



Effectiveness of judicial remedy – from paper to practice

Parallel session

28 November

15:00-18:00

Part 1: Increasing the effectiveness of domestic public law regimes

15:00-16:25

Organized by OHCHR

Part 2: The life cycle of a criminal prosecution: Overcoming challenges and increasing accountability for cross-border corporate human rights crimes

16:35-18:00

Organized by International Corporate Accountability Roundtable (ICAR) and Amnesty International

Part 1: Increasing the effectiveness of domestic public law regimes

Brief outline: What elements of criminal and administrative regimes may facilitate or hinder corporate accountability and access to remedy when companies are involved in human rights abuses? This session will discuss the findings and recommendations of the OHCHR Accountability and Remedy Project Phase I, focusing on ways to increase the effectiveness of domestic public law regimes (i.e. criminal and administrative or quasi-criminal law). The session will discuss strengths and weaknesses of different approaches to establishing corporate liability, and outline ways forward for states to begin to review the effectiveness of their domestic public law regimes.

The session will be followed by a session lead by ICAR and Amnesty International that will explore the life-cycle of a criminal prosecution with a focus on cross-border cases of corporate human rights abuses.

Session objectives: This session will discuss the findings and recommendations of the OHCHR Accountability and Remedy Project (phase I), focusing on how key elements of public law regimes (i.e. criminal and administrative or quasi-criminal law) impact corporate accountability and access to remedy in cases of business-related human rights abuses. It will discuss strengths and weaknesses of

different approaches to establishing corporate liability, and outline ways forward for states to begin to review the effectiveness of their domestic public law regimes.

Key discussion questions:

- What are the main challenges with how domestic public law regimes function in cases where companies are involved in human rights abuses that constitute criminal or administrative offenses? Which key features of domestic legal systems enable accountability? Why are these features not always in place?
- What challenges are particular to cross-border cases, and how can challenges of establishing corporate liability be overcome in such cases?
- How can challenges of complex corporate structures and lack of information about internal management systems and processes be overcome when seeking to hold a company or group of companies liable?
- What approaches best address systemic fault as well as individual faults? Are there challenges with approaches to liability that assess “corporate culture” as well as the actions of individuals?
- What is the appropriate use of “strict liability” or “absolute liability”? How do these tests interact with the exercise of human rights due diligence?
- What are challenges with establishing secondary liability of companies for human rights abuses? What approaches help overcome these challenges?

Speakers

- **Lene Wendland**, OHCHR (moderator)
- **Jennifer Zerk**, Independent consultant and lead legal expert for the Accountability and Remedy Project
- **Jonathan Kaufman**, Advocates for Community Alternatives
- **Sandra Cossart**, SHERPA
- **Rae Lindsay**, Clifford Chance
- **Humberto Cantú Rivera**, University of Monterrey

Background: The Accountability and Remedy Project (ARP) Phase I focused on improving the functioning of judicial remedy mechanisms in ensuring access to effective remedy for victims of business-related human rights abuses. The ARP I project found that although causing or contributing to human rights abuses would amount to a crime in many jurisdictions or give rise to administrative sanctioning, companies are rarely the subject of law enforcement sanctions for such offences. Challenges encountered in public law regimes fragmented and incomplete legal regimes; lack of legal development; lack of awareness of the scope and operation of regimes; structural complexities within business enterprises; and a lack of enforcement. To help overcome these challenges, the ARP I project presented a series of policy objectives that serve as a guide for strengthening domestic public law regimes.

This session will focus on methods to establish corporate liability that ensure both effective deterrence from and effective remedy in the event of business-related human rights abuses. The session will discuss how different tests for assessing corporate criminal and administrative liability are applied in different jurisdictions and strengths and limitations of these models. It will offer reflections on how States can begin to review the effectiveness of current approaches, and how they can consider

methods of attributing legal liability to companies that address systemic fault as well as individual fault, including approaches to the distribution of burdens of proof that take account of considerations of access to remedy in ways that ensure fairness to all parties.

Links to background materials:

- OHCHR Accountability and Remedy Project portal: <https://business-humanrights.org/en/ohchr-accountability-and-remedy-project>
- Final report of the ARP Phase I: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/19 and addendum http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/19/Add.1, containing the recommendations and result
- Link to illustrative examples of elements of state legal regimes relevant to the guidance in the ARP report: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARP_illustrative_examples_July2016.docx

Part 2: The life cycle of a criminal prosecution: Overcoming challenges and increasing accountability for cross-border corporate human rights crimes

Brief outline: The OHCHR's Accountability and Remedy Project I highlights criminal law as a crucial avenue for remedy for human rights victims. In an effort to increase criminally accountability, this session will explore the life cycle of a criminal case against a corporation from the perspective of an investigator, prosecutor, judge, and civil society organization by using real case examples. The discussion will focus particularly on cases that involve multiple jurisdictions and require cross-border collaboration.

