groups of academics and NGOs who largely share the same viewpoints and agendas. The wider the consultation, the more likely there will be greater buy-in. All actors must be evaluated from the same critical perspective.*”<sup>73</sup> The International Organisation of Employers states, in its submission “*the full participation of stakeholders (civil society, enterprises, international and national business organisations, government and administration) in the process – including from the global South – must be ensured*”.<sup>74</sup>

#### **4.2 Specific comments and suggestions with respect to the scope and subject matter of the proposed consultation processes**

The respondents from civil society, law firms and academic institutions who chose to engage with the detailed list of issues proposed to be covered by the two-stage consultative process highlighted a number of issues of concern to them, from their own work and research in the area (including work on previous and ongoing legal cases). None of the respondents expressed any real disagreement with any of the issues selected for further exploration. On the contrary, the issues raised in the submissions, taken as a whole, appeared to mirror closely the preliminary agenda for the two-part process. However, some respondents took the opportunity to suggest some slight refinements and additions. Rather than reproducing all of those individual comments here, an updated list of issues (which includes suggested amendments to the original recommendations arising from respondents’ comments) are set out in the pages that follow. Suggested amendments to the original list of issues are indicated with the use of yellow highlighting.

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<sup>71</sup> Ibid, pp. 1-2.

<sup>72</sup> Submission of the United States Government, n. 18 above, pp. 2-3.

<sup>73</sup> Submission of the Amutah for NGO Responsibility, n. 13 above, pp. 19-20.

<sup>74</sup> Submission of the International Organisation of Employers, n. 37 above, p. 2.

**Recommendation 1: Consult and clarify: an inclusive, consultative, multi-stakeholder process of clarification in two parts:**

***Part 1: Clarify key issues of principle and policy***

**Box 1: Updated extract from Study, pp8. 111-112**

***Part 1: Clarify key issues of principle and policy***

The first part of this process would focus on the appropriate tests for legal accountability, and the respective roles of different interested states in investigation and enforcement, which would take account of differences between states in legal systems and traditions and levels of development, ensuring that all geographic regions are properly represented. This would include an examination of:

- Definitions of gross human rights abuses in domestic legal systems;
- The circumstances in which and the conditions under which allegations against businesses arise, including (in cases where allegations of secondary liability are made) an analysis of the types of contractual and other relationships that businesses may have with primary perpetrators;
- The elements of corporate liability for involvement in gross human rights abuses, under both private law regimes and public law regimes (and in particular as a matter of criminal law) (a) where the corporation is the primary perpetrator and (b) under theories of secondary liability and the conceptual differences between the two;
- The tests for attribution of liability to corporate entities (under both public law and private law regimes) including the link between individual and corporate liability and the role and relevance of human rights due diligence;
- Legal coverage and definitions of offences and private causes of action;
- The application of limitations periods;
- Different approaches to the choice of law (i.e. in private law cases) including the use of public policy exceptions to choice of law rules;
- Appropriate scope of sovereign immunity in cases of business involvement in gross human rights abuses and the implications for corporate liability;
- The international law rules governing the use of extraterritorial jurisdiction in cases of business involvement in gross human rights abuses (in both the public law and private law spheres) and the appropriate use of that jurisdiction in practice;
- Different models of international cooperation in investigation and enforcement, including international legal cooperation.

The Institute for Business and Human Rights suggests, in addition, that *“future research and discussion should keep a watching brief on developments in corporate law, particularly with respect to evolving concepts around parent-subsidiary relationships and ‘piercing the corporate veil’”*.<sup>75</sup>

The joint submission from the University of Utah’s S.J Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston suggests a study specifically on experiences and challenges associated with the use of universal jurisdiction.<sup>76</sup>

<sup>75</sup> Submission of the Institute for Human Rights and Business, n. 27 above, p. 5.

<sup>76</sup> The joint submission from the University of Utah’s S.J Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston, n. 14 above, p. 4.

