



Corporate Complicity & Legal Accountability

VOLUME **3** Civil
Remedies

Report of the International Commission of Jurists
Expert Legal Panel on Corporate Complicity
in International Crimes



INTERNATIONAL
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While there are situations in which businesses and their officials are directly and immediately responsible for human rights abuses, allegations are frequently made that businesses have become implicated with another actor in the perpetration of human rights abuses. In such circumstances, human rights organisations and activists, international policy makers, government experts, and businesses themselves, now use the phrase “business complicity in human rights abuses” to describe what they view as undesirable business involvement in such abuses. This development has spawned reports, analysis, debate and questions. What does it mean for a business to be “complicit”? What are the consequences of such complicity? How can businesses avoid becoming complicit? How should they be held to account for their complicity? In many respects, although the use of the term is widespread, there continues to be considerable confusion and uncertainty about the boundaries of this concept and in particular when legal liability, both civil and criminal, could arise.

In 2006, in order to address some of these questions the International Commission of Jurists asked eight expert jurists to form the Expert Legal Panel on Corporate Complicity in International Crimes. The Panel was asked to explore when companies and their officials could be held legally responsible under criminal and/or civil law when they are complicit in gross human rights abuses and to provide guidance as to the kind of situations prudent companies should avoid.

In this third Volume of its final report, through a comparative analysis of the law of tort in common law countries and the law of non-contractual obligations in civil law jurisdictions, the Panel explores the law of domestic civil liability and the ways in which, across jurisdictions, civil liability may arise for companies and/or their officials when they are complicit in gross human rights abuses.



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International Commission of Jurists

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This volume was drafted by Leah Hctor. Cees van Dam provided legal advice and legal review. The Panel reviewed the volume during the drafting process a minimum of three times. The volume was edited by Madeleine Colvin and Róisín Pillay. Massimo Frigo provided research assistance. Marlena Ong and Priyamvada Yarnell assisted in the production. In addition to Steering Group Members and Advisors, thanks are also due to Paul Hoffman, Jaap Winter and Vino Timmerman for their contribution on specific legal questions.

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Forward

In March 2006 the International Commission of Jurists asked eight expert jurists to form the Expert Legal Panel on Corporate Complicity in International Crimes (the Panel). The Panel was created to explore when companies and their officials could be held legally responsible under criminal and/or civil law when they are involved with other actors in gross human rights abuses.

The Panel members are leading lawyers in different fields of expertise, from five continents, and representing both common law and civil law legal traditions. They are: Andrew Clapham, Claes Cronstedt, Louise Doswald-Beck, John Dugard, Alberto León Gómez-Zuluaga, Howard Mann, Usha Ramanathan, and Ralph G. Steinhardt.

Throughout the process the ICJ engaged several experts, as advisers to the Panel, including: Eric David, Errol Mendes, Peter Muchlinski, Anita Ramasastry and Cees van Dam.

The Project's Steering Group was comprised of: Widney Brown & Peter Frankental (Amnesty International), Arvind Ganesan (Human Rights Watch), Patricia Feeney (Rights and Accountability in Development), John Morrison (Business Leaders Initiative on Human Rights; TwentyFifty Ltd.), Sune Skadegaard Thorsen (Lawhouse DK; ICJ Denmark), and Salil Tripathi (International Alert).

The Panel received research papers from leading academics, practitioners and corporate counsel on several relevant topics. These included: Larissa van den Herik (International Criminal Law), David Hunter (International Environmental Law), Olivier de Schutter, (Law of the European Union), Jennifer Zerk (Common Law Tort Liability), Celia Wells (Corporate Criminal Law), Jonathan Burchell (Comparative Criminal Law on Joint Liability), Beth Stephens (U.S. Litigation Against Companies for Gross Violations of Human Rights), Rachel Nicolson and Emily Howie (Separate Legal Personality, Limited Liability and the Corporate Veil), Sunny Mann (Competition Law) and John Sherman (The United States Sentencing Guidelines for Organisational Defendants).

In October 2006, at a multi-stakeholder consultation, organised in cooperation with Friedrich-Ebert-Stiftung, the Panel engaged with key stakeholders including representatives of: ABB, Amnesty International, BP, Building and Wood Workers International, the Business Leaders Initiative for Human Rights, the Centre for Corporate Accountability, Chatham House, The Coca-Cola Company, the German Forum for Human Rights, Global Witness, Human Rights Watch, the ILO Governing Body, the International Committee of the Red Cross, the International Confederation of Free Trade Unions, the International Council on Human Rights Policy, National Grid, the Office of the UN High Commissioner for Human Rights, Rights and Accountability in Development, and Sherpa.

The Panel also sought input from lawyers, business representatives and others via an online request for submissions. Among others submissions were received from: the Corporate Responsibility Coalition (CORE), EarthRights, Global Witness, and the International Criminal Defence Attorney's Association.

The Panel met in plenary three times during the process. The three volumes of this report set out final conclusions and recommendations. The report as a whole has been approved by each member of the panel and reflects their collective views. However it may happen that there are specific statements in the report which do not accord with, or comprehensively reflect, the precise view of every Panelist.

Glossary of Key Terms

Company

Although the title of the Panel’s report uses the phrase “corporate complicity,” throughout its inquiry the Panel has focused on all business entities irrespective of structure or composition, of whether they are large or small, multinational, transnational or national, state or privately owned. The Panel’s analysis and findings are intended to apply across the board to all business entities and throughout its report the Panel uses the terms *company* and *business* interchangeably to describe them. Furthermore throughout Volume 3 when the Panel refers to the legal accountability of companies or businesses, it should be understood as referring to the legal liability of a company entity and/or a company official. Across all jurisdictions, civil liability can arise for both companies as legal entities and for company officials, as natural persons.

Complicity

As outlined in Volume 1, for a number of years now the word “complicity” has been used on a daily basis in policy documents, newspaper articles and campaigning slogans, to describe the different ways in which one actor becomes involved in an undesirable manner in something that someone else is doing. Frequently it is not used to denote the criminal law responsibility of a criminal accomplice but rather in a rich and multi-layered colloquial manner to convey the connotation that someone has become caught up and implicated in something that is negative and unacceptable. Such use of the term has become commonplace in the context of work on business and human rights, and it has provided a tool to capture and explain in simple terms the fact that companies can become involved in human rights abuses in a manner that incurs responsibility and blame. Throughout this Volume the Panel uses the term “complicity” in this non-legal sense, to describe the various ways in which companies can become involved with other actors in the perpetration of human rights abuses.

Gross Human Rights Abuses

The Panel’s analysis has focused on actions that constitute human rights violations by governments and/or impairments of human rights by non-state actors, including for example armed groups and other companies. Throughout this Volume the Panel uses the term “human rights abuses” to describe all such conduct. The Panel was asked to consider some of the most egregious human rights abuses, which will often have devastating effects,

not only on individual victims and their families, but on the communities and societies in which they take place. Throughout this Volume the Panel uses the term “gross human rights abuse” to describe such abuses. The term is generally understood as describing an infringement of a flagrant nature that amounts to a direct and outright assault on internationally recognised human rights. For example, among others, crimes against humanity, enforced disappearances, slavery, and torture are generally acknowledged to constitute gross human rights abuses. The concept of gross human rights abuses is continuously developing and expanding.

1 Introduction

The focus of this Volume is the domestic law of civil remedies. In it the Panel explores the way in which the law of civil remedies applies to situations in which companies are complicit in gross human rights abuses.

The Panel uses the term “law of civil remedies” to refer to both the law of tort in common law legal systems, and the law of non-contractual obligations in civil law jurisdictions.¹ The two bodies of law are intended to regulate, and provide for civil liability, in situations where harm is caused to someone as a result of another actor’s behaviour and where that actor and the victim are not in a contractual relationship. The Panel has studied both systems of law and has endeavoured to describe the common ground between the two. In this way it has been able to explain when and how, across jurisdictions, civil liability could arise in situations where a company is complicit in gross human rights abuses.

In Section 2 the Panel outlines the basic principles of civil liability that apply across jurisdictions. It asks what state of mind the law of civil remedies looks for before holding an actor responsible. It considers how close to a gross human rights abuse a company must be before it can, and should, be considered responsible under different civil causes of action. In Section 3, it applies these principles in a detailed manner to a number of particular situations in which companies often face allegations of complicity in human rights abuses. In Section 4, the Panel examines some of the procedural rules and requirements that can make it difficult for victims of human rights abuses to use the law of civil remedies to obtain justice. It analyses how they can, and should, be interpreted and applied so as to ensure they do not impede access to justice. In Section 5 the Panel focuses briefly on the unique example of the United States where a piece of legislation commonly referred to as the Alien Tort Statute has in a relatively short time given rise to several civil claims against companies for alleged involvement in gross human rights abuses.

Every legal system in the world encompasses some form of tort law or law of non-contractual obligations and the remit of the Panel’s inquiry has been vast.² Not only are there general differences between the content of the law of tort in common law countries and the law of non-contractual obligations in civil law jurisdictions, but the law of civil remedies varies from each individual country to the next. The Panel has sought to take account of these differences while focusing on, and identifying, the

1 The terminology used throughout jurisdictions to describe this area of law can vary depending on jurisdiction, from *the law of non-contractual obligations*, to *extra-contractual liability*, to *civil responsibility for delicts/quasi-delicts* (in French: *la responsabilité civile délictuelle*) (in German: *Unerlaubte Handlung*), to *the law of tort*.

2 The Panel did not undertake in-depth analysis of many important and relevant areas of law that can give rise to a civil remedy: including substantial parts of labour law, environmental law, and company law. However it believes that future exploration of the ways in which these bodies of law are, and could be, used to hold companies legally accountable when they are complicit in human rights abuses, would be worthwhile.

similarities. In this way it endeavours to describe the type of conduct and situations that companies throughout the world would be wise to avoid if they are to remain within the limits of the law of civil remedies and avoid a zone of legal risk.

1.1 Legal Accountability for Company Complicity in Gross Human Rights Abuses: the Importance of Civil Liability in Defining the Zone of Legal Risk

The Panel believes that civil liability is increasingly important as a means of assuring legal accountability when a company is complicit in gross human rights abuses.

First, a finding of civil liability can have a meaningful impact on the situation and lives of those who have suffered human rights abuses, through providing for appropriate remedies.³ It can also significantly influence patterns of behaviour in a society, raising expectations as to what is acceptable conduct, and preventing repeat of particular conduct, by both the actor held liable, and by other actors who operate in similar spheres or find themselves in similar situations.

Second, in every jurisdiction, victims of gross human rights abuses or their families can initiate civil claims themselves.⁴ This means that even where governmental authorities are reluctant to become involved in criminal proceedings (because they have an interest in shielding a particular company or its representatives from liability, or protecting themselves if it is claimed that the company was complicit in abuses committed by the state) legal liability may nonetheless be sought in instances of alleged complicity.

Third, although the law of civil remedies may not use the terminology of human rights law (and for example may not classify harm as ‘torture,’ ‘arbitrary detention,’ or ‘forced prostitution’), as outlined in Section 2.1, in all jurisdictions it protects “interests” such as life, liberty, dignity, physical and mental integrity, and property.⁵ The Panel considers that harm to one or several of these interests will always be an

3 Throughout jurisdictions the law of civil remedies includes mechanisms of remedy which can often mirror the types of reparation required by international law when human rights abuses are suffered. For example under international law proper reparation may include, among other things, one or many of: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. See for example Article 34, Draft Articles on Responsibility of States for Internationally Wrongful Acts; Article 63, American Convention on Human Rights (hereinafter ACHR); Article 41, European Convention on Human Rights (hereinafter ECHR); Article 75, Rome Statute of the International Criminal Court (hereinafter ICC); Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (GA Resolution A/RES/60/147 16 December 2003) (hereinafter UN Principles on Reparation). For more sources and a general discussion see *The Right to Remedy and Reparation for Gross Human Rights Violations: A Practitioners Guide* (International Commission of Jurists 2006).

4 Whereas in the context of criminal investigations and prosecutions the involvement of state prosecutors and/or other state authorities may sometimes be required at varying stages of the proceedings.

5 For a discussion, see Section 2.1, p. 10.

inherent part of a gross human rights abuse, and as a result in cases of gross human rights abuses, civil claims will usually be possible.

Fourth, for the purposes of civil liability it is irrelevant whether or not the company whose liability is sought was a primary or secondary actor. Most of the time the law of civil remedies does not use the word complicity or draw distinctions between accomplices or accessories and principal perpetrators. In general, all actors whose conduct contributes in greater or lesser ways to harm suffered by another, can potentially face civil liability whether or not they instigated the situation, actively inflicted the harm, or helped a principal actor.⁶

Fifth, when the legal accountability of a company entity is sought, the law of civil remedies may often provide victims with their only legal avenue to remedy. This is because the law of civil remedies will always have the ability to deal with the conduct of companies, individuals and state authorities. In contrast international and national human rights monitoring bodies, tribunals or courts may often not have the jurisdiction to hear claims against companies and individuals,⁷ while criminal law may often only allow the prosecution of individuals.⁸

Throughout its inquiry, the Panel has been struck by the way in which the law of civil remedies is being applied in new contexts. As the Panel noted in Volume 1, victims of human rights abuses are increasingly turning to law to constrain corporate power: to hold those responsible for corporate abuses accountable and to seek remedies and reparations. As these expectations placed on legal remedies by victims of injustice develop, the law of civil remedies is being called upon to respond to new situations.

During the last three decades there has been a dramatic surge in litigation in the United States under a 1789 law often referred to as the Alien Tort Statute (ATS).⁹ This

6 While different legal systems may describe conduct differently, or use different headings of liability, essentially the Panel has found that there is a certain level of conduct that throughout jurisdictions may place an actor in a zone of legal risk. This conduct is described in Section 2 p. 10. In such circumstances, when a finding of civil liability is made, and where more than one actor is responsible for the harm caused, those liable are generally referred to as joint-tortfeasors or co-authors. However this absence of categorisation is not the case in every jurisdiction. For example in the United States not only can a natural or legal person be held generally liable in tort law without specification of the role they played in causing the harm, in some instances they can also be held specifically liable for “aiding and abetting” a tort. See US Restatement of the Law, 2nd, Torts; and for a discussion see Zerk, *Common Law Tort Liability for Corporate Participation in International Crimes: A paper prepared for the International Commission of Jurists, Expert Legal Panel on Corporate Complicity*, www.icj.org.

7 For a brief discussion of when a national human or constitutional rights claim against a company may be possible see Box 1, p. 7. International human rights bodies only have jurisdiction over states, see for example: Article 41, International Covenant on Civil and Political Rights (hereinafter ICCPR), and Article 1 First Optional Protocol to the ICCPR; Article 14, Convention on the Elimination of all forms of Racial Discrimination (hereinafter CERD); Article 33 & 34 ECHR.

8 See Volume 2, Section 9.

9 28 U. S. C. §1350 ‘Alien’s action for tort’. Included in the Judiciary Act of 1789. The legislation is also often referred to as the Alien Tort Claims Act (ATCA).

legislation, which is considered in more detail in Section 5, enables foreigners to sue private actors in United States courts for their alleged participation throughout the world in some of the most egregious human rights abuses. The legislation is unique to the United States but nevertheless ATS litigation has reverberated around the world. It has motivated lawyers in other jurisdictions to explore the feasibility in their own countries of seeking the civil liability of actors involved in gross human rights abuses. The Panel has found that there is now a small, but growing number of claims being brought in different jurisdictions invoking the domestic law of civil remedies against businesses for involvement in gross human rights abuses. The Panel believes that these developments are creating a network of avenues to accountability and justice that is slowly establishing opportunities for victims to obtain civil redress when companies are involved in gross human rights abuses.

Of course, at the same time, despite the many positive and important features of civil liability, as discussed in Section 4, victims still face considerable obstacles when seeking the liability of a company for its involvement in gross human rights abuses.

The Panel believes it to be of great importance that, in the context of law-making and policy-setting, steps continue to be taken to tackle, in appropriate ways, the obstacles to civil liability which can arise, and to ensure the continuing development of civil liability. Under international human rights law, individuals have the right to remedy and reparation when their human rights are violated. States have the obligation to ensure the enjoyment of human rights, including to protect those rights from abuse and provide access to a judicial remedy when abuses occur.¹⁰ Governments often refer to the law of tort and non-contractual obligations as mechanisms through which they are fulfilling these obligations.¹¹ In this context, the Panel believes that governments must take the steps necessary to ensure that the law of civil remedies is able to respond in an effective manner when it is called upon to address claims for remedy in respect of gross human rights abuses.

