

Transnational Corporate Human Rights Abuses: Delivering Access to Justice

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CORE Coalition and Business & Human Rights Resource Centre, in association with BIICL

Summary note

PANEL 1

Marilyn Croser

The conference was introduced by Marilyn Croser, director of CORE, who set the stage for the discussion by citing examples in which violations of human rights by transnational businesses may arise:

- Mobile phones that rely on metals and minerals
- Clothes made in factories in China
- Food grown by farmers in the Dominican Republic

The industries within which such products or services are provided are rife with human rights abuses. As an example of the scale of abuse, Marilyn cited a 2014 Regional Briefing on Africa which noted a boom in the oil and gas sector. However, she explained that the same period has seen a fivefold increase in allegations of human rights violations in the region.

The UN Guiding Principles on Business and Human Rights (the 'Guiding Principles') are designed to deal with such issues. Under the Guiding Principles, there is a clear duty on States to protect human rights and address violations of human rights. The onus is on governments to ensure that companies meet their responsibility to respect human rights as governments have the capacity to provide support, for example, in the form of export credit tariffs.

Robert McCorquodale

Professor Robert McCorquodale is Director of the British Institute of International and Comparative Law and professor of International Law and Human Rights at Nottingham University.

Robert introduced his discussion by illustrating the legal challenges in pursuing a private enterprise for its human rights abuses. In northern Peru a mining company was allowed to take over land in order to construct a mine. Protests were staged opposing the construction of the mine. Protesters were subsequently arrested which spawned further protests. Some of the protesters alleged they were sexually assaulted or tortured during their arrest in the company's premises. The Public Prosecutor in Peru refused to bring action against the company for complicity. Instead, he brought a criminal action against the protesters. In the absence of criminal prosecution, civil action against the company was the only route available. The private enterprise was a Peruvian subsidiary of

Monterrico Metals PLC, a resource development business that is incorporated in the UK but whose corporate headquarters are based in Hong Kong.

Robert explained that 'The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business' study addressed the 'access to justice' pillar of the UN's Respect, Protect, Remedy framework in order to emphasise and work to overcome the challenges faced in the pursuit of transnational corporate justice. The focus of this study was on industrialised states. Consultations were conducted in Brussels, London and Washington DC. Case studies were provided and recommendations were made.

In the Peruvian example, the Peruvian subsidiary of Monterrico Metals found itself defending a claim issued in the UK based on the negligence of the parent company's directors. There were difficulties pursuing the claim in the host state due to weak local laws and a general lack of transparency. Further, the main difficulties in awarding a remedy in the forum state – the UK in this example – related to identifying the defendant entity when faced with a parent-subsidiary relationship and compelling the defendant to disclose information.

The main recommendations for businesses, which came out of the Third Pillar study, included:

- Implementing 'human rights due diligence', which is a key concept of the UN Guiding Principles. Although the concept is still being defined, human rights due diligence implies having policies in place, such as human rights impact assessments, transparency, reporting. These policies must apply to all business enterprises, and be spread across entities within a corporate group. This would be in line with *Chandler v Cape*. Furthermore, reporting requirements should be increased.
- Overcoming issues linked to 'extraterritoriality' under the Brussels I Regulation, which deals with jurisdiction, in order to take into account the transnational nature of multinational enterprises' activities. The application of the doctrine of *forum necessitatis* should be considered where no other forum can be used to achieve an effective remedy.
- Overcoming issues linked to applicable law under the Rome II Regulation, as seen in the claims against the oil multinational Shell in Dutch courts.
- Improving access to evidence across States of the European Union, as it is one of the main obstacles faced by plaintiffs in human rights litigation against businesses.

Robert also shed light on the nature of claims for human rights violations, which can become an obstacle to litigation. For instance, a public law claim may be brought under criminal law, as seen in European civil systems whereby victims may be added to a claim. An example of this was the Amesys case in France, in which a French company provided critical IT surveillance database systems, with a view to monitoring and reducing crime levels to the Libyan government during the Gaddafi regime. The systems were used by the Gaddafi regime to arrest civilians, who were later tortured. The company was alleged to have been complicit with the arrests and torture of those civilians. The matter was initiated under criminal law procedure in Paris and five victims were added as '*partie civile*' but the prosecutor was not willing to hear the claim. Robert recommended training public prosecutors and legal officers as well as criminalising human rights violations. Furthermore, victims should play a greater role in proceedings against corporations.

