



## **Better Together: A Complementary Approach to Civil Judicial Remedies in Business and Human Rights**

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### **Abstract**

*Effective civil judicial remedies are often inaccessible to victims of transnational corporations (TNCs) from economically developed states that operate in developing or emerging states. The general consensus is that local capacity development is the most practical solution. The alternative solution—opening the doors of courts to victims in other states (including TNC home states)—is often said to be illusory. At the 2017 Discussion Day on Business and Human Rights, organized by the United Nations Committee on Economic, Social and Cultural Rights (CESCR), one invited speaker went as far as stating that extraterritorial remedies would only result in victims’ disappointment.<sup>1</sup> There is, however, an inconsistency in*

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<sup>1</sup> CESCR, General Comment 24 on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities, U.N. Doc. E/C.12/60/R.1 (Jun. 23, 2017) 4 [hereinafter E/C.12/60/R.1]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; CESCR, *General Day of Discussion - 3rd Meeting, 60th Session* [hereinafter CESCR 2017 Day of Discussion], UN WEBTV (Feb. 21, 2017), <http://webtv.un.org/meetings-events/human-rights-treaty-bodies/committee-on-economic-social-and-cultural-rights/watch/general-day-of-discussion-3rd-meeting-60th-session-of-committee-on-economic-social-and-cultural-rights/5334700925001> (last visited Mar. 3, 2017).

*this argument. Extraterritorial remedies are still important in dealing with current issues. This article weighs the arguments and makes the case for a mixed approach consisting of both local and extraterritorial capacity development.*

## **I. Introduction**

Transnational corporations from economically developed “home” states (TNCs) tend to outsource their supply chains to low-cost “host” states with fewer regulations. Broadly speaking, TNCs can have a positive social and economic impact in host states by, for example, creating jobs and introducing services. However, their operations can also have a devastating impact on the most vulnerable people there.

Legal mechanisms to render corporations that operate in more than one state accountable for human rights violations have attracted attention over the past four decades. The 2011 UN Guiding Principles (the “Guiding Principles”) are widely recognized as the most comprehensive template to deal with such so-called “business and human rights” issues.<sup>2</sup> These principles integrate existing standards and practices under international law and are organized around a three-pillar framework: the state’s duty to protect human rights, the corporate responsibility to respect human rights, and access to remedy for those whose rights have been violated.<sup>3</sup>

Access to remedy is generally considered to be the weakest pillar of the Guiding Principles.<sup>4</sup> Various problems arise when the

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<sup>2</sup> See John Ruggie, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011); UNHRC, Res. 17/4 (2011), U.N. Doc. A/HRC/RES/17/4.

<sup>3</sup> See John Ruggie, Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, ¶¶ 82-103, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

<sup>4</sup> See UNHRC, Progress Report of the United Nations High Commissioner for Human Rights on Legal Options and Practical Measures to Improve Access to

authorities of the emerging or developing host state are not able or willing to remedy human rights violations by TNCs.<sup>5</sup>

Judicial remedies should form the backbone of a wider package of remedies that include non-judicial remedies at the state, industry, and company level.<sup>6</sup> Victims of corporate abuse should have the ability to assert their human rights through effective civil legal means that lead to a prompt, thorough, and impartial judgment.<sup>7</sup> Such proceedings and reparations can effectively stop corporate abuse. They can also act as an essential incentive for all TNCs to investigate and address any harmful behavior in which they might be involved through their business relationships or supply chains.<sup>8</sup>

The Guiding Principles explain that national states continue to play a central role in the development and implementation of international law. Guiding Principle 26 stresses that “[s]tates should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.”<sup>9</sup> Such barriers have been relatively well documented. For example, the Accountability and Remedy Research Project undertaken by the UN Office of the High

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Remedy for Victims of Business-Related Human Rights Abuses, U.N. Doc. A/HRC/29/39 (May 7, 2015).

<sup>5</sup> Commentary to Guiding Principle 25 & Commentary to Guiding Principle 26.