Session objectives: The session will highlight challenges that arise at various stages of the investigation and prosecution process and, informed by *The Corporate Crimes Principles*, explore what is needed to overcome these obstacles. The session will further explore how law enforcement officials can work with civil society organizations in each phase of the criminal prosecution to further justice for victims of corporate crimes.

Key discussion questions:

- How is a corporate crimes case initiated? How does a case come to the attention of an investigator or prosecutor? What can investigators / prosecutors do to increase the number of cases brought to them or to more pro-actively pursue these cases?
- What factors should an investigator or prosecutor take into consideration when deciding whether to accept a case?
- How does an investigator work with the prosecution and other agencies to collect the necessary evidence, including witness testimonies? In particular, how can investigators and prosecutors work effectively with other law enforcement agencies in cross-border cases?

What measures should the investigator or prosecutor consider in order to protect the victims, witnesses, and whistle-blowers throughout the process?

- How should a prosecutor decide which offenses to pursue and which, if not all, suspects to investigate and/or prosecute?
- What accompanying measures, such as asset forfeiture of the alleged proceeds of crimes, should a prosecutor consider to ensure an effective prosecution?
- What special expertise does a judge need to effectively adjudicate a corporate crimes case?
- What support, financially and politically, do law enforcement and the judiciary need from government policy makers in order to more effectively pursue a corporate crimes case, particularly when it involves multiple jurisdictions?
- Throughout the investigation, prosecution, and adjudication processes, what action should be taken to enhance collaboration between law enforcement across jurisdictions and with civil society to successfully bring about criminal prosecution of corporate actors involved in corporate crimes? How can law enforcement and civil society work more effectively together to increase cooperation and accountability and remedy in corporate crimes cases?

Speakers:¹

- **Anita Ramasastry**, UN Working Group on Business and Human Rights
- **Seema Joshi**, Head of Business and Human Rights, Amnesty International
- **Debra LaPrevotte**, Senior Investigator, The Sentry
- **Simon Minks**, Public Prosecutor, Office of the Attorney General of the Netherlands
- **Justice Ian Binnie**, C.C., Q.C., Counsel, Lenczner Slaght (former Justice of the Supreme Court of Canada)
- **Sarah McGrath**, Legal and Policy Director, ICAR (moderator)

Format: Moderated panel discussion.

Background: States rarely investigate or prosecute business for criminal conduct linked to serious human rights abuses (“corporate crimes”). This problem is particularly acute in cross border cases, when a company based in one state causes or contributes to a harm in another state. As a result, victims are being denied an essential form of justice, and implicated actors, including commercial entities and individuals, continue to act with impunity.

At the same time, investigators and prosecutors consulted by Amnesty International and the International Corporate Accountability Roundtable (ICAR) through the multi-year Commerce, Crime, and Human Rights Project, highlighted a number of practical and legal challenges to pursuing corporate crime cases, including a lack of legal infrastructure, political will, and necessary expertise, capacity, and resources within law enforcement and the judiciary. Practical challenges also exist in relation to evidence collection and witness testimony, particularly in cross-border cases.

These challenges are not insurmountable. For instance, in April, Dutch authorities successfully prosecuted businessman Guus Kouwenhoven for complicity in war crimes and arms trafficking for selling weapons to Liberia’s former President Charles Taylor during the country’s brutal civil war. The Dutch appeals court sentenced Kouwenhoven to 19 years in prison. The Kouwenhoven case shows

¹ Further information on speakers provided in Annex

that, to overcome the challenges, states and law enforcement must commit to fighting impunity by developing targeted strategies and actively pursuing these cases.

To spur this change, Amnesty and ICAR worked with a small group of renowned experts in international criminal law and human rights law to develop *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases (The Corporate Crimes Principles)*. *The Corporate Crimes Principles* in particular aim to encourage action by law enforcement, by presenting practical solutions to the key challenges they face in pursuing corporate crime cases.

Links to background materials:

- <http://www.commercecrimelaw.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf>
- <http://www.commercecrimelaw.org>
- UN Working Group report: Best practices and how to improve on the effectiveness of cross-border cooperation between States with respect to law enforcement on the issue of business and human rights, http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/35/33

ANNEX. SPEAKERS SHORT BIOS.

PART 1.