Another challenge, albeit a lesser one, which Robert mentioned was the matter of who brings a claim. It is common for human rights violations by businesses to impact a group or a community as opposed to one individual. Class actions are common in the United States. However, this is not the case in Europe, given that this mechanism does not really exist across European countries, apart from the group action system in the United Kingdom. Therefore, there should be reform of collective action mechanisms in Europe, as they would be the appropriate form to include multiple claimants.

One crucial hurdle is the costs of pursuing a claim. This is a major obstacle for victims. It was recommended that there should be measures to enable financial assistance, such as improved legal aid. Further, reparations to victims for violations can go beyond financial remedies, for example, providing suitable alternative housing to a group or community displaced by a mining company's activities. In addition, the benefits provided by non-judicial grievance mechanisms should be explored, although we should keep in mind potential abuses of these mechanisms by corporations. Finally, it is very difficult to translate human rights abuses in torts or crimes under domestic law. Thus, the power of human rights language can be lost once a claim is formulated.

Despite the obstacles to accessing judicial remedies cited, Robert explained that these hurdles can be overcome. To this end, we continuously need innovative lawyers, the tireless work of NGO's and judges, the development of more hard law, and pressure on States to improve access to remedy.

Seema Joshi

Seema Joshi is Amnesty International's head of Business and Human Rights. Her discussion covered Amnesty International's new book, *Injustice Incorporated*.

Seema explained that the rationale behind the book was to document obstacles faced by victims in their ability to access a remedy. While conducting the studies, Amnesty International realized that existing policies and laws do not work to provide adequate remedies to victims. Further, the Amnesty International book attempts to encourage more targeted discussions and comparative analysis of solutions in other legal areas that could be transferred and used to stop corporate abuse of human rights.

Seema discussed the case studies presented in the book. These cases symbolise the efforts to access effective remedies. They are:

1. Gas leak in Bhopal, India in 1984
2. Flooding and contamination of a river by the Omai gold mine in Guyana in 1995
3. Flooding and contamination of rivers caused by the Ok Tedi mine in Papua New Guinea in 1984
4. Dumping of toxic waste in Abidjan, Cote d'Ivoire in 2006 resulting in over 100,000 people requiring medical treatment

Through these case studies, the book arrives at the conclusion that there are three obstacles in particular, namely:

1. Legal hurdles to transnational claims

2. Victims' lack of access to information, due to corporate control over information
3. Impact of the corporate-State relationship on the willingness of States to pursue claims and the right to remedy

A notable feature of these cases is that the harm caused to the environment and human health is ongoing, even though the actual incidents occurred many years ago. In the cases of the Bhopal gas leak and the Ok Tedi contamination, there have been no clean-up efforts to date. The settlements reached in some of these cases have been insufficient in relation to the damage caused. Seema explained that it would be prudent to question settlement models that inadequately address such harms.

Further, in the Bhopal and Ok Tedi cases, Seema shed light on the fact that only civil society organisations have conducted studies on the health consequences of the damage when governments and corporations ought to have done so.

Seema discussed further that *Injustice Incorporated* examines large multinational corporations that are powerful and complex entities in their own right. The various corporate group members are considered separate legal entities due to the established principle of corporations having separate legal personality. There is also a critical disconnect with the corporate responsibility to respect human rights in national laws across various legal systems and this needs to be reconciled.

Finally, Seema discussed the main recommendations presented by Amnesty International's book:

First, in parent-subsidary corporate relationships, the parent's duty of care needs to extend to the subsidiary. She suggested that, in cases like Bhopal, there ought to be a rebuttable presumption that a parent is liable for the subsidiary's actions, borrowing from the UK Bribery Act's definition of 'associated persons' who commit bribery on behalf of a company, including a subsidiary of that company.