<sup>6</sup> Commentary to Guiding Principle 26; E/C.12/60/R.1, *supra* note 1, ¶ 39; UNHRC, Report of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises, ¶ 36, U.N. Doc. A/HRC/26/25 (May 5, 2014). The Working Group stated that “judicial remedy remains at the core of access to remedy, while non-judicial mechanisms may play complementary and supportive roles.” *Id.*

<sup>7</sup> E/C.12/60/R.1, *supra* note 1, ¶ 49.

<sup>8</sup> Judith Schrempf-Stirling & Florian Wettstein, *Beyond Guilty Verdicts: Human Rights Litigation and its Impact on Corporations’ Human Rights Policies*, J. OF BUS. ETHICS 3–4 (2015).

<sup>9</sup> Guiding Principle 26.

Commissioner for Human Rights listed barriers that could lead to a denial of access to remedy, including “fragmented” and “poorly designed” legal regimes and lack of sufficient funding and information.<sup>10</sup>

Barriers to justice can be of a technical or substantial nature. Lengthy proceedings or limited access to legal services free of charge are examples of technical barriers. Substantial barriers refer to underlying dynamics that can impede the enjoyment of rights in complex and relational contexts.<sup>11</sup> Limited checks and balances to control governments that want to line their own pockets or judiciaries that are not independent are examples of substantial barriers. Substantial barriers are often associated with deeply embedded patterns of exclusion and marginalization. People who cannot enjoy their rights are often struggling to get their rights recognized and protected by legal systems, governments and institutions.

The home and the host state of private TNCs should cooperate to reduce barriers that could lead to a denial of justice in primary proceedings in host states as much as in subsidiary civil

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<sup>10</sup> UNHRC, Rep. of the United Nations High Commissioner for Human Rights, *Improving Accountability And Access to Remedy for Victims of Business-Related Human Rights Abuse*, at 3–4, U.N. Doc. A/HRC/32/19 (May 10, 2016) [hereinafter A/HRC/32/19]. See also Commentary to Guiding Principle 26; UNGA, *Report of the Working Group on the Issue of Human Rights and Transnational Corporations and other Business Enterprises*, U.N. Doc. A/72/162 (Jul. 18, 2017) ¶¶ 6 & 55; OHCHR, *State Positions on the Use of Extraterritorial Jurisdiction in Cases of Allegations of Business Involvement in Severe Human Rights Abuses: a Survey of Amicus Curiae Briefs filed by States and State Agencies in ATS Cases (2000–2015)* UN Office of The High Commissioner (Business and Human Rights: Enhancing Accountability and Access to Remedy, Project 2: Roles and Responsibilities of Interested States, Working Paper No. 2, 2015), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/StateamicusATS-cases.pdf> (last visited Mar. 3, 2017); UNHRC, *Access to Justice for Children: Rep. of the United Nations High Commissioner for Human Rights*, at 8, U.N. Doc. A/HRC/25/35 (Dec. 16, 2013).

<sup>11</sup> Roderick Macdonald, *Access to Civil Justice*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 510 (Peter Cane and Herbert Kritzer eds., 2010).

proceedings in home states.<sup>12</sup> Various human rights treaties and the CESCR's 2016 General Comment on Business and Human Rights explicitly refer to the international duty to cooperate.<sup>13</sup> Moreover, home and host states that are members of the same human rights treaties or international organizations have entered into a relationship with other states to defend shared substantive interests.<sup>14</sup>

The state that hosts the TNC is to be viewed as the “primary” duty-holder. If the right to access to a civil judicial remedy is unavailable or ineffective in the host state, other states (including TNC home states) could be obligated to or may contribute willingly to access to remedy, provided there is a recognized jurisdictional basis.<sup>15</sup> The home state of the TNC (or other states with a recognized jurisdictional basis) can take two approaches.<sup>16</sup> On the one hand, it can support the host state to develop local access to justice strategies. On the other hand, it can encourage its own courts to open their doors to victims of such abuse. Such an extraterritorial litigation mechanism can be illustrated briefly by a lawsuit brought by 200 Cambodian families who claimed that the British sugar company Tate & Lyle owed them millions of dollars for sugar bought from a Thai plantation that acquired their land illegally.<sup>17</sup> The villagers filed complaints in Koh Kong Provincial

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<sup>12</sup> Olivier De Schutter, *Towards a New Treaty on Business and Human Rights*, 1 BUS. & HUM. RIGHTS J. 63–65 (2015).