## ***Part 2: Identify models of good State practice in relation to the functioning of domestic judicial mechanisms***

**Box 2: Updated extract from Original Study Report, p. 112**

### ***Part 2: Identify models of good state practice in relation to functioning of domestic judicial mechanisms***

.... The second part of the consultative process ...would be aimed at improving the accessibility and performance of domestic judicial mechanisms from a practical point of view. The recommendation is for a programme of activities to promote technical cooperation and knowledge exchange between policymakers, operators and users of domestic judicial mechanisms so that examples of good practice (with respect to matters such as legal funding, protection of witnesses, liaison with victims, sentencing, monitoring and enforcement) are identified, analysed and replicated. The list of topics that would be useful to explore in this setting would include:

- Legal funding options (including legal aid and contingency fee arrangements);
- Protection from adverse costs orders (including litigation risk insurance);
- Availability and management of collective, representative and group actions;
- Simplifying and streamlining the process of making and prosecuting a claim;
- Rules of discovery;
- Challenges faced by prosecution bodies in investigating allegations (including in cross border cases);
- Processes to ensure appropriate levels of involvement of victims in decision-making by prosecution bodies, including access to information and rights of consultation at different stages of the proceedings, and rights to challenge the decisions of public authorities;
- Access to legal representation (including ways to increase the pool of legal counsel willing to take on claimant work and access to pro bono counsel);
- Supporting those involved in working with victims, including in relation to the bringing of legal claims;
- Promoting awareness of legal rights and remedial mechanisms;
- Protecting prosecution bodies and courts from political interference and the effects of corruption;
- Devising appropriate and effective sanctions;
- Interface between judicial and non-judicial mechanisms;
- Calculating damages;
- Seeking balance between distributive and restorative justice;
- Protecting victims and their representatives and witnesses from intimidation and harm; and
- International judicial cooperation, international cooperation by domestic law enforcement bodies, managing jurisdictional conflicts, mutual legal assistance and enforcement of foreign judgments.

The submission of the Institute for Business and Human Rights suggests that the work contemplated in this part of the consultative process could be better organised by themes (e.g. issues relating to victims, issues relating to prosecution, and issues relating to “broader goals of the system”). A possible framework is set out at pp. 4-5 of their submission for consideration.

The submission makes the further suggestion that these best practice models, when developed, could include practical tools for states, such a model language for laws and training packages.

Several respondents (notably the Institute for Human Rights and Business, Assistant Professor Urska Velikonja, Emory University School of Law; the Amutah for NGO Responsibility; SOMO) suggested that the search for best practice models of state responses should extend beyond the field of business and human rights to other regulatory areas. It was suggested that useful precedents and regulatory insights might be found in areas of law such as anti-bribery, money laundering, and securities law. The Institute for Human Rights and Business added that it would also welcome “*a review of other levers for deterrence and even potentially jurisdiction, such as linking company access to investment treaty protection to engagement with a process to provide a remedy*”.<sup>77</sup> The submission from SOMO urged the study to take account of the possibilities afforded by laws on money-laundering to achieve some degree of corporate accountability for involvement in serious crimes.<sup>78</sup>

The Institute for Human Rights and Business suggests that, in order to gain a better understanding of the practical barriers facing claimants, “*OHCHR organize in-depth consultations with advocacy groups, law firms, academics, officials, businesses and independent experts to feed into the process of developing a knowledge-base of existing practices and practical experiences*”.<sup>79</sup> The joint submission from the University of Utah’s S.J. Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston makes a similar point, arguing that on the question of barriers to justice, “*future research should consult victims as stakeholders, who may have novel ideas on possible solutions*”.<sup>80</sup>

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<sup>77</sup> Submission of the Institute for Human Rights and Business, n. 27 above, pp. 2-3.

<sup>78</sup> Submission of SOMO, n. 49 above, p. 5.

<sup>79</sup> Submission of the Institute for Human Rights and Business, n. 27 above, p. 3.

<sup>80</sup> The joint submission from the University of Utah’s S.J. Quinney College of Law Center for Global Justice and the Centre for International Law and Policy at New England Law, Boston, n. 14 above, p. 5.

## **Recommendation 2: Further activities to build know-how and capacity of domestic prosecution bodies**

There seemed general agreement that more work is needed in this area, particularly in order to gain a better understanding of the challenges faced by criminal prosecutors. Noting that “political inertia is a major factor”, the Institute for Human Rights and Business recommends the work planned under this heading “*look at successful efforts to increase attention to other serious crimes for lessons learned*”.<sup>81</sup>

SOMO suggests, in its own submission, that “*The European Network of contact points for prosecuting international crimes [footnote omitted] may be an interesting group to work with*” in relation to both the development of best practice models for domestic law responses and in understanding the challenges faced by criminal prosecutors in particular.<sup>82</sup>

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<sup>81</sup> Submission of the Institute for Human Rights and Business, n. 27 above, p. 5.

<sup>82</sup> Submission of SOMO, n. 49 above, p. 6.