Second, Seema emphasised the importance of understanding information as power and explained that measures ought to be taken requiring the mandatory disclosure of information by a corporation in the face of human rights violations. If such information is not available, the claim against the corporation can be more difficult to pursue.

Lastly, Seema welcomed efforts for legal proposals that acknowledge the corporate-State relationship and reduce the corporate influence on the State. As an example, in the context of land acquisition, agreements between States and businesses ought to be assessed through a human rights lens, thereby enabling greater transparency of the full spectrum of corporate activities.

Richard Meeran

Richard Meeran is a partner at Leigh Day where he specialises in corporate accountability and human rights litigation. His discussion surrounded the current state of play in litigation against multinational enterprises in the UK. Leigh Day has litigated against multinational enterprises for the last 20 years.

The cases to date are not cases which allege violations of human rights; but the subject matter of the cases very much is human rights. Richard accepted Robert McCorquodale's point that the use of a term such as "trespass to the person" significantly diminishes an offence like rape. However, when these cases are litigated, the facts are brought to light.

Often, claims are brought as negligence suits whereby a victim of a human rights violation alleges a breach of a duty of care by the company. Leigh Day has worked on imposing a duty of care on the parent company, to avoid the obstacles resulting from the principles of separate personality and limited liability, and the corporate veil doctrine, which protects a parent company as a shareholder of its subsidiaries. Establishing the duty depends on identifying the functions that a parent company is responsible for in a multinational group and establishing a connection between those functions, or deficiencies in those functions and the harm that has occurred on the ground.

There have been several positive developments towards better access to remedy for victims of corporate abuse over the last two decades. Through the cases litigated by Leigh Day, the notion of the parent company's duty of care has gained increasing traction. The UK Court of Appeal provided guidance in *Chandler v Cape* and ruled that, under certain circumstances, a parent company could owe a legal duty of care to employees of its subsidiaries. The duty of care of a parent company may appear difficult to establish, but there are ways to argue for the connections between a parent company and its subsidiaries, and the influence of the former over the latter. Defendants tend not to want confront the duty of care issue in these cases, and therefore establishing the duty of care tends not to be an issue which causes major problems.

While the Rome II regulation requires that local law is applied to cases dealing with harm that has occurred overseas, this has not proved to be a significant hurdle to date, as even in countries where the legal system is different, the legal provisions tend to be similar to those in English law.

Richard mentioned that, in another positive development the doctrine of *forum non conveniens* is no longer an issue in the United Kingdom.

However, there have been some setbacks. The LASPO (Legal Aid, Sentencing & Punishment of Offenders) Act introduced changes to the civil costs regime and much tighter principles around proportionality, specifically the notion that the expense incurred in running cases should be proportionate to the value of the cases. This is quite a significant issue because cases like this are incredibly expensive to run; they are fought tooth and nail by the defendants and are extremely complicated. Even with a small number of claimants, the costs are often much higher than the value of the cases. This, combined with the provision in the Rome II regulation which requires damages to be assessed with reference to local levels of damages makes running these cases less financially viable. This is of particular concern in cases involving a relatively small number of claimants, whereas in mass tort claims, the level of damages will be much higher and the proportionality principle is much easier to satisfy.

Panel 1 Q&A

During the Q&A session, participants asked questions related to the outcomes of cases brought against multinational enterprises. The panellists discussed that progress has been made towards the

development of a duty of care for respecting human rights on the part of transnational businesses. However, there is yet to be a legal precedent which would firmly place this duty upon multinational businesses for violations of human rights.

The panellists also discussed the merits of litigation through courts as opposed to internal grievance mechanisms. It was suggested that payments made through corporate grievance mechanisms might be disproportionately low. Furthermore, neither settlements nor internal grievance mechanisms hold defendants to account for the harm caused, thereby doing little in the way of setting a legal standard for corporate liability. Richard Meeran noted that, in some cases, non-judicial grievance mechanisms might provide decent financial compensation to victims. However, in general, such mechanisms do not provide for full scrutiny or deal with issues of liability. He also pointed out that vulnerable victims are not in a position to bargain with powerful companies over the level of settlement on offer. Robert McCorquodale advised that companies should consult with local communities from the start of a project, and they should put internal grievance mechanisms in place as soon as possible in order to solve conflicts as soon as they emerge and avoid litigation in the future. Robert also stated the importance of non-financial compensation. One participant raised the benefit of litigation related to land rights. Robert highlighted that mixed claims involving different entities, such as the State and the company, may be adequate for this type of rights violations.