10 Article 2 ICCPR; Articles 2 and 6 CERD; Article 2 Convention on the Rights of the Child (hereinafter CRC); Article 2, Convention on the Elimination of all forms of Discrimination Against Women (hereinafter CEDAW); Article 7, Convention on Protection of the Rights of All Migrant Workers and Members of Their Families (hereinafter CPMW); Articles 1 and 25 ACHR; Article 1 ECHR. See also Article 8, Universal Declaration of Human Rights (hereinafter UDHR), Article 7 of the African Charter on Human and Peoples Rights (hereinafter ACHPR), and the UN Principles on Reparation. For examples of how international monitoring bodies or courts have discussed the obligation to ensure the enjoyment of human rights, including obligations to protect human rights and ensure access to remedies, see for example: Human Rights Committee (hereinafter HRC), *General Comment No. 31 on Article 2 of the ICCPR*; Inter-American Court of Human Rights (hereinafter IACtHR), *Velasquez Rodriguez v. Honduras*, 29 July 1988. For an in-depth study of these matters and specifically the right to remedy including reparation, see *The Right to Remedy and Reparation for Gross Human Rights Violations: A Practitioners Guide* (International Commission of Jurists 2006).

11 See for example, Peru's report to the Committee Against Torture (CAT/C/20/Add.6, 12/08/98, par. 86), Denmark's report to the HRC (HRI/CORE/1/Add.58, par. 60), France's report to the same body (CCPR/C/76/Add.7, par. 35) and Ireland's report to the Committee on the Elimination of all forms of Discrimination Against Women (CEDAW/C/IRL/4-5 (2003)).

1.2 Distilling the Principles of Civil Liability

From its comparative inquiry into the law of civil remedies, the Panel has distilled a number of questions which courts throughout the world will seek to answer when endeavouring to draw legal lines between conduct which may give rise to liability and that which may not. In Sections 2 and 3 below, the Panel outlines the legal basis for these questions and discusses in detail the way in which they may be answered and analysed in circumstances where companies are allegedly complicit in gross human rights abuses. These questions are as follows:

Was harm inflicted to an interest of the victim that is protected by law?

Did the company's conduct contribute to the infliction of the harm?

Did the company know or would a prudent company in the same circumstances have known that its conduct posed a risk of harm to the victim?

Considering this risk did the company take the precautionary measures a prudent company would have taken in order to prevent the risk from materialising?

Of course, as the facts and policy considerations at play in each individual situation vary, so too will the decision of any court as to whether civil liability should be imposed. However, the Panel believes that a prudent company that wishes to avoid becoming complicit in the infliction of harm would have reference to these questions and would modify and/or redress its chosen course of action accordingly.

Box 1: National Human Rights and Constitutional Law

When it comes to ensuring the legal accountability of companies and company officials for human rights abuses, criminal law (Volume 2) and the law of civil remedies (Volume 3) usually provide the mechanisms through which governments fulfil their international obligations to protect human rights and provide for access to remedy.

Perhaps in light of this, there is a widespread view that in the case of human rights abuses perpetrated by non-state actors, national human rights legislation or constitutional rights protection is irrelevant in terms of providing for direct accountability mechanisms.

However, the Panel has found that in a number of countries domestic constitutional or human rights provisions do in fact provide for a direct cause of action against a non-state actor, including companies or company officials, alleging that their conduct infringed a protected right. In some legal systems

this will be generally available,¹² and in other jurisdictions it will be possible in a more limited set of circumstances, such as where a company undertakes conduct on behalf of a government, with state support, under state control, or in fulfilment of a public function.¹³

The Panel considers that a direct constitutional or human rights cause of action against a company can play a significant symbolic role in the context of legal accountability for human rights abuses. However in practice such claims against companies or their officials when they are allegedly involved in gross human rights abuses will be rare. First, because a constitutional claim is generally only available if no other pertinent cause of action exists under another body of law, including the law of civil remedies.¹⁴ Second, because in the majority of jurisdictions, constitutional actions only allow for a declaration that conduct was unconstitutional and not for other remedies. For these reasons, and as is explored in Section 2, the law of tort and non-contractual obligations will usually provide the primary bases for civil claims in the kind of cases at the heart of the Panel's inquiry.

However at the same time it is important to recall that constitutional rights or human rights provisions will have a powerful effect on the application of the law of civil remedies to the facts in any given case and particularly in cases concerning human rights abuses. This is because in the majority of constitutional legal systems, or systems with national human rights legislation, the

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- 12 For example: Argentina: Article 43, Argentine Constitution; Portugal: Constitution of Portugal, Article 18. See also Brazil: *União Brasileira de Compositores c. Arthur Rodrigues Villarinho*, R.E. 201.819-8, Supremo Tribunal Federal, Segunda Turma, 11 October 2005; Ireland: *Meskeil v. Coras Iompair Eireann*, Irish Supreme Court, 1973 1 I.R. 121; Nigeria: *Gbemre v. Shell Petroleum Development Co. Nigeria Ltd and Others*, available at <http://www.climatelaw.org/cases/case-documents/nigeria/ni-shell-novo5-judgment.pdf>. This is not an exhaustive list. In some jurisdictions international human rights treaties which have been incorporated into national law may have a similar effect, and a human rights cause of action against private actors in respect of all or certain of the rights enshrined in those treaties may be possible.
- 13 See for example India: *M.C. Mehta v. Union of India*, WP 12739/1985 (1986.12.20) and *Ramana Dayaram Shetty v. Intl. Airports Auth. of India*, (1979) 3 S.C.C. 489; New Zealand: Section 3, New Zealand Bill of Rights Act 1990. Every legal system will differ in how it defines state function or what it considers "acting on behalf of the state" to entail. See for example India: *M.C. Mehta v. Union of India*, WP 12739/1985 (1986.12.20) and *Ramana Dayaram Shetty v. Intl. Airports Auth. of India*, (1979) 3 S.C.C. 489, and compare with United States: *Food Employees v. Logan Plaza*, 391 US 308 (1986), *Holly v Scott*, 434 F.3d 287, US Court of Appeal, 4th Cir.12 January 2006, para.293, *Jackson v. Metropolitan Edison Co.* (419 US 345), and *Blum v Yaretsky* (457 US 991). See also Section 6 (3) (b) UK Human Rights Act 1998, available at: http://www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1 (And see in relation to interpretation of the relevant clause: Statement of the Secretary for the Home Department, Jack Straw, HC Deb, 17 June 1998, col. 433; YL (by her litigation friend the Official Solicitor) (FC) (Appellant) v. Birmingham City Council and others (Respondents), [2007] UKHL 27; and Report of the Joint Committee on Human Rights (House of Lords), *The Meaning of Public Authority under the Human Rights Act*, 19 March 2007).
- 14 See for example Argentina: Article 43 of the Argentine Constitution and Ireland: *Meskeil v. Coras Iompair Eireann*, 1973 1 I.R. 121.

law of tort or non-contractual obligations must be applied and interpreted in line with constitutional or human rights provisions.¹⁵

15 See for example: Germany: *Lüth Case*, German Constitutional Court, BVerGE 7, 198, 15 January 1958; South Africa: *Ronald Stuart Napier v Barend Petrus Barkhuizen*, Supreme Court of Appeal, 30 November 2005; Switzerland: Swiss Federal Tribunal, *BGE 111 II 245*, 18 June 1985.

2 The Law of Civil Remedies and Complicity

In every jurisdiction, despite differences in terminology and approach, an actor can be held liable under the law of civil remedies if through *negligent* or *intentional conduct* it *causes harm* to someone else.¹⁶ Across a range of jurisdictions, this is referred to as *fault liability*.¹⁷ Most jurisdictions also include rules of strict (no fault) liability in relation to specific types of activity or damage under which someone can be liable even if their conduct was not negligent or intentional. An example is the vicarious liability of the employer for the damage his or her employee causes to a third party.¹⁸ However, situations in which strict liability apply are usually specific exceptions to the general rule which requires intention or negligence. Therefore in its analysis the Panel focuses on fault liability: situations in which *harm*, *intentional* or *negligent conduct* and *causation* are prerequisites for liability.

In the following pages, with reference to the differences between jurisdictions and legal systems, the Panel seeks to explain in sequence the content of each of these requirements and analyses their potential application in a variety of situations.

2.1 Harm and Gross Human Rights Abuses

One of the main purposes of the law of civil remedies is to protect personal interests and provide remedies to those who have suffered harm. In order for such a remedy to be available under the law of tort or non-contractual obligations, damage must have been caused to an interest that the law protects.¹⁹ In this way, the law of tort

16 For a cross section of relevant laws in civil law jurisdictions see: Article 1382, and 1383 French Civil Code; Article 823, German Civil Code; Article 1, Section 1, Chapter 2, Finnish Tort Liability Act; Article 2043 Italian Civil Code; Article 1.089, Spanish Civil Code; Article 106, Section 1, Chapter VI, General Principles of the Civil Law of the Peoples Republic of China; Article 20, Chapter 2, Philippines Civil Code; Article 1058 (1) & (2), Section 1, Division 9, Chapter 60, Armenian Civil Code; Article 2314 (read with Article 2284) Chilean Civil Code; Article 2341 Colombian Civil Code; Article 927 Brazilian Civil Code; *Air Canada v. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554, Canadian Supreme Court. In common law jurisdictions there are often no general legislative/code provisions which capture the instances in which tort liability can arise, rather the law is to be found in judicial decisions. See for example, in England and Wales on negligence: *Donoghue v. Stevenson* ([1932] A.C. 562; *Caparo Industries Plc v Dickman* [1990] 2 AC 605. For a comparative analysis of European legal systems see Article 1 (101), Principles on European Tort Law, European Group on Tort Law, www.egtl.org. For a broader range of examples, see *International Encyclopaedia of Comparative Law: Tort*, p. 5, et seq.; See also Cees Van Dam, *European Tort Law*, Oxford University Press.

17 Not every jurisdiction uses the term *fault* liability – however the components of fault liability as outlined by the Panel (intention or negligence, causation and harm) can ground liability in all jurisdictions.

18 See for example: Article 1384, French Civil Code; Article 831, German Civil Code; Chapter 3, Section 1, Finnish Tort Liability Act; Article 2049 Italian Civil Code; Articles 932 & 933, Brazilian Civil Code. And see also, the Panel's discussion in Section 3.3 p. 36 of liability in the context of business partnerships, and of strict liability in relation to "hazardous activities" in Box 9: Beyond Complicity: Human Rights Abuses Resulting from Environmental Damage.

19 See for example, Article 2: 101, Principles on European Tort Law, www.egtl.org, which take a comparative European approach.

and non-contractual obligations can ultimately provide remedies for damage to any interest that a particular society deems worthy of legal protection.

In many civil law jurisdictions, the law of non-contractual obligations does not explicitly limit the situations in which a remedy may be available, and the courts decide in every case whether the alleged harm was caused to an interest protected by law and therefore deserving of a remedy.²⁰ In other civil law jurisdictions the provisions outlining the law of non-contractual obligations explicitly list the protected interests.²¹ The law of tort in common law jurisdictions more closely resembles the first kind of civil law system, and generally (especially with regard to the common law tort of negligence) does not provide a categorical list of the kinds of harm that are remediable.²²

However as explained in Section 1.1, no matter what approach a specific legal system takes, in all jurisdictions the law of civil remedies can be invoked to remedy harm to *life, liberty, dignity, physical and mental integrity and property*. While the law of civil remedies does not generally use human rights language, the Panel considers that harm to one or several of these interests will always be an inherent part of a gross human rights abuse, and as a result in cases of gross human rights abuses, civil claims will be possible.

Box 2: Chevron and Nigeria

In 1998, the Nigerian military and police allegedly killed and tortured protestors and environmental activists in the Niger Delta who were campaigning against Chevron's subsidiary's oil drilling in the area. In 2004 a civil tort claim was initiated in the United States against Chevron Corporation and relevant subsidiaries.²³ The complainants alleged that the companies were involved in planning and carrying out the attacks: that they hired the Nigerian

20 See for example: Article 1382, French Civil Code, Article 2043 Italian Civil Code; Article 1.089, Spanish Civil Code; Article 2314 (read with Article 2284), Chilean Civil Code.

21 See for example: Article 823, German Civil Code; Article 32, Chapter 2, Civil Code of the Philippines; Article 1064, Chapter 59, Section IV, Part 2, Civil Code of the Russian Federation.

22 In some common law jurisdictions there are also torts distinct from the tort of negligence, known as intentional torts, such as the tort of battery or false imprisonment, which are formulated around the desire to protect one particular interest. For example: physical integrity in the case of the tort of battery: *Wainwright & Anor v. Home Office* [2003] UKHL 53 (16 October 2003), *Collins v Wilcock* [1984] 1 WLR 1172, *Re F* [1990] 2 AC 1 and personal liberty in the case of false imprisonment: Lord Goff of Chieveley, *R v Bournewood Community and Mental Health NHS Trust*, ex parte L., [1998] UKHL 24; [1999] AC 458; [1998] 3 All ER 289; See also, *Bird v Jones* (1845) 7 QB 742; *Austin and Saxby v the Commissioner of Police of the Metropolis* [2007] EWCA Civ 989; and *Meering v Grahame-White Aviation Co. Ltd.* (1920) 122 LT 44, at 51, 53.

23 *Bowoto et al. v. Chevron Co. et al.*, For more information, and links to relevant documents and court judgments see <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ChevronlawsuitNigeria>.

authorities to provide security for their business operations, accompanied them during the attacks, provided intelligence and other information and participated in the planning and coordination of security operations. It is also alleged that the companies provided the military and police with the means to carry out the attacks – including weapons, helicopters, and boats.

The companies have denied the allegations in full.²⁴ No finding of liability has been made in the case thus far. The complaint has been the subject of a number of preliminary court judgments, in which context a U.S. District Court has held that the plaintiffs have raised some triable issues of fact which allow the case to go to trial.²⁵ For example in one ruling the Court has held “the plaintiffs present evidence that CNL (Chevron Nigeria Limited) personnel were directly involved in the attacks; CNL transported the GSF (Government Security Forces); CNL paid the GSF; and CNL knew that GSF were prone to use excessive force. These facts, among, other, are sufficient to raise a triable issue as to whether CNL knew that GSF planned to attack, and whether CNL agreed that GSF should commit the attacks.”²⁶

2.2 Fault: Intention or Negligence

When harm is caused to legally protected interests, the law of civil remedies seeks to place responsibility for that harm on the shoulders of those actors it considers should rightly bear the burden in the circumstances. This means that the law of civil remedies will only hold liable those actors whose conduct it considers did not meet a standard which society could legitimately have expected of them in the circumstances. As noted above, in every jurisdiction, *intentional* and *negligent* conduct that harms legally protected interests will be considered by the courts to fall short of the legitimate expectations of society, and therefore could potentially give rise to civil liability.²⁷

Beyond the legal sphere, the concepts of intention and negligence have clear and simple meanings with universal resonance, with intention invoking a sense of a determination to act in a specific way,²⁸ and negligence speaking of carelessness, or a lack of forethought or concern.²⁹ Although the legal meanings of intention

24 *Bowoto et al. v. Chevron Co. et al.*, Defendants' Answer to Tenth Amended Complaint for Damages.

25 See for example, *Bowoto et al. v. Chevron Co. et al.*, August 14, 2007, Case 3:99-cv-02506-SI, Document 1640, Order Re: Defendants Motion for Summary Judgement on Plaintiffs' Claims 10 Through 17.

26 *Ibid.*

27 See fn. 16, p. 10 for examples.

28 “Purpose, goal; aim.” *Collins English Dictionary*, Millenium Edition.

29 “Lacking attention, care or concern; careless or nonchalant.” *Collins English Dictionary*, Millenium

and negligence encompass these ordinary meanings, they are more particular and establishing that an actor acted negligently or intentionally for the purposes of the law of civil remedies can include a number of requirements which the Panel explores below.

Instances in which businesses actually desire to participate in gross human rights abuses and wish to inflict harm are the exception rather than the rule. However, for the purposes of civil liability in instances of harm to life, liberty, personal bodily or mental integrity, or property, whether or not an actor actually desired to harm someone is largely irrelevant. In such instances a court's inquiry as to whether conduct was intentional or negligent will not focus on whether there was a desire to cause harm but rather will consider what a company *knew* about the likelihood that its conduct would cause harm (in the case of intention) or what it should have known (in the case of negligence).