<sup>13</sup> *E.g.*, Convention on the Rights of the Child Preamble & art. 4, Nov. 20, 1999, 1577 U.N.T.S. 3; International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3; E/C.12/60/R.1, *supra* note 1, ¶¶ 27 & 29.

<sup>14</sup> *See* CASES AND CONCEPTS ON EXTRATERRITORIAL OBLIGATIONS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 9 (Fons Coomans & Rolf Künnemann eds., 2012).

<sup>15</sup> E/C.12/60/R.1, *supra* note 1, ¶ 30.

<sup>16</sup> Gabriela Quijano, *Where Can Victims of Corporate Human Rights Atrocities Turn for Justice?*, 57 HARV. INT'L L. J. ONLINE 30 (2016).

<sup>17</sup> Statement of Claim, Claim No. 2013 Folio 451, Song Mao v. Tate & Lyle Indus. Ltd. [2013] EWHC (QB), <https://business-humanrights.org/sites/default/files/media/documents/tate-lyle-particular-of-claim-28-mar-2013.pdf> (last visited Nov. 20, 2015).

Court in Cambodia in 2007, which ruled that it did not have jurisdiction over land rights in 2012. One year later, the UK High Court accepted jurisdiction of the suit in order to guarantee access to justice, a decision which goes against the UK courts' tendency to presume against extraterritoriality nowadays.<sup>18</sup>

Extraterritorial litigation is often said to be illusory. For instance, Rae Lindsay, a lawyer at Clifford Chance LLP, said—in her personal capacity—that local remedies should be preferred over extraterritorial remedies in her keynote speech during the 2017 Discussion Day of the CESCR's General Comment on Business and Human Rights.<sup>19</sup> She attempted to underpin this assertion by explaining that “bringing victims to a court on the other side of the world” would only result in their “disappointment.”

This article finds that such a one-sided argument fails to consider the merits of extraterritorial litigation. Both options—support for local capacity and extraterritorial litigation—have their own advantages and drawbacks. The process of local judicial capacity building is not in itself able to guarantee equal access to remedies, but extraterritorial adjudicatory jurisdiction alone will not suffice either. In an attempt to move beyond the traditional divide between local and extraterritorial approaches to litigation, it is argued that a mixed framework is needed in current times in which access to remedy is a far-fetched dream for affected stakeholders on the ground. While it is not the ambition of this article to compare national legal frameworks, it draws from cases and commentaries which have been put forth in particular contexts in home and host states. The structure of this article is as follows: Section II sets out the advantages of support for local capacity development; Section

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<sup>18</sup> For recent analyses of access to extraterritorial civil judicial remedies in the UK see Ekaterina Aristova, *Suing TNCs in the English Courts: the Challenge of Jurisdiction*, CONFLICT OF LAWS .NET (2017), <http://conflictoflaws.net/2017/suing-tncs-in-the-english-courts-the-challenge-of-jurisdiction/> (last visited Apr. 22, 2018); Lucas Roorda, *Okpabi v. Shell on Appeal: Foreign Direct Liability in Troubled Waters*, RIGHTSASUSUAL (2018), <http://www.rightsasusual.com/?p=1194> (last visited Apr. 22, 2018).

<sup>19</sup> CESCR 2017 Day of Discussion, *supra* note 1. This point was also raised in several panel discussions during Utrecht University's *UCall Conference on Accountability and International Business Operations* (May 18–20, 2017).

III explores the advantages of extraterritorial remedies; Section IV concludes and presents two final polarizing issues.

## II. Support for Local Remedies

Extraterritorial states might consider supporting local judicial capacity development. Local litigation has various advantages that courts in other states (including TNC home states) cannot offer to the same degree. This Section provides a comprehensive overview of these advantages.