The audience asked additional questions related to adequacy of sanctions for corporate misbehaviour and satisfactory remedy for victims, especially in the case of sexual violence. Robert held that criminal law provides an interesting avenue to hold businesses accountable. He noted that, in the UK, criminal sanctions are in place for some corporate offences, such as corporate manslaughter. However, criminal law does not cover all types of corporate crimes. For example, criminal sanctions are lacking for corporate sexual harassment. Furthermore, Robert acknowledged that, in the UK, tort law has been the favoured route to access effective remedies when human rights violations occur. Opportunities provided by criminal law should then be explored. In Richard's view, civil consequences, such as litigation costs or damage to reputation can be more damaging than criminal sanctions for corporate organisations. Richard also emphasized the importance of financial compensation to victims.

One participant wondered whether revocation of a corporate entity's charter would resolve matters in the face of human rights violations. For Robert, this would not be an adequate response, and there are alternative methods that may have the same effects, such as stock exchange listing requirements or opportunities offered by corporate law. Seema Joshi further stated that revocation of a corporate charter might produce limited effects in the context of corporate groups, as only one entity would be directly affected while the other entities would be able to continue their activities.

One participant asked how State constitutional law could help phrasing claims using human rights standards. Robert provided that the nature and content of a constitution can allow plaintiffs to frame their claims on the basis of international standards of human rights. For example, the South African Constitution allows human rights claims against corporations. However, this is not the usual framing of constitutions. Robert advised exploring innovative ways to hold corporations accountable using constitutional law, such as joint liability claims against both States and corporations.

PANEL 2

David Chivers QC

David Chivers QC is a barrister at Erskine Chambers. His discussion addressed practical solutions to the challenges presented in gaining access to remedies in the UK in the face of corporate abuse of human rights.

David explained that it would be prudent to establish a duty of care on the part of business enterprises to respect human rights. A clear duty would enable victims to pursue a line of legal recourse which has been attempted in an *ad hoc* fashion thus far.

David explained that there are three primary ways to approach corporate liability under a duty of care model. First, the direct liability of the parent company should be established for its direct role in its subsidiary's activities. David suggested when action against a subsidiary would be obsolete and the parent ought to be pursued, clear responsibility on the parent's part must be established. This would clarify that the parent entity's actions are proven to have a direct role on the subsidiary. Second, the parent company should be held liable for its subsidiary's acts. The corporate veil separating the parent and subsidiary must be lifted in order to eliminate such a defence available to the parent entity. Third, liability ought to be imposed on the defendant entity for failing to prevent conduct of its associates, in line with its duty of care to respect human rights in the event that this duty is breached. This is the approach followed by the UK Bribery Act in respect to its criminal sanctions. This approach is in line with the UN Guiding Principles and allows for flexibility to deal with concepts such as the sphere of influence.

David cited the UK Bribery Act as a model to follow for creating direct liability for the acts of others. While the Bribery Act imposes criminal liability for failure to prevent bribery by an associated person of an enterprise, David suggested that this model could be used to impose civil liability on businesses which adversely impact upon human rights.

Finally, David provided insight into the political rationale behind the Bribery Act in order to illustrate how well the legislation was received by companies in the UK. He explained that the Bribery Act was enacted in such a manner that it was not met with resistance from companies precisely because a company would not seek vindication from the commission of bribery on its behalf.

Sandra Cossart

Sandra Cossart is from SHERPA, a legal human rights NGO based in France.