Intention

In the majority of jurisdictions, despite differences in terminology, for the purposes of civil liability an actor will often be considered to have acted intentionally if it voluntarily undertook a course of conduct knowing that it was more than likely to result in harm.³⁰ In this way the actor's motive, and whether or not there is malicious intention, or an actual desire to inflict harm, are largely irrelevant.³¹ In many civil law countries, acting in a certain way with knowledge that harm is likely to result is referred to as acting with *dolus eventualis*: an actor knows that harm may occur as a result of its conduct, and even though it may in fact hope that the harm does not take place, it consents to the harm by carrying out the course of conduct anyway. In common law countries, while the meaning of intention for the purposes of the law of civil remedies varies with each tort, for those intentional torts designed to protect interests such as life, liberty or bodily and mental integrity, such as battery and false imprisonment,³² again, a voluntary course of action undertaken with knowledge as to the likelihood of harm resulting, could give rise to liability.³³

Edition.

30 For a general discussion of the approaches of different systems, see *International Encyclopaedia of Comparative Law, Tort* p. 31.

31 Sometimes there will be causes of action in relation to specific damage, or particular conduct, that will require a motive to cause harm or a malicious intention to harm, but these are usually the exception and were not part of the Panel's analysis. For example: liability for abuse of a right in France; liability for infliction of damage contrary to ethical principles in Germany, see Article 826, German Civil Code; liability for malicious prosecution in England and Wales, see *Mitchell v. Jenkins*, 1835.

32 See fn. 22, p. 11 for a discussion of these torts.

33 UK: *Bradford Corporation v. Pickles*, 1895 A.C. 587; *Daily Mirror Newspapers, Ltd. v. Gardner and Another*, 1968 2 Q.B. 768; Canada: *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551.

Negligence

In the same way, across jurisdictions, motive, or whether or not there is malicious intention or a desire to inflict harm, is irrelevant to establishing negligence for the purposes of civil liability. Furthermore, in contrast with the requirements of intention, in all jurisdictions for an actor to have acted negligently, it does not even need to know of, or perceive, a risk of harm. As will be explained below in more detail, an actor may be considered negligent if the law considers that in the circumstances it should have foreseen the risk.

The Panel has found that in cases of harm to life and liberty, dignity, physical and mental integrity, and property, negligent conduct will very often be sufficient to ground liability. Therefore, most of the time, when harm is caused to such interests, civil law jurisdictions will not place any emphasis on the distinction between negligence and intention – civil liability can be imposed once it is considered that, at the very least, an actor was negligent, (and the requirements of harm and causation are fulfilled). As a result, in cases of harm to such interests courts in civil law jurisdictions will rarely move to identify whether intention was present. Although the law of tort in common law jurisdictions does include a small number of explicit causes of action designed to remedy only intentionally inflicted harm to particular interests,³⁴ whether or not the higher requirement of intention is present, a cause of action can always be brought for the negligent infliction of harm in cases of harm to life, liberty, physical and mental integrity and property.

Because in this way negligent conduct presents a bottom line common across jurisdictions as to the kind of conduct which can give rise to civil liability, the Panel focuses in more detail in the coming pages on the elements of negligent conduct.

Box 3: Establishing the State of Mind of a Company Entity

While the law of tort and non-contractual obligations can hold company entities liable just as they can human beings, companies are not physically present in the world in the same way that human beings are and do not have brains and thought processes in the way that human beings do. Therefore establishing the state of mind of a company entity (did it undertake harmful conduct intentionally or negligently?) has to be done with reference to the state of mind of human beings associated with the company.

³⁴ For example, as mentioned above, the torts of “trespass to the person,”: battery, assault, false imprisonment. See fn. 22, p. 11 for a description.

“A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company.”³⁵

The Panel has found that across jurisdictions the law will only look at the state of mind of certain company employees or officers when assessing whether a company entity acted with intention or negligence.³⁶ From a legal perspective *“some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will.”³⁷*

In general the Board of Directors, Managing Director and other superior officers of a company will be considered to speak and act as the company and therefore their state of mind will be considered by a Court seeking evidence of the company’s state of mind.³⁸ The law also recognises that at times these officers may delegate their functions to other company employees – in which case their state of mind may provide evidence of company state of mind.

Although the terminology used to describe the formal requirements necessary to establish negligence under the law of tort in common law countries and the law of non-contractual obligations in civil law jurisdictions may differ, the policy elements underlying those formal requirements, which guide the courts’ application of the law, are similar. In this way, across jurisdictions, understanding whether a course of conduct was negligent or not involves asking many of the same questions, although they may be described differently in different countries and may be explicit or implicit considerations depending on the jurisdiction.

In the simplest terms, a company can potentially be held legally responsible for negligence, if it does not take the care required of it by the law of civil remedies.

³⁵ *Tesco Supermarket v. Nastrass*, [1971] 2WLR 1166 (UK).

³⁶ For example for England and Wales: *Tesco Supermarket v. Nastrass*, [1971] 2WLR 1166 (UK).

³⁷ Lord Denning, *Bolton (Engineering) Co. v. Graham* [1957] 1 Q-B. 159 (UK).

³⁸ *“Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.”* Lord Denning, *Bolton (Engineering) Co. v. Graham* [1957] 1 Q-B. 159 (UK).

Although the elements are described differently, essentially establishing whether a company was sufficiently careful involves asking the following questions:

Did the company know, or should it have known, about the risk of harm that was involved in its conduct?

Did the company take sufficient measures in order to prevent that risk from materialising?

Across jurisdictions, a court will consider these two questions with reference to what it considers a reasonable person would have known and done in the circumstances.³⁹ The reasonable person conceived of by the law of civil remedies does not represent the lowest common denominator, but instead is a responsible, careful actor, ‘a good member of society.’⁴⁰ The Panel has noted that as societal expectations develop and expand, so too will the expectations placed on the reasonable person by the law of civil remedies, and the requirements of careful conduct today, will always be higher than they were yesterday.

As the two questions outlined above indicate, the key factors involved in establishing whether or not a course of conduct was negligent, relate to (1) the knowledge which a company had, or should have had, as to the risk that its conduct would inflict harm, and (2) whether it took sufficient steps to minimise this risk. Below these two elements are assessed and analysed in more detail.

In seeking to understand the way in which the law of civil remedies will decide, on a certain set of facts, the legal answers to these two questions, it is important to recall that in most jurisdictions not every kind of injury and not every kind of harmful conduct will give rise to liability. The law of civil remedies may introduce requirements intended to limit the circumstances in which liability may be imposed.⁴¹ For example, in some common law countries, liability for negligence requires the exist-

39 See for example: Article 276 (2) German Civil Code: “A person acts negligently if he fails to exercise reasonable care”; For England and Wales see: *Blyth v Company of Proprietors of the Birmingham Waterworks* (1856) 156 ER 1047, 1049 (quote below); and from a comparative law perspective see for example, Article 4:102 (1) Required Standard of Conduct, *Principles of European Tort Law*, www.egtl.org. “The required standard of conduct is that of the reasonable person in the circumstances, and depends, in particular, on the nature and value of the protected interest involved, the dangerousness of the activity, the expertise to be expected of a person carrying it on, the foreseeability of the damage, the relationship of proximity or special reliance between those involved, as well as the availability and the costs of precautionary or alternative methods.”

40 In France, and similar legal systems: *le bon père de famille* (good head of a family). In England and Wales, see for example, *Blyth v Company of Proprietors of the Birmingham Waterworks* (1856) 156 ER 1047, 1049 (UK): “Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.” See for a discussion, Cees Van Dam, *European Tort Law*, Oxford University Press.

41 Such requirements usually play a particularly central role in particular instances, for example, where the harm at issue was caused by omission, where the liability of public bodies is alleged, or where the harm for which remedy is sought is financial “pure economic loss.”

ence of a “duty of care.”⁴² In order for an actor to owe another a duty of care, it must be foreseeable that his or her conduct has the potential to cause that particular actor, or class of actors, harm. Although civil law jurisdictions do not look for a duty of care, some may require that the conduct in question was not only carried out without due care, but that it was “unlawful.”⁴³ The meaning of “unlawfulness” varies between jurisdictions and may or may not be precisely defined, but it is generally considered to include acts such as: infringement of another actor’s right, breach of a legal duty, violation of a specific statutory legal provision.⁴⁴ Other jurisdictions do not explicitly introduce such control mechanisms on the circumstances in which liability may arise for negligent conduct, but, as will be discussed in Section 2.3, may instead implicitly limit liability through causation requirements.⁴⁵

2.2.1 Knowledge or Foreseeability of Harm

In considering whether a prudent company would have foreseen a risk, a court will look at objective evidence as to what kind of information was available to the company about the risk – perhaps from past experience, or from its own employees and consultants, the media and civil society. Where it is alleged that a company’s conduct helped another actor to inflict harm, questions may arise about what information was available to the company, including about the practices and past behaviour of that actor. Of course, over time, as communication mechanisms and the availability of information become more accessible, the extent of what is considered reasonably foreseeable will increase.

For example such questions arose in many of the civil claims brought in various jurisdictions in relation to health damage caused to employees due to exposure to asbestos at work.⁴⁶ In these cases, the courts held that from a certain time the employer companies knew that exposure to asbestos would cause health risks to their employees. The courts established the companies’ knowledge on the basis of statements they made acknowledging the risk,⁴⁷ or due to the fact that they had a library that contained information on the risks.⁴⁸ However even had such evidence not existed, the courts would have taken into account the state of knowledge gener-

42 See for example the UK: *Caparo Industries Plc v Dickman* [1990] 2 AC 605, and see Winfield and Jolowicz on Tort (2006), par. 5-2ff.

43 See for example: Article 823 German Civil Code “A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from this”; and see Article 1294, Austrian Civil Code; Article 420, Thai Civil & Commercial Code.

44 See for example: Article 823 German Civil Code.

45 This is the practice in France, and in many jurisdictions which follow the French tradition.

46 *Wren v Csr Ltd & Another* [1997] NSWDDT 7; (1997) 15 NSWCCR 45 (8 August 1997), Australia, Dust Diseases Tribunal of New South Wales; *John Pinder v Cape LPC*, (2006) EWHC 3630 (QB), 20 December 2006.

47 *John Pinder v Cape LPC*, (2006) EWHC 3630 (QB), 20 December 2006.

48 *Wren v Csr Ltd & Another* [1997] NSWDDT 7; (1997) 15 NSWCCR 45 (8 August 1997), Australia, Dust Diseases Tribunal of New South Wales.

ally available at the time, and decided on the basis of what a reasonable person would have known.

Beyond the question of what information was generally available, the Panel has observed that the law of civil remedies may consider that given the circumstances a reasonable person in the company's shoes would have undertaken an inquiry as to the potential risks involved in his or her conduct, and as a result would have foreseen the risk of harm. In this way the law of civil remedies will often require a company to undertake a due diligence inquiry: an investigation and inventory of the potential risks to third parties that could be connected with its activities. Generally, the more serious that a certain risk could be for third parties, the less easy it will be for a company to demonstrate that it did not know or could not have known about it, if the risk materialises.

Box 4: Practical Questions on Knowledge & Foreseeability of Risk

The Panel believes that a company seeking to avoid the risk of civil liability would ask itself the following questions which relate to the foreseeability of risk:

- Does the company itself have actual information about a risk that gross human rights abuses might occur in a particular situation?
- Have such risks been brought to the company's attention by other actors?
- Do other actors involved in the situation have a track record of human rights abuses?
- Does publicly available information draw attention to the risk of gross human rights abuses occurring in the situation or general context?
- Does information available to experts familiar with the context, situation, place, and/or actors concerned, point to risks of gross human rights abuses occurring?
- Has the company, guided by best practice examples, undertaken inquiries intended to (1) unearth risks of harm, and (2) fully investigate the contour of risks that its conduct will in some way contribute to harm?

2.2.2 Taking Precautionary Measures

If it is established that a company knew or should have known about a risk, the second question will be about the measures that it ought to have taken to prevent the harm from materialising. How serious was the potential harm? How likely was it to result? What would a reasonable person have done having appreciated the risk? Were there other avenues of conduct available – could the risk have been avoided? Were preventative measures, or measures to reduce the risk, possible and if so, why were they not taken?

Liability can arise under the law of civil remedies, not only for conduct that actively causes damage but also for doing nothing, i.e. for omissions or for remaining silent.⁴⁹ This means that taking precautionary measures can require not only that a company refrains from certain conduct, for example providing weapons to someone, but also that it may have to do something proactive to protect someone, or stop someone acting in a certain way. Although it can be difficult to draw a clear line between acts and omissions, across jurisdictions the law of civil remedies recognises that under certain circumstances a duty to act can be imposed.⁵⁰ In both common law and civil law jurisdictions the imposition of such a duty is more likely to arise when a company has a special relationship with the principal perpetrator, the victim, the place where the harm is caused or the means by which the harm is inflicted.

Indeed it is generally true, both in relation to acts and omissions, that the closer a company's relationship with a victim including in real time and space or the more intertwined the company is with the principal perpetrator, in terms of the length and depth of the relationship, the more likely it is that a court will find that the company should have taken particular positive steps to avoid the risk of harm materialising.

Also, under the law of civil remedies the higher the risk, the more cautious a company needs to be. This means that the more likely it is that third parties will be negatively affected by a company's conduct or the more serious the harm in question, the more care the company needs to take. For example, in the case of asbestos, the health risk is considered to be so high that the use of this material has been prohibited. Companies removing asbestos have to provide their employees with the highest

49 Sometimes the term *nonfeasance* is used.

50 See for a comparative summary of European law, Article 4:103. *Principles of European Tort Law*, www.egt1.org: "A duty to act positively to protect others from damage may exist if law so provides, or if the actor creates or controls a dangerous situation, or when there is a special relationship between parties or when the seriousness of the harm on the one side and the ease of avoiding the damage on the other side point towards such a duty." In Common Law jurisdictions, whether or not liability for omissions may arise will usually be dealt with through analysis of the duty of care, see for example: *Caparo Industries Plc v Dickman* [1990] 2 AC 605. In Germany, Article 823 (1) of the German Civil Code is considered to encompass liability for harm to someone's interest/rights by omission: RG 30 October 1902, RGZ 52, 373; and in France Article 1383 of the French Civil Code is considered to cover liability for both positive acts and omissions alike. For a discussion see, *European Tort Law*, Cees van Dam, p. 205.

level of safety equipment. The *severe consequences* for the employee's health, if they do contract an asbestos disease, warrant the highest care by the employer. In other situations, where the risk is less serious or immediate, it could be sufficient to warn potential victims of the risk.⁵¹ This does not prevent the risk but it does reduce the chance that the risk will materialise.

Box 5: Voluntary Initiatives: Guidance for Companies on Foreseeability of Risk & Precautionary Measures

The Panel has found that in some situations there may be a number of voluntary initiatives and guidelines which will provide companies in certain spheres with good practice examples of how to identify and investigate foreseeable risks and therefore take appropriate precautionary measures. Although they are not legal instruments, and will not have a legal impact on domestic civil proceedings, such initiatives may at times provide companies, lawyers and the judiciary with factual examples of good practice, and indications of what appropriate behaviour may be.

However the Panel would also note that a company cannot rely simply on following the terms of such initiatives as a means to ensure it does not enter a zone of legal risk. Existing voluntary initiatives do not address all those situations and circumstances in which a zone of legal risk may arise. Furthermore, even where relevant voluntary guidelines do exist, it may happen that the applicable legal requirements are higher or more specific.

Foreseeability of Risk: Sometimes the mere adoption or introduction of such initiatives highlights the fact that in certain situations or contexts or in relation to certain activity the risks of harm and human rights abuses are generally considered to be foreseeable. For example the number of industry and NGO sponsored codes of conduct aimed at manufacturers, retailers and all other companies in clothing supply chains, highlight the fact that there is a generally accepted risk that human rights abuses, including forced labour or child labour, may take place in such contexts.⁵²

Foreseeability of Risk & Precautionary Measures: Sometimes voluntary initiatives provide examples of the kind of assessments which companies should undertake in order to identify potential risks (foreseeability) and to

51 For example, a drug manufacturer may, under certain conditions, bring a drug on the market which has certain side effects, provided he properly informs the user/patient about these effects.