A first advantage is that settling a dispute as close as possible to its source is more practical and efficient.<sup>20</sup> Local remedies are less time- and cost-consuming and facilitate the disclosure of evidence to a larger extent.<sup>21</sup> Moreover, a range of practical challenges might obstruct effective cooperation between host and other states in extraterritorial proceedings, including language barriers and differences of approach regarding the protection of sensitive information.<sup>22</sup> Extraterritorial remedies lead sometimes also to conflicts over choice of law.

In addition, local judges might be more capable of addressing the consequences of harm than remote judges. Local remedies tend to

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<sup>20</sup> A/HRC/32/19, *supra* note 10, ¶ 5.

<sup>21</sup> See Sif Thorgeirsson, *Closing the Courtroom Door: Where Can Victims of Human Rights Abuse by Business Find Justice?*, BUS. & HUM. RIGHTS RESOURCE CENTRE (2014), <http://business-humanrights.org/en/closing-the-courtroom-door-where-can-victims-of-human-rights-abuse-by-business-find-justice> (last visited Mar. 3, 2017); International Organization of Employers, COMMENTS ON THE DRAFT GENERAL COMMENT NO. 24 ON STATE OBLIGATIONS UNDER THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE CONTEXT OF BUSINESS ACTIVITIES UN OFFICE OF THE HIGH COMMISSIONER, at 7 (2016), <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/Submissions2017.aspx> (last visited Jan. 9, 2017).

<sup>22</sup> A/HRC/32/19, *supra* note 10, ¶¶ 26 & 27; Salil Tripathi, *A Business and Human Rights Treaty? More Immediate Actions Would Make a Bigger Difference*, INST. FOR HUM. RIGHTS & BUS. (2006), <http://www.ihrb.org/commentary/business-and-human-rights-treaty-more-immediate-actions-required.html> (last visited Jan. 15, 2016).

be better suited to the gravity of the abuse and the extent and nature of the harm suffered. There are three reasons for this: local judges can ensure victim participation and dialogue with affected local communities to a greater extent; they are better placed to provide interim relief; and local remedies are more varied, whereas extraterritorial remedies tend to be confined to financial compensation and fines.<sup>23</sup> Victimologists have pointed out that a plethora of non-monetary remedial measures need to be considered, such as acknowledgment of the truth, public apologies, changes to the law, restitution, rehabilitation, injunctions, and guarantees of non-repetition in order to bring appropriate closure to victims.<sup>24</sup>

A further advantage is that local remedies can inspire a sense of ownership in developing and emerging states. *Western* states can unilaterally determine which human rights deserve protection if there are not sufficient investments in local capacity building.<sup>25</sup> Similarly, extraterritorial remedies can be perceived as being determined by *Western* imperial infringement upon the sovereignty of developing and emerging states.<sup>26</sup> Authority exercised in remote

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<sup>23</sup> See *supra* note 10, A/HRC/32/19, ¶ 19.2; CASES AND CONCEPTS ON EXTRATERRITORIAL OBLIGATIONS IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *supra* note 14, at 227. Cf. Lawrence Friedman, *The Level Playing Field: Human Rights and Modern Legal Culture*, 44 HONG KONG L.J. 403 (2014).

<sup>24</sup> Commentary to Guiding Principle 25; WILLIAM G. DOERNER & STEVEN P. LAB, VICTIMOLOGY 152 (6th ed. 2012).

<sup>25</sup> August Reinisch, *The Changing International Legal Framework for Dealing with Non-State Actors*, in NON-STATE ACTORS AND HUMAN RIGHTS 60–61 (Philip Alston ed., 2005).

<sup>26</sup> See Donald Francis Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. OF INT'L L. 142, 157 (2006); James Thuo Gathii, *TWAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography*, 3(1) TRADE L. & DEV. 26, 35–36 (2011); Susan Rose-Ackerman, *Regulation and Public Law in Comparative Perspective*, 60 UNIV. TORONTO L.J. 519 (2010); Jan Wouters, Leen De Smet & Cédric Ryngaert, *Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act?*, in GLOBALISATION AND JURISDICTION 192–193 (Piet Jan Slot & Miele K. Bulterman eds., 2004).



courts in extraterritorial states can therefore easily be considered invalid by the host state. Because of this, victims may face various difficulties in obtaining recognition and execution of judgments that allow them to receive damages.