Sandra discussed the process that led to the Bill on the duty of care of controlling companies recently introduced in the French Parliament. Realizing that most initiatives in the field of corporate accountability were voluntary, a group of French NGOs advocated for a legislative proposal that would impose a duty of care upon controlling companies for violations of human rights, thus making corporate liability expressly clear in the context of the international activities of French multinationals. The main objective was to have a central reference document in the context of human rights violations and to raise awareness across the political and legal spectrum. The content

of this Bill was largely influenced by the UN Guiding Principles on Business and Human Rights, most notably the concept of human rights due diligence. Previous cases brought against companies in France provided a helpful basis to develop the duty of care as outlined in the Bill. Sandra noted that the articles contained in the Bill would affect the French civil, criminal and commercial codes, which implies comprehensive progress.

Sandra explained that four political groups in France are currently supporting this Bill and, accordingly, it is gaining some momentum. However, SHERPA and the other NGOs involved in the process have faced a number of obstacles, including: fears that such legislation could worsen the economic crisis; finding deputies willing to support the project; reluctance from the government; and companies' attempts to delegitimize the whole process. Sandra also emphasised the importance of training and raising awareness among French deputies and civil society organisations on the issue of corporate accountability and cited the interaction between NGO's and parliamentarians in this regard.

Further, Sandra explained that procedures for disclosure of, or access to information by corporations ought to be formalised as, echoing Seema Joshi's assertion that 'information is power', access to such information is crucial in bringing legal claims against corporations.

Roper Cleland

Roper Cleland is Senior Manager of Social Responsibility at IPIECA, an oil and gas industry association for environmental and social matters.

Roper started her discussion by explaining that the UN Guiding Principles are the principle point of reference when addressing environmental and social issues at IPIECA. IPIECA works with experts in the oil and gas industries on the implementation of the UN Guiding Principles and a worldwide project on internal grievance mechanisms for communities.

Based on IPIECA's experience, Roper emphasized that internal grievance mechanisms should neither replace nor impede access to judicial systems or prevent claimants from going to courts. However, they may prove an effective alternative in some situations for the corporate organisation and the aggrieved party. Roper noted that grievance mechanisms are sometimes the quickest and most cost effective means to achieving access to justice. Community grievance projects and mechanisms enable both parties to resolve disputes before a judicial remedy is sought. This is mutually cost effective and de-escalates the situation before the need to instigate legal proceedings arises.

Roper noted that there are positive signs of progression in both developed and developing countries. Consensual agreements are less adversarial whereby reparations are an option. Such mechanisms ought to be risk-based and circumstantially-based. Addressing matters and taking preventative measures in the early stages of business is critical.

Despite developments in terms of grievance mechanisms, Roper noted that they alone are not enough to sufficiently address access to effective remedies. The satisfactory outcomes of grievance mechanisms are assessed by the parties or individuals privy to that dispute.

Finally, Roper explained it is essential to maintain relationships between communities and corporations to ensure respect and responsiveness to human rights violations. Further, it would be prudent to design a 'fit for purpose' mechanism that ought to be part of a business's due diligence.

Genevieve Paul

Genevieve Paul is head of Globalisation and Human Rights at the International Federation for Human Rights ('FIDH'), an international NGO.

Genevieve noted some positive international developments within the UN regarding business and human rights. In the context of the implementation of the UN Guiding Principles, Genevieve mentioned a resolution adopted by the UN Human Rights Council in June 2014, renewing the mandate of the UN Working Group on Business and Human Rights, requesting stakeholder consultation on legal and practical measures to improve access to remedy and encouraged States to implement the UNGPs, including via national action plans. Genevieve also cited the adoption of a resolution supported by Equator and South Africa calling for a legally binding instrument on business and human rights at the UN level. An open-ended intergovernmental working group will soon work on this issue. Genevieve noted that civil society organisations and social movements have been advocating for strengthening the international legal framework, including remedial mechanisms, for years.

Access to justice remains a challenge and needs to be addressed in the context of growing dangers faced by human rights defenders. She advocates exerting pressure on both States and corporations to protect human rights defenders. Highlighting that the two resolutions should be seen as complementary and mutually reinforcing, Genevieve shed light on what form future developments should take to enhance access to effective remedies. Genevieve explained there is already indication of trends moving in those directions, including:

- Adoption of a binding instrument to complement the UN Guiding Principles;
- Regulating business enterprises and being consistent in doing so to ensure standardised application of requirements;
- Strengthening of domestic judicial systems;
- Policy coherence and capturing the complexity of the corporate structure;
- Need for sanctions and collective reparations;
- Development of robust remedial mechanisms.