52 See for example: Fair Labour Association, Code of Conduct: http://www.fairlabor.org/all/code/FLA_PRINCIPLES_OF_MONITORING.pdf.

identify the type of activity necessary to mitigate those risks (precautionary measures). For example the Voluntary Principles on Security and Human Rights set out a number of advised measures that companies who engage public and private security should take both to assess potential risks, and respond to these risks.⁵³

Precautionary Measures: Often voluntary initiatives provide examples of the kind of steps companies could take in order to minimise or eliminate risks. For example the Kimberly Process Certification Scheme outlines a number of steps which it advises companies buying and selling diamonds should take, in order to minimise the risk that through the diamond trade they will financially support and reinforce the perpetration of gross human rights abuses.⁵⁴

2.3 Causation and Complicity

As stated above,⁵⁵ when harm is suffered, under fault liability principles the law of civil remedies will hold liable only those actors whose negligent or intentional conduct is connected, or has contributed in some way, to the harm. The Panel's inquiry has focused on describing when complicity in a gross human rights abuse could be found to constitute such a connection or contribution for the purposes of civil liability.

The question of whether or not there is a sufficient link between conduct and harm suffered for the purposes of civil liability is not a simple one, and there are a number of varying factual, legal and policy issues that the courts will take into account when making a decision as to whether the requisite connection or contribution exists. At the same time, despite complexities, there is common ground between legal systems and whenever a company's conduct is *a cause* of harm suffered the company is potentially in a zone of legal risk.⁵⁶

Under the law of civil remedies, for a course of conduct to constitute *a cause* of harm, there must be a causal connection between the conduct in question and the harm. This is a question of fact. Once this is established, legal and policy determinations come into play as to whether the causal connection is sufficiently close to warrant liability, with most legal systems believing that "some limitation must be

53 See, the Voluntary Principles on Security and Human Rights: http://www.voluntaryprinciples.org/files/voluntary_principles.pdf.

54 <http://www.kimberleyprocess.com>.

55 See p. 12.

56 See for examples of sources fn. 106.

placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity.”⁵⁷

2.3.1 Factual Causation

When analysing whether or not the causal connection is present, the principal question which courts will ask, is whether or not the concerned conduct was a condition without which the harm would not have occurred.⁵⁸ Whenever harm is suffered, there will be a series of large and small, near and distant, incidents that comprise the chain of causation, leading to the infliction of the harm, without which it would not have occurred, or would have been of a different nature or lesser degree. In factual terms, if a course of conduct has a place in this chain of causation, even if it is not the sole, or main cause,⁵⁹ the requisite link will be established.

When a gross human rights abuse occurs, the Panel believes that there will usually be several actors whose negligent conduct has a causal nexus to the abuse and the resulting harm. Tracing the chain of causation involves looking behind the principal perpetrator (be they government, armed group, or other actor) and understanding the numerous factors that have made the perpetration of those abuses possible. For example, where political dissidents are subjected to enforced disappearance and torture by a government agency, several different but connected acts may enable this – the direct actions of the agency officials, coupled with a transport company’s provision of vehicles and services used to move the dissidents, a technology firm’s services used to identify their location and a weapons manufacturer’s sale of equipment designed for torture. Sometimes a company’s place in the chain of causation allegedly involves direct and active participation in abuses committed by a principal perpetrator, for example if employees of private security companies are alleged to have physically participated in the interrogation and torture of detainees in military prisons. In other situations, companies are alleged to have caused harm suffered, through providing the principal actor with the weapons or tools to inflict harm, or by entering into a business partnership, where the terms of the agreement assign a particular role to another actor, who in fulfilling them perpetrates gross human rights abuses.

57 South Africa Court of Appeal, *Minister Of Safety And Security v Hamilton* (457/2002) [2003] ZASCA 98 (26 September 2003), at 42; and see also South Africa Court of Appeal, *International Shipping Co (Pty) Ltd v Bentley* (1990 1 SA 680 (A) 700F-H).

58 A common phrase used to describe this is: “*Conditio Sine Qua Non*.” See for example: Article 3:101. Causation, *Principles of European Tort Law*, <http://www.egtl.org>. In English this is often called the “but for test”: would the damage have occurred *but for* the conduct in question? For a common law approach see for example, *Barnett v. Chelsea and Kensington Hospital Management Committee*, 1969 1 QB 428 and for a discussion see: Hoffman *Causation*, *Law Quarterly Review*, 2005, 121(Oct), 592. Understanding whether or not the necessary link is present will involve something of a hypothetical and retrospective inquiry as to what might have happened, in the ordinary course of events, if the conduct in question had not taken place: see *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A); *Minister for Security v. Hamilton*, 26 September 2003, Case No. 457/02 (South African Supreme Court of Appeal).

59 See for example: *Athey v. Leonati* 1996, 2 SCR 458 (Canada); *March v. E & MH Stramere Pty. Ltd* 1991 171 CLR 506 (Australia).

Any kind of conduct can be considered to be a cause of harm, even that which is ordinarily a normal part of doing business. Particular types of business dealings and transactions, which the Panel considers in more detail below, such as selling and providing goods and services, purchasing in a supply chain, financing, hiring services and entering into a joint venture, have all been alleged to be intrinsic parts of a chain of causation leading to the infliction of harm through gross human rights abuses. The Panel believes that the nature of the negligent or intentional conduct in question is and should be immaterial for the purposes of civil liability once the conduct is found to be part of the chain of causation leading to a gross human rights abuse.

Companies sometimes argue that a causal nexus cannot be established because gross human rights abuses would have occurred anyway, even if the company had not been involved. However the inquiry is not whether gross human rights abuses would have occurred in general without the company's input – but rather whether the specific harm suffered by a specific victim was caused, even to a small degree, by the company's conduct. For example, the fact that a government consistently uses forced labour will not be relevant to determining whether a company, which enters into a joint venture arrangement with that government in the context of which the government uses forced labour, is casually linked to the human rights abuses and resulting harm. While in such circumstances it may be true that forced labour would have taken place anyway in the country concerned, with or without the business agreement between the company and the government, the relevant issue is whether without the joint venture agreement, the same victims would have been implicated and suffered the same harm, in the same circumstances?

Companies also sometimes argue that if they had not transacted with the government, armed group or other business, someone else would have. However, this is not relevant to establishing the chain of causation. A court will simply confine itself to considering the actual facts of the given case and will not substitute the company's conduct with the possible hypothetical input of other actors who were not in fact involved. It is irrelevant to establishing causation that there may have been a line of other companies waiting to step into the company's shoes if it pulled out.

2.3.2 Legal and Policy Considerations

Once a causal nexus has been established between conduct and harm suffered, legal and policy considerations will come into play, determining whether in the circumstances liability should arise. As outlined above, a chain of causation can be comprised of several ever-increasingly distant elements that, despite their

remoteness, are factual causes of the harm. The law of civil remedies will draw a line between causal acts which should give rise to liability, and those which it considers lie too far down the chain of causation to give rise to civil responsibility.⁶⁰ The Panel believes that if applied correctly this approach can be reconciled with common sense views as to who should and should not be held to account for different impacts their conduct may have had.

The terminology used to describe the line drawn by the law differs across jurisdictions, and not only between civil and common law jurisdictions but also from country to country. There is no generalised approach in this respect. However, depending on the circumstances the courts in various jurisdictions will take similar factors into consideration when establishing causation.⁶¹ An important question will be whether the injury suffered could have been foreseen by a reasonable person. As outlined above, reasonable foreseeability is an objective standard that determines what a prudent person would have appreciated in the circumstances and it plays a role in establishing both negligence (fault) and causation.⁶² In the context of whether a company was negligent or not, discussed above, the question of reasonable foreseeability is about how likely it was that harm of any kind to any interest would be caused by the actor's negligent conduct, whereas in the context of causation the question is how likely it was that the damage actually suffered would be caused by the negligent conduct. When establishing causation for the purposes of imposing liability for negligence, the foreseeability requirement is related to the fact that particular conduct can cause harm to a particular interest, such as damage to health or to property. The very particular sequence of events that resulted in the harm does not need to be foreseeable, particularly in personal injury cases.⁶³

60 See South Africa Court of Appeal, *Minister Of Safety And Security v Hamilton* (457/2002) [2003] ZASCA 98 (26 September 2003), at 42; and see South Africa Court of Appeal, *International Shipping Co (Pty) Ltd v Bentley* (1990 1 SA 680 (A) 700F-H): “The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. There must be a reasonable connection between the harm threatened and the harm done. This inquiry, unlike the first, presents a much larger area of choice in which legal policy and accepted value judgments must be the final arbiter of what balance to strike between the claim to full reparation for the loss suffered by an innocent victim of another's culpable conduct and the excessive burden that would be imposed on human activity if a wrongdoer were held to answer for all the consequences of his default.”

61 See for example Article 3:201, *Principles of European Tort Law*, www.egt1.org: “Where an activity is a cause within the meaning of Section 1 of this Chapter, whether and to what extent damage may be attributed to a person depends on factors such as a) the foreseeability of the damage to a reasonable person at the time of the activity, taking into account in particular the closeness in time or space between the damaging activity and its consequence, or the magnitude of the damage in relation to the normal consequences of such an activity; b) the nature and the value of the protected interest (Article 2:102); c) the basis of liability (Article 1:101); d) the extent of the ordinary risks of life; and e) the protective purpose of the rule that has been violated.”

62 See p. 16, Section 2.1.

63 See for a discussion, Cees van Dam, *European Tort Law* (2006), p. 267.

Other important factors will be the remoteness of the damage (both in time and place) from the conduct in question, the nature and value of the protected interest (causation is more easily established in cases of interests such as life and health than in cases of pure economic loss), and the care taken by the actor concerned (the more careless a court considers a course of conduct to have been the more likely it is to find causation established).⁶⁴

Sometimes a court may find that another event or actor's conduct has broken the chain of causation between the company's act and the harm. This is sometimes known as an "intervening act."⁶⁵ In such instances, courts may consider the causal nexus between the company's act and the harm to be insufficiently direct because the damage is "too remote" from the company's conduct⁶⁶ or is no longer an "inevitable consequence" of the defendant's act or omission.⁶⁷ However it is very unlikely that another actor's intentional conduct will be considered to constitute an intervening act if that conduct was foreseeable and the company had a special relationship with the actor.

When US military personnel initiated civil litigation against banks that provided the Iraq Government with letters of credit, the US District Court considered whether or not the provision of the letters was a *cause* of the physical injuries the personnel suffered during the Gulf War when Iraq's supply of chemical weapons were detonated by the US and allied forces. The letters of credit had been used by the Iraq Government in transactions with the chemical suppliers. The Court held that in the circumstances, the harm suffered was not a foreseeable result of the provision of letters of credit:

"What the plaintiffs essentially ask the Court to accept is that by providing letters of credit to the manufacturers of chemicals, the Bank...should have perceived the risk that those chemicals would be sold to Iraq; that Saddam Hussein would use those weapons to manufacture lethal weapons, that those weapons would be stockpiled in a location that would one day be bombed by coalition forces; that the bombs would hit and detonate those weapons; that the detonation would cause the toxic emissions to be released; that those emissions would permeate the atmosphere; that the plaintiffs would be present in that atmosphere, inhale those emissions and sustain the injuries alleged. Given

64 Particularly in civil law jurisdictions where the civil code reflects the Germanic approach, questions such as whether the consequences were part of the ordinary risks of life and whether the violated rule aimed to protect the damage actually suffered by the victim may also be asked when assessing causation.

65 *Novus Actus Interveniens*.

66 This is generally the approach in common law systems.

67 This may be the approach in France, or in civil law systems which reflect the French approach.

the procession of events this Court is driven to conclude that there was nothing to suggest to the most cautious mind that a letter of credit would cause the harm the plaintiffs allege.”⁶⁸

Box 6: Practical Questions on Causation

The Panel believes that a company seeking to avoid the risk of civil liability for complicity in gross human rights abuses should ask itself the following questions which relate to whether its conduct could risk being deemed a cause of harm by a court in a civil claim:

- Is there a potential casual connection, large or small, between the company’s conduct and a gross human rights abuse? i.e. Could the company’s conduct contribute in some way to the perpetration of a gross human rights abuse?
- Can the company foresee or would a responsible company foresee (on the basis of inquiry and risk assessment) that the company’s conduct risks contributing to a particular type of harm (e.g. personal injury) or harm to a particular interest (e.g. life or personal liberty)?
- What is the interest that is at risk of harm?
- How close in the chain of causation to the gross human rights abuse does the company’s conduct risk becoming?

In the context of whether or not a court will establish a causal link, the Panel has observed that a decision will vary depending on the facts, and will ultimately be a contextual matter. Essentially, in every legal system it involves the courts undertaking a policy assessment about what conduct the law of civil remedies should sanction, and what harm it should remedy.

For example, the nature of the harm suffered and/or the right or interest affected by the conduct, will often be a central factor underlying a court’s decision and for example often interference with someone’s bodily integrity will be deemed more foreseeable by the courts than will damage to their economic interests.⁶⁹ The more

⁶⁸ *James Stutt et al. v. the De Dietrich Group et al.*, United States District Court, E.D. New York, F Supp.2d, 2006 WL 1867060, at 17, 30 June 2006.

⁶⁹ Throughout common law and civil law jurisdictions when it comes to personal injury the maxim “the tort-feasor takes the victim as he finds him” is accepted. This means that the defendant also has to answer for the consequences of the claimant’s vulnerabilities and predispositions, even if he is extremely vulnerable and this was not foreseeable in the particular case. On the other hand, in cases where the damage suffered

serious a human rights abuse and resulting harm, the greater the risk of legal liability for a company whose conduct is an element in the chain of causation. Gross human rights abuses have long-lasting and grave impacts on their victims and the Panel believes that policy considerations do, and will ever increasingly, dictate that such harm be remediable through civil liability and that those who contribute to it be held legally responsible.

Furthermore, the Panel has found that where a company acted intentionally, across jurisdictions, causation will become a less complicated matter and the courts will take a more flexible approach. It will often be the case that a course of conduct which was undertaken with the intention of contributing to the infliction of harm will be considered a cause of the harm even though for example the conduct may be very distant in the chain of causation from the harm.⁷⁰

2.4 Conclusions: The Principles of Civil Law

Throughout the preceding section the Panel has considered the elements which the law of civil remedies will look for before holding a company liable when it is allegedly complicit in gross human rights abuses. From its analysis the Panel has distilled a number of questions which the courts will ask in order to decide whether liability should arise or not in relation to a specific set of facts. These are the same questions as outlined in Section 1.2.

Was harm inflicted to an interest of the victim that is protected by law?

Did the company know or would a careful and responsible company in the same circumstances have known that its conduct posed a risk of harm to the victim's interest?

Considering this risk, did the company take the precautionary measures a responsible company would have taken in order to prevent the risk from materialising?

Finally, did the company's conduct contribute to the infliction of the harm?

In the following section the Panel analyses the application of these questions in the context of a number of factual scenarios in which allegations of company complicity in gross human rights abuses are often made.

amounts to pure economic loss a common law court may not even reach the causation stage because it may hold that there was no duty of care, while a civil law court may decide that the prevention of economic loss was not covered by the scope of the rule invoked as the basis of liability.

70 *Quinn v Leathem* [1901] AC 495, 537: 'intention to injure the plaintiff disposes of any question of remoteness of damages.' See also, Germany: BGH 27 January 1981, BGHZ 79, 259, 262. See also Christian von Bar, *The Common European Law of Torts*, Clarendon Press, Oxford, 1998, Vol. 1, p. 77.

3 Applying the Law of Civil Remedies to Specific Allegations of Complicity

Companies face allegations of complicity in gross human rights abuses in numerous situations. These allegations are often made when companies engage in a business transaction, or enter into and remain in, a business relationship with another actor who is carrying out gross human rights abuses. In the following pages, the Panel explores the potential application of the law of civil remedies to some of the types of business interaction and interplay which can give rise to allegations of complicity. In these situations, understanding whether or not a company could be held legally liable, involves looking at the situation through the lens of the four questions highlighted at the end of the previous section.

As the facts of each individual situation vary, so too will the answers to these questions and the decision of any court as to whether liability should be imposed. Moreover, beyond a factual analysis, the Panel has found that policy considerations will play a substantial part in any decision to impose, or not to impose, civil liability on a company in relation to circumstances where it was allegedly complicit in gross human rights abuses. Such policy considerations will vary significantly from case to case and their impact cannot be definitively quantified in the abstract.

3.1 Providing Goods and Services

Be it raw materials, equipment and infrastructure, logistical assistance, location, information or financing, companies operating in a wide variety of contexts throughout the world have found themselves subject to claims of complicity in gross human rights abuses because they have allegedly provided the principal perpetrator with the means to carry out the abuses.