Lene Wendland

Chief of the Human Rights And Economic and Social Issues Section, Office of the United Nations High Commissioner for Human Rights (OHCHR)

Lene Wendland leads OHCHR's section on human rights and economic and social issues, which includes the Office's work on business and human rights. Previously, Lene was the OHCHR adviser on Business and Human Rights since 2004. In that capacity she was part of the team of former Special Representative of the Secretary-General on business and human rights, Professor John Ruggie, for the duration of his mandate from 2005-2011 and contributed to the development and drafting of the UN Guiding Principles on Business and Human Rights. She leads OHCHR's Corporate Accountability and Remedy Project which aims to enhance accountability and access to remedy in cases of business involvement in human rights abuses. Before joining OHCHR, Lene consulted on human rights issues to a range of international NGOs and intergovernmental organisations. From 1993 – 1997 she headed the Media Law Project at the Centre for Applied Legal Studies at the University of the Witwatersrand in South Africa, and before that she was a research officer at the Danish Institute for Human Rights.

Rae Lindsay

Clifford Chance

Rae Lindsay specializes in international law, litigation, economic sanctions and the emerging area of business and human rights. She is co-head of the firm's Public International Law practice. Rae represents governments, governmental agencies and international organizations, as well as multinational corporations and international financial institutions. She manages global investigations for clients and advises on anti-corruption matters, sanctions law and regulation, compliance issues, investigations, enforcement and licensing. Rae also advises clients in a variety of sectors on risk management and corporate governance with a focus on financial crime and regulation, and on the emerging regulation of business and human rights. Rae is a trustee and international board member of the Institute for Human Rights and Business, and a member of the World Economic Forum Global Agenda Council on Human Rights. She is Treasurer of the British Branch of the International Law Association. Rae is co-author of "State Immunity: Selected Materials and Commentary" (OUP, 2004).

Jonathan Kaufman

Advocates for Community Alternatives

Jonathan Kaufman is the founder and Executive Director of Ghana-based Advocates for Alternatives, which helps West African communities that are threatened by the destructive impacts of extractives-led development to take control of their own futures. Prior to founding ACA, Jonathan was Legal Advocacy Coordinator at EarthRights International, where he worked with civil society groups and communities on six continents to promote accountability for corporate complicity in human rights abuse and environmental devastation. He was a Finalist for the Public Justice Trial Lawyer of the Year

Award in 2010, and has served as an adviser to the U.S. State Department on dispute resolution between communities and corporations.

Sandra Cossart

SHERPA

Sandra Cossart is acting Executive Director of Sherpa and its Programs Director. Sandra is an international lawyer and began her career within international organizations such as the European Parliament and the Council of Europe, before working several years for the European Union in Russia. Upon her return to France, she joined a law firm where she provided counsel and litigation services, notably in business law, and was simultaneously involved in pro bono work for asylum seekers and refugees. She previously worked as an independent consultant and for the Business and Human Rights Resource in England before joining Sherpa in 2010.

Jennifer Zerk

Independent consultant and lead legal expert for the Accountability and Remedy Project

Dr Jennifer Zerk is a freelance analyst and consultant specializing in legal aspects of business and human rights and corporate social responsibility. Before setting up her consulting practice she worked as a commercial lawyer in London, with a particular focus on energy law and infrastructure projects. Jennifer is a regular contributor and commentator on UK and EU policy and regulatory strategy and has testified before the UK Parliamentary Joint Committee on Human Rights. Internationally, she is a respected and sought after consultant, commentator and speaker. She has advised on a number of significant law reform and policy initiatives in the business and human rights field including as lead legal consultant to the Accountability and Remedy Project of the Office of the UN High Commissioner for Human Rights.

Humberto Cantú Rivera

Professor, School of Law of the University of Monterrey, Mexico

He has participated as Expert Adviser to the Delegation of Mexico in the sessions of the Open-Ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights, and in the development process of Mexico's National Action Plan on Business and Human Rights. He has also participated in expert consultations of international and regional organizations on business and human rights, and has advised companies and Mexico's NHRI on this issue. A Member of the Editorial Board of the Business and Human Rights Journal, he is the editor of *Derechos humanos y empresas: reflexiones desde América Latina*, published by the Inter-American Institute for Human Rights in 2017, the first edited book in Spanish on business and human rights with a regional focus

PART 2.

Anita Ramasastry

Member, UN OHCHR Working Group on the issue of human rights and transnational corporations and other business enterprises.

Anita Ramasastry is a Roland L. Hjorth Professor of Law and the Director of the Graduate Program in Sustainable International Development at the University of Washington School of Law. She researches and teaches in the fields of law and development, anti-corruption, international commercial law and business and human rights. From 2009 to 2012, Professor Ramasastry served as a senior advisor to the International Trade Administration of the US Department of Commerce. She has authored numerous scholarly articles and reports focused on emerging issues in business and human rights including the influential survey on access to remedy, titled Commerce, Crime and Conflict (alongside Mark Taylor and Bob Thompson), and recently has co-chaired an Independent Commission on Experts with Justice Ian Binnie focused on commerce, crime and human rights.