One of the most important challenges to overcome in order to have access to effective remedies is ensuring the participation of all stakeholders, including in the drafting of an international instrument on business and human rights.

Panel 2 Q&A

During the Q&A session, participants were particularly interested in non-judicial grievance mechanisms. One participant asked how companies could take into account victims who are afraid of engaging with corporate grievance mechanisms, most notably in the context of human trafficking or labour rights abuses. Roper Cleland emphasized that companies should ensure confidentiality in order to protect the most vulnerable victims. Another member of the audience questioned the efficiency of corporate grievance mechanisms. The panel had different views on the issue. For Sandra Cossart, non-judicial grievance mechanisms usually fail to provide adequate access to remedy to victims or to hold businesses accountable. She reasserted the need for strong judicial mechanisms. Finally, a participant highlighted the diversity of grievances brought forward and asked how to avoid situations where corporations are, at the same time, “party, judge, and executioner” during a non-judicial grievance procedure. Roper stressed the importance of impartiality and of having checks and balances in place.

Participants also raised issues related to the debate on a treaty on business and human rights. To date, governmental and business responses to such an international instrument have been perceived as lukewarm. Some observers fear the result will be a weak treaty with a low number of ratifications and, as a result, limited efficiency. However, one participant asked whether debate around a treaty could contribute to improved access to remedy for victims of business-related abuses. Genevieve Paul highlighted that some governments, most notably in Europe, have said that it is too early to adopt a treaty and that the UN Guiding Principles should be given more time to show their efficacy. However, FIDH’s research about the implementation of the UN Guiding Principles has shown that some gaps remain. Ultimately, the process leading to the adoption of a treaty should be inclusive and Genevieve called on major actors, such as the US and the EU, to join the debate. Genevieve also highlighted that, as the result of the current debate on a treaty, the resolution adopted by the UN Human Rights Council renewing the mandate of the Working Group focuses on access to remedy. For Genevieve, the text of this resolution was a positive outcome that was influenced by the debate on a treaty.

Participants and speakers also discussed technical issues of liability. Participants showed an interest in the application of bribery laws to leaders of indigenous and local communities who accept bribes from companies. For David Chivers, under the UK Bribery Act, the leader of an indigenous community could be held liable if he/she accepted bribes from companies. The nature of the position of the leader would then play an important role in the assessment of liability. Other participants pointed out the differences between the French and English approaches with regard to the formulation of the duty of care of parent companies. One participant mentioned that the French bill on the duty of care of controlling companies appears to focus on the harm, while the *Chandler* case requires the existence of specific criteria to prove a link between the parent company and the harm. Sandra Cossart responded that there is not a big difference between the French and English approaches and she commented that, if the bill is enacted, the burden of proof would be on the parent company. Finally, one participant asked whether the offence of benefitting from proceeds of crimes could be used under UK law against companies in a human rights context. David Chivers commented that this might be possible. However, it would not give rise to civil remedy, as it would take place in a criminal context.

PANEL 3

Paul Hoffman

Paul Hoffman is a partner at Schonbrun DeSimone Seplow Harris & Hoffman, LLP in the United States.

He cited his experience litigating under the Alien Tort Statute ('ATS') as the most common way to pursue claims in the United States against corporations for harm caused by their activities abroad over the last 15 years. Such claims are brought in the United States precisely because of the lack of access to effective remedies abroad. He also noted that the Ruggie framework is a catalyst for change to this lack of effective remedies.

Some of the most prominent issues in most ATS cases are questions of aiding and abetting, corporate structure and agency relationships, which can determine corporate liability for violations. Previously, the ATS has been used to pierce the corporate veil in this context. Paul attributed liability for violations to the *mens rea* or knowledge of violations that are likely to occur in ATS cases. However, this standard is changing. He explained that previously it was sufficient to prove knowledge whereas recently the standard of the Rome Statute has been favoured. There is also a political nature to the response, as courts want to retain control over disputes thereby departing from the standard of proving knowledge only.