Sometimes in these situations companies have also found themselves subject to civil litigation. Several lawsuits have been filed in the United States, for example: against a construction equipment manufacturer for selling bulldozers to the Israeli Military which the military used to demolish homes in Palestine which sometimes resulted in injury and death of civilians;⁷¹ and against oil companies, arms manufacturers, banks, car manufacturers, and computer technology companies for the sale and provision of various goods and services to the Apartheid regime in South Africa.⁷² Claims have also been lodged in other countries, for example in Switzerland,

71 *Cynthia Corrie v. Caterpillar Inc.* For relevant court judgements see: United States District Court, W.D. Washington: *Cynthia Corrie v. Caterpillar Inc.*, 403 F.Supp.2d 1019, W.D.Wash.,2005., November 22, 2005 and United States Court of Appeals, Ninth Circuit: *Cynthia Corrie v. Caterpillar Inc.*, 503 F.3d 974, C.A.9 (Wash.),2007, September 17, 2007.

72 *Khulumani v. Barclay Nat. Bank Ltd.*: For relevant court judgements see: *Khulumani v. Barclay Nat. Bank Ltd.* 509 F.3d 148, C.A.2,2007., November 27, 2007; *Khulumani v. Barclay Nat. Bank Ltd.* 504 F.3d 254 (2nd Cir.(N.Y.) Oct 12, 2007) and *In re South African Apartheid Litigation*, 346 F.Supp.2d 538 (S.D.N.Y. Nov 29, 2004).

against a computer technology company alleging that it provided computer software to the Nazi regime during the Holocaust, which was allegedly used to keep track of the whereabouts and identity of all those targeted for extermination.⁷³

Box 7: Jeppesen Dataplan & the United States Renditions Programme

Between 2001 and 2007 a number of terrorist suspects of different nationalities were detained in a number of locations worldwide and held by CIA and other US Government agencies.⁷⁴ They were then transferred to holding locations in different countries, and interrogated. It is alleged that the men were held incommunicado for various periods, in some cases subject to enforced disappearance, and tortured. Although the situations in which the men were detained differ, in all instances their detention and transfer allegedly took place outside of the normal legal procedures of extradition, deportation, expulsion or removal. They were denied access to their families, legal counsel and consulate officials from their countries of citizenship and there was no judicial oversight, during significant periods of their detention.

In 2007 some of these individuals filed a civil claim in the United States against the aviation company Jeppesen Dataplan.⁷⁵ The complaint alleged that the company contributed to the gross human rights abuses committed by the US government, through its provision of logistical and travel services to US officials, which were allegedly used to transfer the men to secret locations, outside the protection of the law, where they suffered torture and enforced disappearance. The complaint alleged that the company organised flight plans and customs clearance, secured the necessary landing and departure permits, arranged catering, accommodation and ground transportation, hired security, and arranged fueling and aircraft maintenance. The complaint alleged that the company provided the US Government with services which it knew or should have known would enable the US Government to success-

73 For relevant court judgements, in which the Court held that the case could not continue due to the application of a Statute of Limitations, see: *GIRCA v IBM*, no. 4C.296/2004 /ech, 22 December 2004, and *GIRCA v IBM*, no. 4C.113/2006 available in French at: <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

74 This practice is often referred to as “extraordinary rendition” and involves the transfer by US officials, outside of normal legal procedures, of non-US citizens, to secret locations outside of the US, where they are detained and interrogated, often in secret, and regularly tortured. For more information see: First and Second report of Mr. Marty to the Parliamentary Assembly of the Council of Europe (AS/Jur (2006) 16 Part II (7 June 2006): http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf and AS/Jur (2007) 36 (7 June 2007): http://assembly.coe.int/committeeDocs/2007/Emarty_20070608_noEmbargo.pdf).

75 *Mohamed Binyam v. Jeppesen Dataplan, Inc.* http://www.aclu.org/pdfs/safefree/mohamed_v_jeppesen_1stamendedcomplaint.pdf.

fully subject the men to secret transfer and detention, in locations where they would be tortured.

When the complaint was filed, the US Government filed a motion to intervene in the case and submitted to the Court that the case should be dismissed as it concerned matters subject to a states secret privilege.⁷⁶ In 2008 the US Court dismissed the lawsuit on the basis of the states secret privilege.⁷⁷

As a result of the US Government's motion to dismiss and the subsequent Court ruling the company did not file a response to the complaint, but noted that its right to raise factual and legal defences is preserved.⁷⁸ The plaintiffs have since filed an appeal in relation to the Court's decision, claiming that the Court mistakenly applied the states secret privilege and that a US court should hear the case.⁷⁹

Knowledge

Where a company provides another actor with goods or services, which that actor uses to carry out gross human rights abuses, the first question which the law of civil remedies will ask is whether the company knew, or whether it should have known, how the products or services would be used.

In deciding what the company should have known, much will depend on the character of the product or the service provided as well as the character of the company, organisation or public body using the product or the service. Generally, the more a product or a service is apt to be used to infringe human rights, the more suspicious a provider will need to be. In this respect, distinctions are often drawn between multi-purpose generic goods or services which are misused in a certain fashion by the recipient, and tailor-made goods and services designed by a company for a particular actor with a particular purpose in mind, or inherently dangerous goods or services.

As a starting point, the law will most likely not consider that a company providing multi-purpose generic products or services ought to have foreseen that third parties would be victims of gross human rights abuses through the misuse of its products.

76 *Mohamed v. Jeppesen Dataplan, Inc.*, Reply in Support of Motion to Dismiss, or, in the Alternative, for Summary Judgment By the United States of America, January 18, 2008.

77 *Mohamed v. Jeppesen Dataplan, Inc.*, 539 F. Supp. 2d 1128, N.D.Cal., 2008, February 13, 2008 http://www.aclunc.org/cases/active_cases/asset_upload_file957_7038.pdf.

78 *Mohamed v. Jeppesen Dataplan, Inc.*, Defendant Jeppesen Dataplan, Inc.'s Statement of Non-Opposition to (1) the United States' "Motion to Intervene"; and (2) the United States' "Motion to Dismiss, or, in the Alternative, for Summary Judgment".

79 http://www.aclunc.org/cases/active_cases/mohamed_v._jeppesen_dataplan,_inc.shtml.

However, this may be different if there were special circumstances or where the company actually knew of the risk of harm, or easily could have known. The facts will be determinative in this respect, especially in regard to what was the company's relationship with the victim, or with the principal perpetrator, as well as the context in which the provision of goods or services occurred.

For example, sometimes companies face allegations of complicity because they have freely (without charging a fee) provided a range of actors with company property, which those actors have then used in the perpetration of gross human rights abuses. In most of the instances, the actors concerned have been military forces or armed groups. The Panel considers that in such situations, given that there may be a relationship between the company and the other actor, in which context the sharing of equipment arises, a company would be wise to alert itself to the possible purposes for which the material it provides could be used.

The Panel has also found that the law will often be more inclined to find the risk of harm to have been reasonably foreseeable in the case of tailor-made or inherently dangerous goods and services. Where such products or services are used to infringe rights, a company providing them runs an increased risk of allegations that it knew or should have known the purposes for which its products or services would be used. For example, in the lawsuit against the aviation company described above it is alleged that the company knew of, and therefore was able to tailor its services to, the specific needs of the US agencies in carrying out secret rendition of terrorist suspects by aeroplane. In this context it is alleged that the company knew, or should have known, of the circumstances surrounding the flights because it worked so closely with the US agencies to create a framework in which the circumstances of the flights were kept secret.

In practice, there will be many grey areas between these two extremes of what is considered to be foreseeable and what is not. The Panel believes that a company seeking to remain on the safe side of the law of civil remedies needs to be vigilant and alert and educate itself as to the potential consequences for third parties of its provision of products and services to a particular actor.

Precautionary Measures

If a company knew or had reason to believe that its products or services could be misused in order to perpetrate gross human rights abuses, the law of civil remedies will require a company to make proper investigations as to the risks. As a result, in order to avoid civil liability, a company may need to undertake a proper risk assessment, for example on the potential misuse or unintended consequences of a product or service.

In relation to the sale of goods, a company's responsibility to monitor risk may not end after it has sold its product. Where there is a reasonably foreseeable risk, sometimes in order to fulfil the level of care which the law may consider a reasonable

person would have taken, manufacturing companies will need to monitor their product and its safety from the time it leaves their premises until it has reached the final customer and during the time the product is used. Although such obligations are less clearly defined in relation to companies that provide services, the Panel considers that the law of civil remedies will also hold that service providers should monitor and follow up on potential risks.

Where there is a foreseeable risk of harm the law will often require further action on the part of the company. What this will be, first of all, depends on the magnitude of the risk. If the risk is substantial or real, it is conceivable that the law may hold that the company should refrain from making the deal (supplying the goods or providing the services to the party involved in the gross human rights abuse). If the risk is smaller but still realistic, less far-reaching measures might be required. For example, the law may consider that it would have been reasonable for a manufacturer to obtain a clear undertaking from the buyer as to how the item would be used.

Causation

A causal link will also need to exist between the provision of the goods and services and the harm suffered as a result of the gross human rights abuse. This turns on whether the provision of the goods or services was a factual element in the chain of causation and if so was it legally a cause: was it sufficiently integral to the chain of causation that it was foreseeable that the harm suffered would occur as a result? Again, issues of relationship will arise here, as will the nature of the good or service in question. For example, where a company works closely with another actor tailoring goods and services for a specific purpose which involves the perpetration of gross human rights abuses, it will be more likely that the company's conduct will be considered to be an integral part of the chain of causation.

General Observations

Where the supply of goods or provision of services is at issue, the Panel has found that a particularly important factor will be the company's relationship with the victims of the gross human rights abuses. In a common law country this would go towards establishing whether or not the company owed the victims a duty of care. In both common law and civil law countries, it will also be relevant to the issue of foreseeability as well as to the policy considerations that arise in the context of causation. This issue arose in a United States case centring on allegations that a manufacturing company contributed to the killing of a peace activist and a number of Palestinian civilians by the Israeli Defence Forces, through supplying the Israeli military with bulldozers the military used to destroy houses in the Occupied Palestinian Territories, causing the deaths in the process. In that case, the District Court said "under principles of duty and causation, Plaintiffs do not state a claim by alleging the lawful sale of a non-defective product that a customer intentionally used to

injure a third party.”⁸⁰ The Court expressed the view that, in the absence of a special relationship between the victim and the company, a duty of care may not be held to exist.⁸¹

Bearing this in mind, the Panel believes that the closer or more special a company’s relationship with the victims of gross human rights abuses the more likely that a risk of harm will be considered foreseeable, the more proactive in terms of precautionary measures the company will need to be, and for the purposes of causation the less remote the harm suffered will be considered to be from the company’s original act of selling a good or providing a service to an actor who uses it to inflict harm. However the Panel would also highlight that the US District Court’s view, in the case noted above, that the military’s use of the bulldozers to injure civilians was too remote from the company’s sale of bulldozers to the military, should be read in the context of that Court’s ultimate decision that the lawsuit interfered with US foreign policy because the sale of the bulldozers was part of a formal US Government military sales programme.⁸² This decision was subsequently ratified by an appellate court.⁸³

“The decisive factor here is that Caterpillar’s sales to Israel were paid for by the United States. Though mindful that we must analyze each of the plaintiffs’ “individual claims,” ... each claim unavoidably rests on the singular premise that Caterpillar should not have sold its bulldozers to the IDF. Yet these sales were financed by the executive branch pursuant to a congressionally enacted program calling for executive discretion as to what lies in the foreign policy and national security interests of the United States ... Allowing this action to proceed would necessarily require the judicial branch of our government to question the political branches’ decision to grant extensive military aid to Israel.”⁸⁴

In the Panel’s view this may have been a factor in the District Court’s failure to consider whether or not exceptions to the general assumption that companies, supplying multi-purpose generic products or services will not be liable, could have been applicable.

3.2 Supply Chain Relationships

In any business context, an important commercial relationship for every company is the one it maintains with its suppliers in a supply chain. It is also a relationship regarding which companies often face allegations of complicity in gross human rights

80 United States District Court, W.D. Washington: *Cynthia Corrie v. Caterpillar Inc.*, 403 F.Supp.2d 1019, November 22, 2005, p.13. http://ccrjustice.org/files/Corrie_decision_11_05_0.pdf.

81 *Ibid.*

82 United States District Court, W.D. Washington: *Cynthia Corrie v. Caterpillar Inc.*, 403 F.Supp.2d 1019, November 22, 2005, p. 1032.

83 United States Court of Appeals, Ninth Circuit: *Cynthia Corrie v. Caterpillar Inc.*, 503 F.3d 974, September 17, 2007.

84 *Ibid.* at p. 982.

abuses. For example, clothing manufacturers, sports equipment brands, computer companies, have all faced allegations of complicity in child labour when it is discovered that children are involved in making products they purchase from suppliers, or in forced labour, when it is considered that a supplier's adult workers are working under slave-labour conditions. In some of these instances, related civil legal claims have been filed. Allegations of complicity in the context of supply chains also arise in situations beyond cases of forced or child labour. For example, companies have been subject to allegations of complicity, and related legal claims, in the murder and torture of trade unionists by paramilitary groups allegedly hired by companies in their supply chains. Allegations of complicity are also often made against precious metal refiners, and jewelers claiming that they are contributing to the gross human rights abuses perpetrated by armed groups when they purchase precious metals or diamonds from those groups, thereby financing their operations.

Once again, as above, the Panel has found that when a gross human rights abuse is committed in the production or sourcing of material in a supply chain, understanding whether civil liability could potentially arise for a company that buys those goods involves looking at issues of foreseeability, precautionary measures and causation.

Knowledge

The question of knowledge will turn on whether the company knew or whether it was reasonably foreseeable that gross human rights abuses could occur, in the context of the production or supply chain. For example, where a supplier has been associated with gross human rights abuses in the past, a company will often know or will easily be able to find out about the risk that abuses are being perpetrated. Even if such knowledge is not present, the law of civil remedies will often consider that a reasonable person would have undertaken analysis of the potential risks that gross human rights abuses were taking place in the context of its supply chain. In the case of child labour, for example, even if there is no specific knowledge as to the practices of an individual supplier, the risk that a supplier may be using child labour will often be held to have been reasonably foreseeable, where it is generally known that child labour is common in the country in which the supplier operates.

Precautionary Measures

In considering whether or not the company took the requisite precautionary measures to avoid its conduct in purchasing from the supplier becoming a factor in the abuses, the law of civil remedies will look at a number of factors. A straightforward precautionary measure would be for the company to refrain from doing business with the supplier. However, if this is not possible or reasonably feasible the law may consider that the company has certain obligations to those suffering harm and it may be required to take active steps to ensure their protection. This will particularly apply in situations where those suffering harm are employees of the supplier, or

where the company was the only purchaser from the supplier in question, or where its orders made up the predominant part of the supplier's business.

The Panel has found that it is often the case that a company's relationship with suppliers does not amount to an arm's length transaction between buyer and seller, but in fact involves a much closer relationship. For example, sometimes the supplier is also the subsidiary of the purchasing company. In such cases, the requirements on a company in relation to due diligence and precautionary measures will increase substantially, as will foreseeability.

Generally speaking, the closer the concerned supplier is to the company in the supply chain (i.e. the less intermediaries between the supplier and the company) the closer the victims will be deemed to be to the company and the more likely it will be that the law will oblige a company to take substantial positive action to protect them from the risk of harm. However, even where a supplier is a number of steps removed in the supply chain from the company, the level of precautionary measures required will increase, depending on the importance of that sub-supplier for the eventual product bought by the company and the seriousness of the human rights abuses.

Causation

These factors will also play a part in a court's decision as to whether the company's conduct was sufficiently integral to the occurrence of the abuses, so as to fulfil the requirements of causation. For example, where goods are produced by forced labour and the purchaser is the only company buying from that particular supplier, a court may find that the purchasing of the items was a cause of the harm suffered by the workers. This might be because in such a situation the single buyer may have dictated the conditions of the sale, including perhaps the price and speed of production. If, however, the company is one of many buyers, and only contributes a small amount of income to the supplier's overall returns, the casual link between the purchase and the use of forced labour may be considered more tenuous.

General Observations

The Panel has found that, given the close relationship which will often exist between a company and its suppliers, and because a company will often be held to have special obligations of care in relation to the employees of its contractors and suppliers, in order to remain on the right side of the law a prudent company would take a number of steps both to investigate the risks, and avoid them. The Panel believes that in particular a company would be guided by the factors that the law will consider in taking a decision as to where liability should lie, for example, whether or not the buyer put in place effective and appropriate monitoring mechanisms in relation to the practices of their suppliers and whether or not the buyer company fairly negotiated reasonable purchase prices and speed of delivery.