Seema Joshi

Head of Business and Human Rights, Secretariat of Amnesty International.

Seema Joshi is the Head of Business and Human Rights at the Secretariat of Amnesty International. She has professional experience in the areas of international law, natural resources, conflict, and human rights. Currently, she leads the organisation's investigative and advocacy work on critical issues pertaining to corporate accountability. Prior to this, Seema worked as Legal Advisor at the London based NGO, Global Witness, where she investigated cases and also pushed for stronger legal accountability of companies that commit criminal acts. Previously, while living in Asia, Seema oversaw the implementation of a UNDP regional programme focused on improving environmental access rights for the poor. Seema is a qualified lawyer, who practiced commercial litigation in Canada.

Debra LaPrevotte

Senior Investigator, The Sentry

Debra LaPrevotte is the Senior Investigator for The Sentry, which seeks to disrupt and ultimately dismantle the network of perpetrators, facilitators, and enablers who fund and profit from Africa's deadliest conflicts. Debra is currently investigating violent kleptocracy in Sudan, South Sudan, Congo (DRC), Central African Republic and Somalia. She focuses on investigating greed that fuels war crimes and atrocities. Prior to joining The Sentry, Debra retired after 20 years with the Federal Bureau of Investigation (FBI). Debra served as a Supervisory Special Agent on the International Corruption Unit at FBI Headquarters. Debra was instrumental in initiating the FBI's Kleptocracy program and seized more than \$1 billion dollars from foreign corrupt officials. Debra has spent the past 14 years working international corruption investigations. Debra is also a Forensic Scientist and spent several years on the FBI's Evidence Response Team Unit at the FBI Lab. Prior to her FBI career, Debra worked for the Department of Defense for five years.

Simon Minks

Senior Public Prosecutor, National Division of the Dutch Department of Prosecutions

National Senior Public Prosecutor of the Netherlands, Simon Minks, specialises in counter terrorism and war crimes. Since 2015, he has (also) resumed position as Liaison Magistrate with the International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY, now MICT: Mechanism for International Criminal Tribunals), and the Embassies.

Simon prosecuted (in appeal) Somali pirates and persons wanting to fight in the Syrian civil war. Trafigura, the world's third largest private oil and base metals trader involved in several scandals, was successfully prosecuted (in appeal) by Minks in 2011 for exporting illegal toxic chemical waste to Ivory Coast causing (probably death and) injury to more than 30,000 inhabitants. Earlier, in 2004, one of his most noteworthy prosecutions (in appeal) was the arrest of Frans van Anraat, first man convicted in connection with alleged war crimes committed against Kurds in Iraq and Iran. Following an international investigation, Anraat was found guilty of supplying Saddam Hussein with chemicals in the full knowledge that they would be used in the manufacture of chemical weapons. Alleged in the Halabja massacre is that chemicals killed an estimated 5,000 civilians in a single day.

Sarah McGrath

Legal and Policy Director, International Corporate Accountability Roundtable (ICAR)

Sarah McGrath is the Legal and Policy Director at the International Corporate Accountability Roundtable (ICAR), overseeing a range of initiatives aimed at ensuring governments create and enforce rules over corporations that promote human rights and reduce inequality. Prior to joining ICAR, Sarah served as the Adviser to the President at the Australian Human Rights Commission and led the development and implementation of the Commission's Business and Human Rights Program. Previously, Sarah worked in the Commission's International Programs Unit providing secretariat and research support to the Commonwealth Forum of National Human Rights Institutions (CFNHRI).

Justice Ian Binnie

counsel at Lenczner Slaght

Justice Ian Binnie is one of Canada's most respected advocates, he served for nearly 14 years as a Justice of the Supreme Court of Canada. When he retired in 2011, he was described by The Globe and Mail as "*arguably the country's premier judge.*" During his time on the country's top court (as only the third modern Justice appointed directly from the bar), Ian authored more than 170 opinions, including on landmark cases involving issues of patent interpretation and validity, protection of trade-marks, media law, commercial disputes, punitive damages, expert evidence and many aspects of constitutional, criminal and administrative law. Throughout his career as a litigator, Ian has often taken on public service roles as well. In the early 1980s he served for four years as Canada's Associate Deputy Minister of Justice. He was later appointed Special Parliamentary Counsel to the Joint Committee of the Senate and the House of Commons on the Meech Lake Accord. An elected member of the International Commission of Jurists, Ian has appeared before the International Court of Justice and various international tribunals in governmental litigation matters, and has acted as Canadian representative in high-profile disputes involving France and the U.S.