Paul also discussed the US Supreme Court's position at present. Paul explained that the US Supreme Court decision in *Kiobel* is misconceived as the 'death knell' to the use of the ATS to bring claims against US corporations for allegations of harm caused abroad. In its 2013 decision, the US Supreme Court decided that the principle underlying the presumption against extraterritoriality does apply to the ATS. This can be contrasted with the position in 1979 when there was no such application. In *Kiobel*, the US Supreme Court asked why the matter was being litigated in the US. This compelled a reframing of the argument to support the ATS's jurisdiction over extraterritorial events which result in social or environmental harm.

Paul explained that the US Supreme Court appears divided upon the question of extraterritoriality. Justice Kennedy suggests that some cases will fall down the middle and then the presumption will be better defined but until then a firm ruling cannot be made. Case law on this matter is divided in the same way the US Supreme Court is divided. Some defendants argue that the Supreme Court has dismissed the ATS thereby precluding the need to bring such claims. By contrast, the Circuit Court in Virginia recently issued an opinion in the *Al Shimari v CACI International* case over alleged abuse in Abu Ghraib in Iraq whereby the judge asked in his opinion 'how can the torture of a US citizen in a US military base not be of concern to the US?'

Finally, in order to establish a standard of corporate liability, Paul explained that first the extraterritorial limitation must be addressed and overcome. He noted a positive development in this regard is that certain statutes already address extraterritorial matters, such as the Torture Victim Prevention Act and Trafficking Victim Prevention Act. Ultimately, Paul raised the importance of using human rights language to base claims against businesses, as it better reflects the abuses suffered by victims.

Martyn Day

Martyn Day is senior partner at the law firm Leigh Day where he specialises in corporate accountability and international and group claims.

In his discussion, Martyn mentioned two cases that are due to go to trial in the UK involving BP and Shell.

The BP litigation pertains to a pipeline constructed in Columbia in the 1990's which resulted in damage to farmland. BP's position is that the harm was not caused by BP's construction but was instead due to livestock on the farms. The community complained about the construction and related harm immediately but it was only when community members attended BP's AGM's in London that BP took notice of the complaints. Martyn cited the practical challenges of the BP litigation, namely that it involves 28 expert witnesses with over 20,000 pages of evidence for a trial listed to last five months. Further, the costs (£35-£40 million between the two parties) exceed the value of the claim. Corporate defendants usually fight hard. The financial resources of BP enable it to spend up to £20 million in order to save its reputation in the face of these allegations. Martyn commented that the costs of resolving the issue when the local community first raised the problem with BP would have been much less than the amount which will be spent on the litigation in England.

The second litigation involving Shell pertains to an oil leak in the Niger Delta in 2008 which resulted in damage to the environment, including the destruction of areas used for fishing. Martyn explained that Shell initially offered bags of flour and rice and subsequently offered £4,000 for the damage to the land and environment as compensation. However, this was paltry in comparison to the harm caused and Martyn explained that Shell's analysis of the damage was severely lacking.

Despite these challenges, Martyn advocates pursuing court claims against multinational corporations as opposed to invoking internal grievance mechanisms. He noted that local communities do not have sufficient resources and the capability to fight equitably in the latter means of redress.

Michael Addo

Michael Addo is the Chair of the UN Working Group on Business and Human Rights (the 'Working Group'). His discussion shed light on the work of the Working Group.

Michael noted that in the day's discussions, the Working Group had been mentioned only twice and wondered whether the Working Group's impact was inadequately low when in fact the Working Group has a crucial role to implement the UN Guiding Principles. Michael suggested that it might be time to make the work of the Working Group more open and transparent.

Michael cited criticism from civil society organisations that not enough is being done to address access to remedies and questions loom over whether the third pillar is being ignored. Michael acknowledged there was some misunderstanding of the mandate and role of the UN Working Group. Further, Michael emphasised that the UN Working Group recognizes the importance of the third pillar. However, perception of the third pillar and its relation with the other two pillars remains a persistent problem.

Michael expanded on the Working Group's mandate which entails the promotion of implementation of the UN Guiding Principles, supporting capacity building and identification of best practices. He noted that there is no express mandate to deal with complaints. In pursuit of its mandate, at present, the Working Group's focus is on taking existing mechanisms and expanding them to incorporate human rights due diligence and the corporate responsibility to respect human rights including access to remedy.