3.3 Close Business Partnerships

Companies are sometimes accused of being responsible for human rights abuses that are carried out by another actor with whom they have entered into a contractual business partnership, such as a joint venture. In the context of such arrangements there is usually close collaboration and coordination between the partners. Essentially it appears to be both the fact of, and alleged closeness of, the relationships involved that gives rise to the allegations.

For example, victims of forced labour and violence at the hands of the Myanmar Government filed a civil complaint against Unocal, which had a joint venture arrangement with the Myanmar Government for the construction and operation of an oil pipeline, in the context of which the victims alleged the harm they suffered occurred.⁸⁵ Also, a business partnership with the Government of Sudan was one of the grounds on the basis of which the civil responsibility of Talisman was sought in relation to alleged gross human rights abuses perpetrated by the Sudanese military in an oil concession area in which Talisman was operating.⁸⁶

There are two types of liability which, depending on the facts, could arise for companies in a business partnership in which context the business partner commits gross human rights abuses.

3.3.1 Fault Liability

Firstly, depending on the facts, the law of civil remedies could find that the company is liable on the basis of fault liability for the consequences of its negligent or intentional conduct. Again this involves asking the core questions: did the company know or would a responsible company in the same circumstances have known that its conduct posed a risk of harm to the victim? Considering this risk, did the company take the precautionary measures it should have taken in order to prevent the risk from materialising? Finally, did the company's conduct contribute to the infliction of the harm?

Knowledge of Risk

The Panel considers that in the context of a business partnership such as a joint venture, it will be difficult for a company to demonstrate that a responsible company in its shoes would not have foreseen the risk that harm could occur as a consequence

85 *Doe v. Unocal Corporation*, for a relevant court judgement see: United State Court of Appeals for the 9th Circuit, *Doe I, et al. v. Unocal Co., et al.*, 395 F.3d 932, C.A.9 (Cal.) 2002, September 18 2002: <http://www.earthrights.org/files/Legal%20Docs/Unocal/0056603.pdf> (This judgement was since vacated as the parties in the case settled.) For a collection of relevant documents and links see: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/UnocallawsuitreBurma>.

86 *The Presbyterian Church of Sudan v. Talisman Energy*. For a collection of relevant documents, including the plaintiff's complaint see: <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TalismanlawsuitreSudan>.

of its partner's conduct. For example, it is more than likely that the law will hold that a responsible company in a business partnership would undertake risk assessments as to the potential impact of the partnership on third parties. If carried out correctly, these would include analysis of how the conduct of the business partner in carrying out tasks mandated by the partnership agreement could affect third parties. Indeed in cases where a joint venture partner has a history of gross human rights abuses or in situations where the partner is a party to an armed conflict, the law may consider that the company was on notice as to the risk and will turn to considering what precautionary measures it should have taken.

In considering the civil claim against Unocal, one US Court looked at issues of knowledge and foreseeability.⁸⁷ In what is now a vacated judgement, the Court noted that there was evidence that the company's own consultants had informed it of the practices of the Myanmar Government generally, and specifically in relation to the construction of the pipeline. It also noted evidence that the company received reports from civil society organisations, such as Amnesty International, that the military was using forced labour and was carrying out gross human rights abuses against the pipeline workers. On the basis of such evidence, the Court held that "the evidence does suggest that Unocal knew that forced labour was being utilized and that the Joint Venturers benefited from the practice."⁸⁸ The Court went on to find that there was evidence to suggest that Unocal "knew or should reasonably have known that its conduct – including the payments and the instructions where to provide security and build infrastructure – would assist or encourage the Myanmar Military to subject Plaintiffs to forced labour."⁸⁹

Precautionary Measures

If the law considers the risk of harm to have been reasonably foreseeable, then in the context of a business partnership or joint venture, the law may require the company to take substantial precautionary measures, for example by negotiating certain conditions which would safeguard human rights protection for parties affected by the joint activities. This will be particularly true where the risk relates to conduct which can result in serious harm to human beings. The level of precautionary measures required may also be determined by the identity of the potential victims, and the company's relationship with those victims. If they are employees of the joint venture partner who are employed under the joint venture agreement, then the company may need to take particularly stringent precautionary measures. A high level of care may also be necessary, for example, if the potential victims are civilians living in the vicinity of the joint venture project.

87 United State Court of Appeals for the 9th Circuit, *Doe I, et al. v. Unocal Co., et al.*, 395 F.3d 932 C.A.9 (Cal.),2002, September 18, 2002; This judgement was since vacated as the parties in the case settled.

88 *Ibid.* at 947.

89 *Doe I, et al. v. Unocal Co., et al.*, 395 F.3d 932, at 953.

Causation

Finally, a Court will consider whether the company's conduct contributed to the infliction of the harm. The law may consider that the very terms of the partnership agreement establish causation, if they envisage that the business partner will carry out particular acts. For example, it may be that a partnership agreement assigns a particular role to the business partner, and therefore depending on the circumstances the law may hold that had the partnership not been formed, the harm would not have been inflicted in the same circumstances or to the same victims.

3.3.2 Strict Liability

In many instances, it may not be necessary to establish that the company acted negligently or intentionally (i.e. was at fault), because across jurisdictions companies can be held accountable for the actions of those with whom they are in a partnership. This is a form of strict liability, which means that all the business partners can be held liable without fault for harm caused by one of the partners in the context of the partnership.

This kind of liability might arise when the partners intend to form a partnership, they share an interest and have joint control over the project, and profits and loss are shared. It goes without saying that for this kind of liability to arise the relevant conduct of the business partner needs to be sufficiently related to the activities of the joint venture or partnership.

3.4 Security Providers

In a variety of different situations and for a number of reasons, companies hire security contractors. Depending on the context in which it is operating, a company may have a legitimate security responsibility to its employees, or may wish to protect its property from destruction. For example, this will often be the case when a company is operating in situations of armed conflict, or where there is community opposition to the company's operations. The security contractors may be private security contractors or state armed forces (military or police) and even in certain instances armed groups who have *de facto* operational control over particular areas or territory. Often, the security services are provided for a fee, however sometimes (particularly where the security providers are state forces) money does not exchange hands, and an actor provides protection because of an interest in protecting the company's investment. In all of these contexts, companies have faced allegations of complicity when the security providers perpetrate gross human rights abuses while providing the company with security.

In such situations it will sometimes be the case that the company is in fact in a business partnership or joint venture relationship with the actor providing security. When such a business partnership is present, the analysis in Section 3.3 will apply. However even without a business partnership, a company can be held liable for

harm suffered as a result of gross human rights abuses perpetrated by its security providers. Again, understanding whether or not this could be the case involves asking the same questions: did the company know or would a prudent company in the same circumstances have known that its conduct posed a risk of harming the victim? Considering this risk, did the company take the precautionary measures a prudent company would have taken in order to prevent the risk from materialising? Finally, did the company's conduct contribute to the infliction of the harm?

Box 8: Security, Paramilitaries & Trade-Unionists: Drummond in Colombia

On two separate occasions in Colombia, three trade union leaders working for Drummond Ltd. a subsidiary of the coal mining company Drummond, were allegedly pulled off a company bus and murdered by members of local paramilitary groups. At the time of their death the victims were allegedly involved in negotiations with Drummond Ltd. demanding, among other things, better company security for workers threatened and compensation for victims injured during an accident at the mine.

In the aftermath of the killings, a civil lawsuit was initiated against Drummond and its subsidiary in the United States, alleging the liability of the companies in relation to what occurred. It was alleged that the killings occurred as part of an arrangement between the companies and the paramilitaries, and that the companies provided the paramilitary groups with material support.⁹⁰

The company denied all the allegations, stating that neither it nor its executives had any involvement in the deaths of the trade unionists, and noting that it did not make any payments to, or enter into any transactions with, illegal groups.⁹¹

When the case went to trial, the jury acquitted the company, holding that it was not at fault. The company welcomed this decision.⁹² The plaintiffs have appealed, alleging, among other things, that the District Court mistakenly did not allow them to introduce witness testimony that would have demonstrated

90 *Romero et al. v. Drummond et al.*, for relevant documents, including the plaintiff's complaints see <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/DrummondlawsuitreColombia>.

91 Drummond Press Release, 21 March 2007: http://www.drummondco.com/news/pdf/news_03212007.pdf.

92 Drummond Press Release, 26 July 2007, http://www.drummondco.com/news/pdf/news_07262007.pdf.

that the paramilitaries killed the men as part of a pact with company officials, under which they were paid a fee.⁹³

3.4.1 Contracting Security Providers under a Formal Agreement

In instances where a company employs security contractors, or enters into a formal agreement with a security provider (whether or not a fee changes hands), the Panel has found that central to allegations of complicity is the act of the company in contracting the services in question. Often it is alleged that by mandating the security providers to provide security, in the context of which gross human rights abuses occur, a company has brought into play the circumstances in which the abuses were perpetrated.

Knowledge of Risk

In light of this, the Panel believes that, when establishing what the company knew or should have known, the law of civil remedies will usually expect a prudent company to take a number of investigatory steps to understand the risks to third parties inherent in hiring the security providers in question.

The Panel considers that a risk assessment will always be required where, given the circumstances, it is inherent in the provision of security that direct physical contact will take place between the security providers and other persons. Even where the security arrangement does not inherently involve interaction with individuals or communities, or use of force (and so the law may hold that the risk or harm was less foreseeable or less likely) a risk assessment would usually still be necessary. A risk assessment should explicitly assess the risk that human rights abuses will be perpetrated by the security providers. The risk may be considered to be high when the context is volatile, or one in which serious human rights abuses are regularly perpetrated, or where the actor hired has a history of human rights abuses.

Precautionary Measures

Since risk of harm will always be foreseeable in contracts for security provision, and this harm may sometimes be substantial, a company contracting for security provision may be required to take stringent precautionary measures. The clearest precautionary measure may simply be for the company to refrain from utilising the services of the actor in question. However sometimes this may not be feasible, and in such cases the law may look at whether or not the company sought undertakings from the security contractors that gross human rights abuses would not be perpetrated, or put strong monitoring, reporting and command mechanisms in place.

93 http://www.iradvocates.org/Drummond_Pls%20Opening%20Brief.pdf.

The Panel has observed that in many of the instances in which a company has been allegedly complicit in gross human rights abuses perpetrated by security providers, not only have such precautionary measures allegedly not been taken, but in fact it is also alleged that the company has ignored the risk, or indeed played an active role in the abuses.

Causation

Such considerations will also be relevant to questions as to whether or not the requirements of causation are fulfilled. Factors in establishing causation may include the proactive conduct of the company in mandating the concerned actor to provide security, or its failure to stop the concerned actor from causing harm to the concerned victims. It may sometimes be the case that a company carries out additional actions that further enable the perpetration of gross human rights abuses. For example, sometimes allegations of complicity extend not only to the fact that a company's security providers have allegedly carried out gross human rights abuses, but that the company also provided weapons and logistical assistance to the providers or played an active role in the abuses.

As in previous scenarios, the company's relationship with the victims will be of relevance to the law's consideration of what was foreseeable, what precautionary measures should have been taken, and whether the elements of causation are fulfilled. For example, if the victims are living in the vicinity of the company's operation or are identified community members protesting at the company's operations in the area the law may require that the company take their safety into account when managing risk. This will be all the more so, if the victims are company employees.

3.4.2 Security Providers Outside of a Formal Agreement

Even if there is no formal agreement or exchange of payment between a company and security providers (be they private services, government military, or members of an armed group), if those providers can be shown to be *de facto* providing security protection for the company, in the context of which gross human rights abuses occur, liability could potentially arise for the company. Important factors in any court's decision will include: whether the security forces were allowed access to the company's operations site, whether they were present at or near to the company's site on a regular basis, and whether the company provided weapons, material and other logistical support. Another important issue will be whether there is some continuity in the security services provided. A combination of some or all of these elements may be deemed to constitute a *de facto* security arrangement between the company and security providers. Within this, the law of civil remedies may require that, if the company knew or should have known of the risk of gross human rights abuses being perpetrated by the security services in the context of their provision of company security, the company should have taken certain precautionary steps.

Box 9: Beyond Complicity – Human Rights Abuses Resulting from Environmental Harm

Harm Resulting from Dangerous Activities: Strict Liability

Across jurisdictions, a company may be held legally responsible when an abnormally dangerous activity it undertakes causes harm, regardless of whether or not it was at fault, and to what extent it took measures to prevent the harm. This is again a form of “strict liability” (or “absolute liability”) and both the law of tort in common law jurisdictions and the law of non-contractual obligations in civil law jurisdictions provide for it in one form or another.⁹⁴ Ever-increasingly, basic provisions or laws outlining this kind of liability, are being supplemented with specific legislation identifying new situations in which this kind of liability will be imposed, particularly in relation to product liability and environmental damage.

When in 1985 oleum gas leaked from a manufacturing plant in India causing injury to the health of nearby individuals, those injured filed a civil claim against the responsible company in the Indian courts. In the course of litigation the Indian Supreme Court developed a theory of absolute liability.

“An enterprise which is engaged in a hazardous or inherently dangerous industry ... owes an absolute and non-delegable duty to the community to ensure that no harm results to anyone on account of ... the activity which it has undertaken ... Such hazardous or inherently dangerous activity for private profit can be tolerated only on condition that the enterprise... indemnifies all those who suffer on account of the carrying on of such hazardous or inherently dangerous activity regardless of whether it is carried on carefully or not ... The enterprise is strictly and absolutely liable to compensate all those who are affected by the accident and such liability is not subject to any of the exceptions which operate vis-à-vis the tortious principle of strict liability.”⁹⁵

94 In some jurisdictions, the two phrases mean the same thing. In others, ‘absolute liability’ imposes a higher standard allowing for no defence except for an act of god or sabotage: see for example, *M.C. Mehta v. Union of India*, WP 12739/1985 (1986.12.20) (Oleum Gas Leak Case); See also, US Restatement (Second) of the Law of Torts, § 519. For a European comparative law synthesis of when such strict liability may come into play see: Article 5.101, *Principles of European Tort Law*, www.egt.com. In common law countries, in addition to legislation providing for strict liability, there is a common law cause of action for strict liability where a business uses substances on its land which, if they escape or impact outside the operations site, cause serious harm see *Rylands v. Fletcher 1865 3 H&C 774; 159 ER 737*.

95 *M.C. Mehta v. Union of India*, WP 12739/1985 (1986.12.20) (Oleum Gas Leak Case).

4 Legal Procedure and Company Law Rules

The law of civil remedies existed long before the international community conceived of human rights and introduced legal instruments to limit the exercise of power in order to protect them. However, as victims increasingly seek the accountability of those who contribute to human rights abuses and as impunity is no longer tolerated, the civil law has been looked to for remedies and it is responding. Many of the reasons for this are explored briefly in Section 1.

As this increase in the application of the law of civil remedies to instances of human rights abuses is witnessed generally (and specifically in cases against companies) the issues and difficulties which victims can face in achieving redress need to be acknowledged and addressed. The Panel has observed that on occasion these obstacles may arise because law and policy makers, litigators, in-company counsel and the judiciary are still adapting to the new role which is being assigned to the law of civil remedies in relation to human rights protection.

As with criminal law a variety of issues can arise. First, the imbalance of arms between a large and often powerful business and the victim of a human rights abuse is not insignificant. Legal aid may not be available, despite the fact that the case involves human rights questions, leaving victims facing a costs burden which on the other hand is manageable for the company. This can result in civil claims not being initiated in the first place, especially in jurisdictions where the losing side in a civil claim pays the costs of both parties, and where lawyers cannot offer contingency fees. Second, while large awards of compensation made by courts and juries in civil claims in the US receive significant public attention, this will not be the case in the majority of jurisdictions, either because the amount of compensation which a court can award is legally limited, because juries are not involved in civil cases or because the possibility of punitive damages (high amounts of damages granted to punish the responsible actor) does not exist. This may mean that although a court decision will offer victims justice and may go some way to covering the practical costs of the harm suffered, unless the decision receives publicity the preventative effect which such publicity offers, and which many victims desire, is lessened. The preventative effect goes to ensuring both that the company itself changes its future behaviour and that other companies refrain from similar conduct.

Other difficulties are more substantive in nature and four in particular are notable. First, a statute of limitations may bar a civil claim if the events happened a certain amount of time before the claim is commenced. Second, the way in which company law treats every business entity as a separate legal entity, even within the same 'business family,' may mean that difficulties arise in seeking to hold a parent company accountable even in instances where it allegedly knew of and supported the conduct of its subsidiary. Third, sometimes the need to establish and persuade a court to exercise jurisdiction can be a substantial burden to overcome. Fourth, understanding and reaching an agreement as to what country's law should govern

a case can be complicated, confusing and protracted. In the following section, the Panel explores the impact of these four issues.