Local remedies do not distinguish between corporations with a transnational supply chain and corporations with a local supply chain. They might have a regulatory effect on all corporations that operate in the host state, and in doing so, effectively contribute to a culture of compliance. It is important to note in this regard that corporations from developing and emerging states have been largely excluded from the “business and human rights debate”. While this debate has focused on issues relating to power diffusion, i.e. the growing influence of corporate non-state actors, it has largely overseen issues relating to power transfusion, i.e. the rising influence of new – and currently particularly Asian – corporations on the global stage.<sup>27</sup> The former UN Special Representative on Business and Human Rights, John Ruggie, touched upon this issue in 2014. Following the resolution initiated by a number of developing and emerging states to draft a treaty that would only be applicable to corporations that have a *transnational* character in their operational activities,<sup>28</sup> Ruggie said that the effects for victims are the same whichever corporation is responsible for human rights violations.<sup>29</sup> Similarly, in 2015, Puvan Selvanathan, a former member of the United Nations Working Group which implements the Guiding Principles, explained that there is “no difference in culpability between states that allow domestic businesses to abuse the human rights of their

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<sup>27</sup> JOSEPH NYE, *THE FUTURE OF POWER* 204 (2011).

<sup>28</sup> UNHRC, Res. 26/9 (2014), U.N. Doc. A/HRC/RES26/9.

<sup>29</sup> John Ruggie, *THIRD UNITED NATIONS FORUM ON BUSINESS & HUMAN RIGHTS CLOSING PLENARY REMARKS 4–7* (2014), [http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie\\_SR\\_SG\\_BHR.pdf](http://www.ohchr.org/Documents/Issues/Business/ForumSession3/Submissions/JohnRuggie_SR_SG_BHR.pdf) (last visited Jan. 28, 2016) (“NGOs have rightly expressed their dismay . . . because victims don’t care whether they are abused by transnational or local firms.”).

own citizens, and states that tolerate and tacitly protect multinational businesses that abuse the rights of others' citizens."<sup>30</sup>

A further advantage is that effective local litigation enhances legal certainty and predictability to a larger extent.<sup>31</sup> While local litigation allows TNCs (and/or their representatives) to know in advance where they can be sued if such proceedings are available, it prevents claimants from "forum-shopping" in the hypothetical situation of several extraterritorial states offering subsidiary remedies. For instance, more than one extraterritorial state might consider the TNC to be a corporate national, as there is currently no agreement to determine the circumstances under which a corporation can be deemed to be a "national" of a state under international law.<sup>32</sup>

Finally, local remedies can increase awareness about the behavior of corporations in the places where misconduct occurs. Ensuring access to effective remedies requires not only transformative changes in legal frameworks, but also in societal structures in

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<sup>30</sup> Puvan Selvanathan, OPEN LETTER FROM PUVAN SELVANATHAN TO PRESIDENT OF THE UN HUMAN RIGHTS COUNCIL BUSINESS & HUMAN RIGHTS RESOURCE CENTRE 1 (2015), <http://business-humanrights.org/sites/default/files/documents/Letter%20to%20the%20President%20HRC.pdf> (last visited Jan. 28, 2016) .

<sup>31</sup> *Contribution of Burkhard Hess on Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, 13 (2011) (PE 453.201); *Contribution of Ilaria Pretelli on Proposal for a Regulation of the European Parliament and of the Council on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast)*, 9, 27 (2011) (PE 453.205); International Organization of Employers, 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," 2 (2014), [http://www.ioe-emp.org/fileadmin/ioe\\_documents/publications/Policy%20Areas/business\\_and\\_human\\_rights/EN/\\_2014-05-22\\_IOE\\_Position\\_on\\_Access\\_to\\_Remedies\\_in\\_the\\_Context\\_of\\_Business\\_\\_Human\\_Rights\\_final\\_.pdf](http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/business_and_human_rights/EN/_2014-05-22_IOE_Position_on_Access_to_Remedies_in_the_Context_of_Business__Human_Rights_final_.pdf) (last visited Mar. 3, 2017).