In order to identify 'good practice', Michael explained we ought to be familiar with 'bad practice'. This would require further examination of cases that highlight the obstacles to access to effective remedies, especially, for example, cases where parent-subsidiary relationships pose a major obstacle to access to justice.

Michael noted that the recent discussions leading to the renewal of the mandate of the Working Group has led to the recognition by the Council of the Work of the Working Group with regards to communications and so in effect implicitly endorsing its practice of receiving communications from victims, governments and civil society organisations. However, he explained that the level of communications has been low. As to capacity building, Michael explained that National Action Plans need to give greater attention to measures such as education and training. He cited the example of Sierra Leone where a policy on sustainable agriculture was introduced. Under this policy, incentives including tax tariffs are discounted if businesses conduct consultations over access to land and increase if businesses include in their policies due diligence whereby a parent entity expressly accepts responsibility for the subsidiary's risks.

Michael believes that the respect of human rights by businesses can be strengthened through National Action Plans and, accordingly, places great emphasis on how States devise their National Action Plans.

Finally, Michael noted that there is an opportunity to strengthen the Working Group's mandate as well as formally expanding the mandate through a Human Rights Council resolution to address the matter of communications received by the Working Group.

Panel 3 Q&A

During the Q&A session, participants were interested in corporate litigation strategies and raised issues faced in the case against Chevron in the US and in Ecuador. Paul Hoffman highlighted the exceptional character of the proceedings against Chevron. He pointed out that, in most cases, corporations are willing to settle and provide financial compensation to victims of human rights abuses. There was interest in legislation that could potentially open more litigation avenues to hold corporations accountable in the US, now that the Supreme Court has limited the extraterritorial reach of the ATS. Paul Hoffman explained that, while litigators are looking at more vehicles to hold businesses accountable, they are also hoping that the ATS will still provide opportunities to seek redress against US companies. However, it seems that suing foreign companies for extraterritorial harm under the ATS is now over.

In response to a query to the panel related to the impact of transnational litigation against multinational enterprises, Martyn Day explained that a positive development arising out of the BP oil

spill and Shell cases in the United States have led to vital policy changes by corporations in their treatment of adverse environmental and social impacts.

There was also a question about the benefit of enacting hard-law as opposed to adopting soft-law instruments. Martyn explained that his faith lies in the development of hard law in respect of corporate responsibility if the barriers to access to effective remedies are to be abated. Michael Addo took the view that hard law is not sufficient on its own and soft law is also necessary to achieve this goal.

Participants also questioned the use of language by the UN Working Group, most notably the use of the words 'adverse impacts' as opposed to 'violations'. Further, they asked whether the UN Working Group was going to extend the application of access to remedy to human rights abuses beyond gross human rights violations. Citing Ruggie's terminology, Michael explained that companies have a 'responsibility', not an 'obligation', to respect human rights. Moreover, Michael emphasized that the UN Working Group uses 'egregious' rather than 'gross' in order to take into account a broad range of human rights abuses.

Participants raised the possibility that company grievance mechanisms could deter the pursuit of other options for access to justice, and they wondered how both National Action Plans and the UN Working Group should address this issue. Michael mentioned that more National Action Plans ought to be devised because they are an important factor to improving access to effective remedies. He informed the conference that a 'repository' of National Action Plans is available on the website of the Working Group and also that of the Business and Human Rights Resource Centre and that this serves as a useful database for the Working Group and for stakeholders to submit comments and advance dialogue.

Closing remarks

Phil Bloomer, Director of the Business and Human Rights Resource Centre thanked all the speakers for presenting an extensive range of issues linked to access to justice, ranging from global to grassroots aspects, as well as legal and practical questions, during the conference. Phil also thanked interns and volunteers from BIICL and the BHRRC, for their help with the event. Finally, Phil was grateful to Keren Ghitis for video recording the conference, the Law Society for providing assistance with the venue and Marilyn Croser for her leadership and her work organizing the conference.

ENDS