4.1 Statutes of Limitation: Preventing the Passing of Time from Preventing Justice

Although the time limits can vary, depending on the harm inflicted or the jurisdiction (and in many legal systems will not start running if a company has taken steps to conceal its conduct, location or identity) in many jurisdictions, if a claim for civil remedies is not initiated within a certain amount of time from the time the harm occurs, the claim will be barred. For example, a Swiss court held that a civil claim against IBM alleging its liability for involvement in harm inflicted by the Nazi regime during the Holocaust could not proceed due to the application of a statute of limitation.⁹⁶

The Panel considers that there will often be reasons why victims of gross human rights abuses do not bring claims within what is usually the relatively short period of time allocated by statutes of limitation. For example, if the government in power in the jurisdiction was involved in the abuses, or if armed groups involved threatened those who speak out, or if the legal system in question was not functioning effectively for other reasons. Such circumstances may mean that it is not feasible or safe for the victims to initiate a civil claim at a particular time. Also, it will often be the case that the nature of the abuses is such that victims are too traumatised in the short-term to initiate litigation.

As discussed in Volume 2, under international law, statutes of limitations may not be applied in domestic or international criminal prosecutions where the crime in question constitutes a war crime, a crime against humanity, genocide or apartheid.⁹⁷ This is because these actions are considered to be so serious that it is essential that they can be prosecuted no matter how many years elapse between their perpetration and the initiation of court proceedings. For the same reason there is a growing trend towards prohibiting statutes of limitation in criminal prosecutions related to other gross human rights abuses, such as torture or enforced disappearances.⁹⁸

96 *GIRCA v IBM*, no. 4C.296/2004 /ech, 22 December 2004, and *GIRCA v IBM*, no. 4C.113/2006 available in French at: <http://www.bger.ch/fr/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

97 See for example: Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; Article 29, Rome Statute of the International Criminal Court; the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes; See also Volume 2, Section 8 for a brief discussion and more sources. For a more comprehensive analysis and sources, see: International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide*, December 2006.

98 See for example, Section IV, Statutes of Limitations 6, in the UN Principles on Reparation; See also for example IACtHR: *Case of Barrios Altos (Chumbipuma Aguirre and others vs. Peru)* 14 March 2001; For a more comprehensive analysis and sources, see: International Commission of Jurists, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide*, December 2006.

The Panel has found evidence of an emerging view that similar considerations should be taken into account in relation to civil claims for harm caused by gross human rights abuses.⁹⁹ The Panel believes this trend to be of great importance. Indeed at the very least, the Panel considers that in all civil lawsuits, where a gross human rights abuse is at the centre of the claim, courts should have the discretion to take the kinds of factors outlined above into account when deciding whether or not to apply a statute of limitations.¹⁰⁰

The Panel believes that these considerations will be particularly important when the claim seeks the accountability of a company entity. As noted in Section 1, there will be many occasions when the law of civil remedies will provide victims with the only legal avenue through which to pursue the accountability of a company entity for involvement in gross human rights abuses. The Panel believes that where a court currently has no such discretion as to the application of a statute of limitations in a claim under the law of tort or non-contractual obligations, law and policy makers should recall, in the context of law-reform, that the law of civil remedies will often provide a very important avenue to justice. As a result, at the very least allowing a court such a discretion to set aside statutes of limitation could be extremely important in ensuring appropriate access to remedy and reparation for gross human rights abuses.¹⁰¹

4.2 The Responsibility of Parent Companies: Working with Separate Legal Personality

Throughout its research and consultation process, the Panel has been struck by the ever-increasing complexity of modern business structures. It is not uncommon for one business enterprise to now consist of a parent company with many subsidiaries, which in turn have subsidiary companies linked to them or which enter into a business partnership with other companies for which a new business entity is formed.

In this context, there are a number of reasons why it may be important to consider the involvement of a parent company in the conduct of its subsidiary, when allegations of complicity in gross human rights abuses arise. For example, when a subsidiary company is involved in human rights abuses, it may be the case that

99 See for example, Principle 23 in the Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity; Para. 73 General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance: <http://www2.ohchr.org/english/issues/disappear/docs/GeneralCommentsCompilationMay06.pdf>; For a more comprehensive analysis and sources, see: International Commission of Jurists, *The Rights to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide*, December 2006.

100 Indeed in the context of causes of action specifically and explicitly intended to remedy human rights abuses such as constitutional rights claims or claims under human rights legislation, courts across jurisdictions often have discretion in instances of all human rights abuses (not simply gross human rights abuses) as to whether or not to apply a statute of limitations. For an example of regional jurisprudence on the matter see: ECHR, *Stubbings and Others v. UK*, Case no. 36-37/1995/542-543/628-629, 22 October 1996.

101 See Section 1.1, p. 4.

the parent company tolerated or was indifferent to the course of conduct taken; or the subsidiary may act with the full knowledge, approval or even direction of the parent company.

The Panel has found that when a parent company is allegedly complicit, alongside its subsidiary company, in gross human rights abuses, the ability to seek the legal responsibility of the parent company may be a necessary factor in ensuring moral redress for the victims and proper vindication of their rights to remedy and reparation. First, parent company liability may be important in order to deter repetition of the conduct and change the practices of the enterprise as a whole. The risk of liability may encourage the enterprise to anticipate problems and take steps to ensure all its parts avoid them. This is all the more true when the subsidiary company is a limited liability company. When parent companies and directors are among the shareholders of a limited liability company, their assets are protected, as are all shareholders' assets. Therefore the ability to hold parent companies directly responsible, in addition to their subsidiaries, may be important in order to ensure a culture of governance in enterprises which does not offset or ignore the risk of involvement in human rights abuses, but takes measures to ensure avoidance.

Second, sometimes a subsidiary company, perhaps for reasons of limited liability, may simply not have enough funds at its disposal to offer meaningful compensation to the victims in the event of a court order. In the case of the Bhopal disaster, the cost of the loss and damage suffered was so high, due to the scale of the numbers of those killed and injured, and livelihoods destroyed, that the capital fund of the company operating the plant, Union Carbide India Limited, was considered unable to meet it and it was seen to be necessary to pursue the legal accountability of the enterprise as a whole.¹⁰²

Legal Accountability

In legal terms however, just as human beings are considered to be legally autonomous and distinct from each other, so too are companies. Each has a separate legal personality and is deemed to be a distinct entity from all other legal and natural persons,¹⁰³ including the parent company in charge of it, and its 'family' companies or subsidiaries.¹⁰⁴ This legal separation or "corporate veil" between different company entities in an enterprise will sometimes affect whether or not a parent company will

102 See also the situation underpinning the claim in *Lubbe v. Cape plc* 2000 4 All ER 268, in which the plaintiff pursued the responsibility of a parent company in relation to his exposure to asbestos in its South African subsidiary. The subsidiary was allegedly insolvent and could not have paid adequate compensation.

103 When a company official is acting for the company in the sense captured in Box 3 p. 14, then this legal separation is not applicable.

104 See for example in common law jurisdictions: *Salomon v Salomon* [1897] AC 22, and for a discussion: *The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective*, submitted to the Panel by Rachel Nicolson and Emily Howie of Allens Arthur Robison, www.icj.org.

be held legally responsible in situations where its subsidiary has become involved in human rights abuses.

Throughout different jurisdictions the basic principle is that the conduct of a subsidiary will not be identified with its parent for the purposes of assigning legal responsibility. This means that a parent company will not generally be held vicariously liable for its subsidiary's conduct, even in situations where it holds 100% of its subsidiary's shares. In contrast, this will not be the case with other in-company relationships, such as between branches and parent companies, or agencies subordinate to a parent company. Both the conduct of a branch or subordinate agency can be associated with its parent, and the vicarious no-fault liability of the parent company may arise.¹⁰⁵

In most jurisdictions there are only two ways to establish parent company liability in parallel to subsidiary company liability. First, when the doctrine of separate legal personality is being abused to perpetrate fraud or avoid existing legal obligations, the courts may be prepared to “lift the corporate veil,” look behind the corporate structure, impute the subsidiary's conduct to the parent, and hold the parent company liable on the basis of vicarious liability for the acts of its subsidiary.¹⁰⁶

Second, when a subsidiary company is involved in human rights abuses, the legal liability of its parent company may arise if the conduct of the parent company itself was also negligent or intentional (i.e. the parent company was at “fault”). This means that the parent company's liability has to be based on its own conduct – and cannot simply derive from the liability of the subsidiary itself. The Panel has found that at times there is a failure to distinguish correctly between situations in which a parent is allegedly liable on the basis of its own faulty conduct, and situations in which a court is asked to “pierce the corporate veil” and hold a parent company vicariously liable for the acts of its subsidiary. The Panel would urge lawyers, policy makers and commentators to avoid confusing these two separate bases for accountability, both of which have very different justifications and legal implications.

Determining whether a parent company may be held liable on the basis of its own fault involves applying the principles of knowledge/foreseeability, precautionary measures (if it is alleged that a company acted negligently) and causation outlined in Section 2 and therefore asking the questions summarised at the end of Section 2. Did the company initiate a negligent or intentional course of conduct that was a cause of harm to the victim concerned? Did it become a contributing actor to the

105 The situation in relation to liability within joint ventures and partnerships is dealt with separately in more detail in Section 3.3 p. 36.

106 See for example: *Australia, Briggs v James Hardie* (1989) 16 NSWLR 549 (at 567); *England and Wales, Re Darby Ex parte Brougham* 1911 1 KB 95; For a discussion of the approach in common law jurisdictions see: *The Impact of the Corporate Form on Corporate Liability for International Crimes: Separate Legal Personality, Limited Liability and the Corporate Veil – An Australian Law Perspective*, submitted to the Panel by Rachel Nicolson and Emily Howie of Allens Arthur Robinson, www.icj.org.

harm suffered? The Panel has found that there are two primary situations in which this will be answered in the affirmative: (1) where the parent company was itself actively involved in the abuses, or (2) where although the parent company was not actively involved, it exercised such control over its subsidiary that it should have taken steps to influence the subsidiary's conduct.

The Parent Company is Actively Involved in the Abuses

As outlined in Section 2, it is clear that several different individuals or companies can commit acts that cause or contribute to the same harm, and they can all be held legally liable for that harm.¹⁰⁷ This is no less true when the different entities involved include a parent and subsidiary company of the same enterprise. In such instances the proximity of the parent to the situation and/or those harmed will be a relevant issue, in terms of whether or not its conduct was a cause of harm suffered, whether in the circumstances it knew of or should have known of the risk that its conduct could result in harm, and whether it took sufficient precautionary measures. A court will look for evidence of active involvement. For example, in deciding whether the civil complaint against parent company Chevron-Texaco in relation to events in Nigeria, involving its Nigerian subsidiary (see Box 1), could go to trial, a US court held that “the fact that defendants were making abnormally frequent attempts to contact Nigeria on the third day of the Parabe incident is probative of defendants’ involvement in the incident.”¹⁰⁸

Cases in which parent companies have been held liable for negligence in this way include a parent company that was directly involved in the faulty and flawed design and construction of a boat which resulted in an oil spill that caused damage to individuals’ health and the environment.¹⁰⁹ In another case, a parent company was held liable for health damage suffered due to working conditions in its subsidiary’s operations because its managers were directly involved in running the subsidiary.¹¹⁰

The Parent Company is Obligated to Actively Intervene in its Subsidiary’s Conduct

In this situation, the question is whether a parent company was negligent because in light of the level of control it exercised over its subsidiary, it failed to take the care that could be expected of it in the circumstances, in terms of intervening in the conduct of its subsidiary and taking other positive preventative steps. If the parent

107 See Section 1, p. 5 and Section 2.3: Causation and Complicity.

108 *Bowoto et al. v. Chevron Co. et al.*, June 5, 2007, Case 3:99-cv-02506-SI, Document 1628, Order Denying Defendant’s Motion for Summary Judgement on Plaintiffs Tertiary Liability Theories.

109 *Amoco Cadiz*, 954 F.2d 1279, US Court of Appeals, 7TH Cir., 24 January 1992; See also the “OK Tedi case”: *Dagi v. BHP No. 2* 1997 1 VR 428.

110 *Wren v Csr Ltd & Another* [1997] 44 NSWLR 463; (1997) 15 NSWCCR 650 (8 August 1997), Australia, Dust Diseases Tribunal of New South Wales; *John Pinder v Cape LPC*, (2006) EWHC 3630 (QB), 20 December 2006.

company knew or should have known about the risk of its subsidiary causing harm to third parties, then it will be required to take sufficient precautionary measures. The level of precautionary measures the law will expect depends on the level of formal and *de facto* control the parent exercises over its subsidiary and whether it was able, on the facts, to intervene in its subsidiary's activities.

For example, in many situations where a parent holds over 50% of the shares in its subsidiary it could also have *de facto* control over the subsidiary and the authority to intervene in the subsidiary's activities. However, this will not always be the case and so in each instance there will need to be an in-depth inquiry. If a subsidiary's business policies are set or approved by its parent company and the relevant harm was caused by conduct undertaken in the course of implementing such policies, the law may consider that a parent company should have been able to influence this course of conduct, and therefore should have taken certain positive steps. On the other hand, if the harm was caused by a course of conduct undertaken outside of, or in contradiction to, company policy, it will be less likely that the parent company will be considered to have had the ability to prevent or limit the harm through precautionary measures. However, again each individual case will be assessed on the facts. If a parent company only holds a minority share in its subsidiary, it will often not be deemed to have control over its subsidiary, such that it was able to influence its decisions in order to eliminate or reduce risks of harm. However, liability in such instances cannot be ruled out completely and it could be that on the facts the parent company will be deemed to have had the capacity to influence its subsidiary's conduct, for example by asking for information and discouraging a particular course of conduct.

4.3 Where can Civil Claims be Brought: Establishing Jurisdiction

As discussed in Volume 2, often the perpetrators of gross human rights abuses amounting to crimes under international law can be subject to criminal proceedings in a variety of different jurisdictions – not only where the crime occurred, but also in their home country, or in some circumstances, anywhere in the world.¹¹¹ In respect of civil claims, it is established that national courts have the right under international law to hear civil claims when the harm occurred within their jurisdiction, or where the defendant has a link to the jurisdiction. In cases involving companies, most national legal systems require that the company be domiciled or incorporated in the jurisdiction, although sometimes, for example in the US, the link can be less formal, and take the form of business activity or financial holdings in the jurisdiction.¹¹²

111 See Volume 2, Section 8.

112 For a comparative analysis, see the *Fourth and Final Report: Jurisdiction over Corporations*, by the International Law Association, Committee on International Civil and Commercial Litigation, <http://www.ila-hq.org/pdf/Civil%20&%20Commercial%20Litigation/Civil%20&%20Commercial%20Litigation%20for%20Final%20Report.pdf>; see also for a discussion of the United States: Stephens, *US Litigation Against*

In many instances, victims of gross human rights abuses will seek out the most appropriate forum – the one that assures them the optimum chance of adequate remedy and reparation. More often than not, this will be the legal system of the country where the abuse occurred. However the intricate and multinational structures of many of today’s large companies means that their reach, presence and impact spans jurisdictions. Victims may therefore sometimes seek justice in a jurisdiction other than that where the harm occurred. This may be because the company concerned is domiciled in the chosen jurisdiction thereby providing greater assurance of access to information and discovery as well as compliance with any judgment issued. It may also be because the victims face obstacles in access to justice in the country where the harm was inflicted.

When a claim is brought in a country other than where the harm occurred, establishing jurisdiction and convincing a court to exercise it become important features of any case.¹¹³ Where courts are asked to determine the responsibility of parent companies over acts of their subsidiaries abroad, establishing jurisdiction can be particularly complex. In order to find a connecting factor between the jurisdiction and the claim, more often than not a court will need to identify evidence that suggests (in line with the discussion in Section 4.2) that the parent company itself was involved in the harm. As we have seen in Section 4.2, this can be a complicated matter, especially if it has to be dealt with at the preliminary stages of a claim. For example in one case, in order to establish whether it had jurisdiction to hear the claim, a Canadian court had to first consider whether there was evidence to suggest a parent company could be held responsible in relation to the release of toxic waste into the environment by its subsidiary company operating a mine in Guyana.¹¹⁴ This necessarily involved, at the preliminary stage, some consideration of whether there was evidence indicating that the parent company could have been at fault for the purposes of civil liability. When a claim was brought in the United Kingdom against a parent company domiciled there, in relation to health damage suffered by workers in its South African subsidiary, through asbestos exposure, the court found it did have jurisdiction to hear the claim after establishing that there was evidence to support the allegation that the parent company’s own negligence was a cause of the harm suffered.¹¹⁵

Companies for Gross Violations of Human Rights, written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, www.icj.org.