<sup>32</sup> They include the nationality of the owners, the location of "incorporation," and the location of the main office. See Cédric Ryngaert, *Extraterritorial Export Controls (Secondary Boycotts)*, 7(3) CHINESE J. OF INT'L L. 625, 627 (2008).

which they are embedded. Barriers to justice often represent exercises of power: the denial of rights enjoyment to vulnerable usually serves to protect the power of a smaller privileged group of people.<sup>33</sup> Courageous efforts of local judges can inform and empower local communities to demand structural solutions.

### **III. Extraterritorial Remedies**

The previous Section has shown that sufficient support for capacity building in host states is a valuable way to guarantee victims of TNCs access to remedies. This does not mean that extraterritorial remedies serve no purpose. Extraterritorial remedies are important to deal with current issues and have at least three advantages over local remedies.

To begin with, extraterritorial remedies can ensure access to justice for claimants of TNCs that currently have no access to remedies locally. Local capacity building in developing and emerging states is a long-term operation. Local litigation proceedings are currently not readily available and accessible for claimants in various developing and emerging states.<sup>34</sup>

In addition, extraterritorial remedies are more likely than local remedies to increase awareness amongst citizens in the home states of TNCs. Most human rights violations by TNCs never capture the public's attention in their home states. Increased awareness may, in some instances, result in changes in buying and investment attitudes and in better policy-making.

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<sup>33</sup> Sonia Cardenas, *Human Rights in Comparative Politics*, in HUMAN RIGHTS: POLITICS AND PRACTICE 81 (Michael Goodhart ed., 2013).

<sup>34</sup> Jennifer Zerk, 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, 8 (2014), <http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyProject1.pdf> (last visited May 15, 2016).

Finally, extraterritorial human rights lawsuits belong to a public interest tradition that aims to bring legal reform.<sup>35</sup> Human rights cases may be filed in other states (including TNC home states) with the direct aim of contributing to developing international human rights law via a bottom-up approach. Most economically developed states deny that they have binding state duties over TNCs that operate abroad, although the CESCR and the UN Committee on the Rights of the Child have detailed such obligations on various occasions.<sup>36</sup>

The statements of states such as the United States, Switzerland, the United Kingdom, and Norway reflected this viewpoint at the 2017 Discussion Day, as these states were quick to opine that their obligations over private TNCs are limited to their territory.<sup>37</sup> For example, the representative of Switzerland explained that the acknowledgment of extraterritorial obligations over people in other states would have negative repercussions on the “competition capacity” of his state.

Independent judges in remote courts who are able and willing to litigate human rights lawsuits have the potential to contribute to the acknowledgment of obligations of one state in relation to corporate human rights abuses endured by individuals in another state. In a bid to support judges, the CESCR’s General Comment on Business and Human Rights recommends that states ensure that judges can exercise their functions in complete independence.<sup>38</sup> This General Comment also stresses that state parties should inform judges of

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<sup>35</sup> Beth Stephens, *Individuals Enforcing International Law: The Comparative and Historical Context*, 52 DEPAUL L. REV. 434 (2002).

<sup>36</sup> *E.g.*, Committee on the Rights of the Child, General Comment 16 on State Obligations regarding the Impact of the Business Sector on Children’s Rights, at 43, U.N. Doc. CRC/C/GC/16 (Apr. 17, 2013); CESCR, General Comment 14 on the Right to the Highest Attainable Standard of Health, at 39, U.N. Doc. E/C.12/2000 (Aug. 11, 2000).

<sup>37</sup> CESCR 2017 Day of Discussion, *supra* note 1.

<sup>38</sup> E/C.12/60/R.1, *supra* note 1, ¶ 47.

the obligations under the Convention on Economic, Social and Cultural Rights linked to business activities.<sup>39</sup>

#### **IV. Conclusion**

This article has shown that a complementary approach comprising of local and extraterritorial civil remedies is the best way to address human rights violations by TNCs. A mixed approach is more likely to give rise to increased awareness of corporate abuse in both host and home states of TNCs.

Effective local capacity is the preferred option to guarantee general access to civil judicial remedies in the long run. Practical local remedies facilitate legal certainty and the participation of everyone involved. Increased support from extraterritorial states to deploy such local capacity would be very welcome.

However, such support would not currently be sufficient. Local remedies in weak or corrupt regimes often equal no remedies in practice, as they favor the most powerful stakeholders, namely TNCs. Richard Meeran, a lawyer at Leigh Day who has brought numerous extraterritorial claims against TNCs in British courts, rightly questioned whether advocates for local justice actually want local justice or rather want to avoid justice.<sup>40</sup>

It appears that the Committee of Ministers of the Council of Europe supports such a proposed mixed approach. In its 2016 Recommendation on Business and Human Rights, this body recommended Council of Europe member states review their policies regarding extraterritorial litigation for foreign victims at home and support local access to justice capacity development in third states.<sup>41</sup> On the one hand, the Recommendation encourages member states to partner with third states and strengthen access to

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<sup>39</sup> E/C.12/60/R.1, *supra* note 1, ¶ 47.

<sup>40</sup> CESCR 2017 Day of Discussion, *supra* note 1.

<sup>41</sup> Council of Europe (CM), Recommendation to Member States on Human Rights and Business, CM/Rec(2016)3, ¶¶ 7, 31-43, & 55-57 (Mar. 2, 2016).

justice locally.<sup>42</sup> The Committee of Ministers explained that collaborative partnerships and other forms of support are deemed valuable in order to accomplish such cooperation.<sup>43</sup> On the other hand, the Committee of Ministers marks out several categories in which Council of Europe member states are recommended to allow alleged victims of abuses by private TNCs to file proceedings in their own national courts if local litigation would not be feasible.<sup>44</sup>

Two final, polarizing issues can be added here because they support this mixed conclusion. First, proponents of local capacity building argue that the long-term reliance on extraterritorial systems will have an adverse impact on the future responsiveness of judicial remedies in host states.<sup>45</sup> However, it could be that the mere possibility of effective extraterritorial litigation could accelerate the development of host state civil remedies,<sup>46</sup> as developing and emerging states might feel encouraged to contribute to local capacity building in order to avoid airing their dirty laundry on the world stage.

Second, it has been suggested that it might be more difficult for TNCs to escape litigation if effective mechanisms are offered in their home states.<sup>47</sup> TNCs are indeed able and willing to move their operations and investments to wherever conditions are most

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<sup>42</sup> CM/Rec (2016) 3 ¶ 7.

<sup>43</sup> Council of Europe (CM), Explanatory Memorandum to Recommendation CM/Rec(2016)3 to Member States on Human Rights and Business, CM(2016)18 ¶ 22.

<sup>44</sup> CM (2016) 18 ¶¶ 34-36.

<sup>45</sup> See Zerk, *supra* note 34, at 8.

<sup>46</sup> Lucas Roorda & Cedric Ryngaert, *Business and human rights litigation in Europe: the Promises Held By Forum of Necessity-Based Jurisdiction*, at 28 (Unijuris, Working Paper, 2014).

<sup>47</sup> Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, BUS. & HUM. RIGHTS RESOURCE CENTRE 22 (2006), <http://business-humanrights.org/en/pdf-extraterritorial-jurisdiction-as-a-tool-for-improving-the-human-rights-accountability-of-transnational-corporations> (last visited Mar. 18, 2016).

favorable.<sup>48</sup> This was recently exemplified by TNCs moving their supply chains from developing and emerging states with greater regulation to Myanmar after the United States and European Union lifted trade sanctions. Myanmar is competing with other low-cost states to attract investment by offering some of the cheapest labor costs in the world and patchy human rights regulation. However, this argument has its limitations, as some TNCs are also willing to move their headquarters to emerging and developing states.

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<sup>48</sup> Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. J. OF INT'L HUM. RIGHTS 262 (2008).