113 See for a comparative analysis of grounds on which courts in different jurisdictions sometimes refuse to exercise jurisdiction: *Third Interim Report: Declining and Referring Jurisdiction in International Litigation*, by the International Law Association, Committee on International Civil and Commercial Litigation, <http://www.ila-hq.org/pdf/Civil%20&%20Commercial%20Litigation/CommLitigation.pdf>.

114 *Recherche’s Internationales Quebec v. Cambior Inc.*, [1998] Q.J. No. 2554. The Court held that it had jurisdiction to hear the claim because Cambior had significant control over the foreign mine. Eventually however the Court found that the Guyana courts would be a more convenient forum for hearing the tort claim. The Court noted, for example, that the mine and spill effects were in Guyana, the claimants live there, witnesses to the disaster resided mostly in Guyana, and the voluminous documentary evidence was developed in Guyana.

115 *Lubbe v. Cape plc.* [2000] 4 All E.R. 268.

Sometimes however, even where a court finds that it has the jurisdiction to hear a claim, it may decide that another forum is better placed to deal with the case and refuse to exercise its jurisdiction. This discretion of a court to refuse jurisdiction on the basis that there is a more appropriate jurisdiction elsewhere, is known as the doctrine of *forum non conveniens*. The doctrine is predominantly applied in common law jurisdictions and does not feature in the vast majority of civil legal systems.¹¹⁶

In some common law jurisdictions, this discretion is now being phased out. Courts in all EU Member States (including the common law legal systems) must now allow proceedings to commence if the defendant business is domiciled, or if the harm occurred, within their jurisdiction.¹¹⁷ Case law indicates that courts in EU Member States cannot now refuse to exercise jurisdiction over companies within EU borders, even if the harm occurred outside the EU¹¹⁸ and even if the victim claiming redress is not an EU resident or national.¹¹⁹ This is a significant development, ensuring that victims who pursue the civil responsibility of companies in the courts of EU Member States, will now no longer be asked to prove that their chosen forum is the only one which offers them access to justice.

The Panel considers that in those common law jurisdictions where the courts can still exercise their discretion to refuse jurisdiction,¹²⁰ it is important to recall that if there is no meaningful, reasonably accessible alternative forum, in which access to justice for the victim concerned is a real possibility, then the doctrine may not be legitimately applied. Ensuring that the doctrine is only applied when there is a reasonably accessible alternative is vital in order to ensure that the application of the doctrine does not present a fundamental obstacle to remedy and reparation for victims, and/or become a mechanism to avoid dealing with difficult, potentially high-profile, politically sensitive cases.

4.4 What Country's Law Applies?

In situations where a claim is brought in a jurisdiction distinct from that where the harm occurred, once it is established that a court has jurisdiction to hear the case, the next question will be what country's law should be applied. This question will be answered according to the private international law rules applicable in the country

116 See for a discussion and comparative analysis, *The Third Interim Report: Declining and Referring Jurisdiction in International Litigation*, by the International Law Association, Committee on International Civil and Commercial Litigation, <http://www.ila-hq.org/pdf/Civil%20&%20Commercial%20Litigation/CommLitigation.pdf>.

117 The Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 27 September 1968, available at <http://curia.europa.eu/common/reccdoc/convention/en/c-textes/brux-idx.htm>.

118 *Andrew Owusu v. N.B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others*, European Court of Justice, Case no. C-281/02, 1 March 2005.

119 *Group Josi Reinsurance Company SA v Universal General Insurance Company (UGIC)*, European Court of Justice, Case no. C-412/98, 13 July 2000.

120 For example Australia, Canada, New Zealand and the United States.

where the case is being heard. Reaching an understanding of which law should apply often involves protracted and difficult deliberations which can impact the extent of legal costs and give rise to delays.

Historically, the general rule in cases of tort law or non-contractual liability was: *lex loci delicti*. This means that the law applicable was that of the country in which the harm occurred. The Panel has found that although this currently remains the starting point in most jurisdictions throughout the world, various exceptions have developed in different countries. For example, in the United States, although the starting point is that the law of the place in which the harm occurred should govern, a level of flexibility, discretion and choice exists for courts as to what law they apply.¹²¹ Essentially they will apply the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties.¹²² Which country this is will differ on the facts of a given case,¹²³ and in making a decision the courts will take into account a number of considerations: the place where the injury occurred, the place where the conduct causing the injury occurred, the domicile, residence, nationality, place of incorporation and place of business of the parties, and the place where the relationship, if any, between the parties is centralised.¹²⁴

In contrast, for courts within EU Member States, many exceptions to the general rule that the law applicable is that of the place where the harm occurred will be eliminated in 2009, with the adoption of a new EU Regulation which will unify, within the Union's borders, the general principles of private international law.¹²⁵ The new law holds that the law applicable shall be the law of the country in which the damage occurred, and not that of the country in which the events giving rise to the damage took place, or in which the indirect consequences of that event occurred.¹²⁶ This means, for example, that the law of the country where the harm caused by human rights abuses occurred will be applied rather than the law of country in which the decisions giving rise to those abuses were taken.

The Panel considers that this development will give rise to greater clarity in relation to the difficult and complex considerations involved in identifying the applicable law,

121 See: The Second Restatement of the Conflict of Laws 1968.

122 *Ibid.*

123 *Cp. Allstate Insurance Co. v. Hague*, 449 US 302 (1981).

124 Additionally, the courts can take seven other factors into account: the needs of the interstate and international systems, the relevant policies of the forum, the relevant policies of other interested states, the protection of justified expectations, the basic policies underlying the particular field of law, certainty, predictability and uniformity of result, and ease in the determination and application of the law to be applied.

125 Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Pb 31.7.2007, L 199/40. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:289E:0068:0083:EN:PDF>.

126 See Recital 17: 'The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.'

which can arise in cases with trans-national elements. It may reduce the time and costs spent in litigation and allow the parties and the court to concentrate on the merits of a case. However on the other hand, it may at times impact in a restrictive manner on the ability of victims to gain effective access to remedies and reparations. The Panel believes it is particularly important to guard against this, in the context of complex and serious cases involving gross human rights abuses.

5 The United States and the Alien Tort Statute

The United States often receives the most attention in terms of the use of tort law as an avenue to company accountability in situations of alleged complicity in gross human rights abuses. The Panel believes that there are a number of reasons for this,¹²⁷ but in this section it focuses only on one: a unique piece of legislation, commonly referred to as the Alien Tort Statute (ATS)¹²⁸ which adds another dimension to the use of the law of tort in the United States in situations where the accountability of businesses for involvement in human rights abuses is sought. Notwithstanding the separate discussion of this provision here, it should be borne in mind that the analysis in the previous four sections of this Volume encompass United States tort law. The general principles of the law of civil remedies which the Panel has analysed in Sections 2 and 3 apply equally in the United States. The same is true of the Panel's discussion of legal procedure and obstacles in Section 4.

The ATS allows people who are non-United States citizens (“aliens”) to file a civil suit in United States courts, for human rights abuses they have suffered, even if the harm took place outside the United States, and even if the actor facing claims of liability has tentative links with the United States. The ATS says that the United States “*shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.*”¹²⁹ Although the Statute dates back to the 18th century, it was only in the second half of the 20th century that it was cited in cases seeking remedies for human rights abuses. On its face, the provision makes no reference to human rights, but in 1980 it was successfully invoked in a human rights claim by two Paraguayan nationals against a former Paraguayan police official, based in the United States at the time of the case, for his torture of a member of their family in Paraguay.¹³⁰

127 For example, procedural rules in the US are generally regarded as favourable to litigation, given the availability of punitive damages, the lack of a loser pays system in relation to cost orders and the possibility for lawyers to charge contingency fees on the basis of a successful outcome. For more discussion see Beth Stephens, *US Litigation Against Companies for Gross Violations of Human Rights*, written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, www.icj.org.

128 28 U. S. C. §1350 ‘Alien’s action for tort’. Included in the Judiciary Act of 1789. The legislation is also often referred to as the Alien Tort Claims Act (ATCA). For a history see US Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-37 (2004): “*The first Congress passed it as part of the Judiciary Act of 1789, in providing that the new federal district courts “shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”* p. 17 – 18, and “*The statute has been slightly modified on a number of occasions since its original enactment. It now reads in its entirety: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States,”* p.18.

129 28 U. S. C. §1350 ‘Alien’s action for tort’.

130 *Filártiga v. Peña-Irala* 630 F.2d 876 (2d Cir. 1980), (for a brief discussion see: <http://ccrjustice.org/ourcases/past-cases/filartiga-v.-peñ-irala>; For more discussion see Beth Stephens, *US Litigation Against Companies for Gross Violations of Human Rights*, written for the ICJ Expert Legal Panel on Corporate Complicity in International Crimes, www.icj.org. See also, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations*,

There are several comprehensive, in-depth reports and commentaries on the legislation and the impact of its ever-increasing use and the Panel has not attempted to mirror these in any way. Rather it seeks to analyse briefly the zone of legal risk which the statute creates for businesses when they are allegedly complicit in gross human rights abuses, and in that regard looks at two points of outstanding confusion.

The Zone of Legal Risk

It is established that private actors, including companies and/or their officials can face claims of liability under the legislation,¹³¹ either when they are the principal actors involved in causing harm, or secondary actors.¹³²

However, two important issues are still under debate and the Panel addresses these two questions in sequence here.

The first relates to jurisdictional issues and specifically what human rights abuses will fulfil the Statute’s requirement that in order for US courts to have jurisdiction under the Statute the harm for which liability is sought must have been inflicted in “violation of the law of nations or a treaty of the United States”?

In 2004, the United States Supreme Court considered what could constitute a violation of the law of nations. It held that, “federal courts should not recognize claims... for violations of any international law norm with less definite content and acceptance among civilized nations than the 18th-century paradigms familiar when §1350 was enacted.”¹³³ It cited previous judgments which held that the clause should apply in cases of “a handful of heinous actions – each of which violates definable, universal and obligatory norms.”¹³⁴ The Court then went on to consider whether or not these requirements were fulfilled in the case at hand. It held that they were not because in its view the situation at the heart of the claim did not involve a violation that had “attained the status of binding customary international law.”¹³⁵

Beth Stephens, 27 Yale J. Int’l L. 1 (2002).

131 Initially the complaints filed claimed the liability of individual government officials. However in the 1990s claims began to be filed against private actors, following a lawsuit against the leader of the Bosnian-Serbs seeking damages for genocide, war crimes, crimes against humanity, extrajudicial killing and torture. In that case the defendant argued that he was a purely private actor and therefore could not violate the law of nations. However the court disagreed, holding that a number of international law violations can be perpetrated by private actors as well as by state officials. *Kadic v. Karadzic*, 70 F.3d 232, 236-37 (2d Cir. 1995). See also *Doe v. Unocal Corporation*, US Court of Appeals for the Ninth Circuit, 12 September 2002. Since then several cases have been filed against companies in a spectrum of different situations, involving a wide range of companies, operating throughout the world.

132 See for example, *Doe v. Unocal Corporation*, US Court of Appeals for the Ninth Circuit, 12 September 2002, and see *Khulumani v. Barclay National Bank, Ltd.* Court of Appeals for the Second Circuit, 12 Oct 2007 <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/ApartheidreparationslawsuitsreSoAfrica>.

133 *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734-37 (2004) (hereinafter *Sosa*).

134 *Ibid.*, at p. 38.

135 In the *Sosa* case, according to the Supreme Court the violation complained of was a detention of less than 24

Drawing on this ruling, the Panel considers that the United States courts will hold conduct to constitute “a violation of the law of nations” if it is contrary to a norm of customary international law.

As a result the Panel considers that involvement in human rights abuses that are contrary to customary international law could give rise to a zone of legal risk under the Statute.¹³⁶ The gross human rights abuses which have formed the heart of the Panel’s inquiry are generally considered to contravene customary international law, and therefore the Panel believes that participating in their perpetration could currently place companies in a zone of legal risk under the Statute.¹³⁷ These include, for example, acts such as: crimes against humanity, torture, slavery and war crimes. Furthermore, the Panel believes that beyond such gross human rights abuses, a prudent company would also be vigilant in ensuring that its conduct does not implicate it in other human rights abuses – which in some instances may amount to infringements of international customary law. Moreover it is vital for businesses to recall that customary international law continues to develop and emerge and that international legal obligations, prohibitions or rights which are not considered to constitute norms of customary international law today, may be tomorrow.

The second question relates to what is the standard of liability which applies under the Statute? Will a company’s conduct be judged against tort law standards of knowledge (foreseeability) and causation (i.e. those outlined in Section 2) or against standards derived from another body of law, for example, international criminal law (see Volume 2, Section 2)?

The Panel has found that in complaint submissions invoking the Statute and related jurisprudence there is often a lack of clarity as to whether international criminal law or domestic tort law provides the standard against which an actor’s conduct will be judged. Sometimes, relevant international criminal law standards such as principal criminal responsibility, aiding and abetting and command responsibility (all of which the Panel analyses in Volume 2, Sections 2, 3 and 4) have been argued by the plaintiffs or applied by the courts. On other occasions, domestic civil liability standards (which are the subject of Section 2) such as negligence, aiding and abetting a tort and joint enterprise liability have been invoked and applied.

hours, pursuant to a lawful arrest warrant. The court held this did not amount to a violation comparable to the 18th century paradigms outlined. “A single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary law so well defined.” Sosa, p. 44-45.

136 The Panel would also note that from the perspective of international law the phrase “law of nations” could be legitimately interpreted as encompassing international laws contained in, or derived from, international treaties, customary international law, or general principles of law recognised by civilized nations. These are denoted as accepted sources of international law in the Statute of the International Court of Justice, Article 38.

137 See Glossary of Key Terms.

For many lawyers, the application of international criminal law standards in a tort case is something of an anomaly and because the Alien Tort Statute is invoked in civil claims for civil remedies, many consider that the standards applied should be civil liability standards.¹³⁸ In 2004, the United States Supreme Court did not definitively and explicitly pronounce on the choice between applying tort standards or international criminal law rules. However it did hold that the best understanding of the Statute was that the cause of action derives from the common law.¹³⁹ This has been understood by many to mean that the Statute requires that the “tort be committed in violation of international law, not that international law itself recognize a right to sue or define the scope of liability,”¹⁴⁰ and that “the cause of action under the Statute is a creature of the common law, not the law of nations per se.”¹⁴¹

The Panel believes this to be a desirable approach. It considers that there is no reason to hold that tort law standards should not, or cannot, govern the application of the law to the facts in Alien Tort Statute cases. As the Panel has outlined in Section 2, the fundamental principles of the law of civil remedies are common to all jurisdictions throughout the world, including the United States.¹⁴²

While questions persist about whether tort law or international criminal law should define the standards of acceptable conduct, how should companies best assess the zone of legal risk? As outlined in Volume 1, and as the analysis in Volume 2 and the present Volume demonstrates, there are notable differences between criminal law and civil law. Nevertheless, the Panel believes that a prudent company seeking to ensure its conduct does not place it in a zone of legal risk with respect to the Statute, would be guided by the standards of both criminal and civil law. This involves asking itself the civil liability questions outlined in Section 2, and the criminal responsibility questions analysed in Section 2, Volume 2. In Volume 1, the Panel seeks to synthesise these questions and to describe such a general zone of legal risk.

138 It seems that international criminal law standards were brought into play because they outline a standard by which to judge the conduct of actors when they are involved in crimes under international law, and as explained in Section 1, Volume 1 and Section 1, Volume 2, many gross human rights abuses amount to crimes under international law. However, international criminal law rules that define circumstances in which an actor will be held responsible for crimes under international law were developed with reference to the imposition of criminal responsibility.

139 “The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time.” *Sosa* p.3 syllabus.

140 *Brief Amici Curia of International Law Scholars* (Philip Alston, William S. Dodge, Thomas Franck, Harold Hong-Ju Koh, Anne-Marie Slaughter, and David Weissbrodt). <http://www.cmht.com/pdfs/SAACLawScholars083005.pdf>.

141 *Ibid.*

142 If however the United States courts do choose to apply international criminal law standards, in relation to which there is no bar under international law, the Panel would urge them to do so with reference to a correct interpretation of those standards. (See for example the Panel’s analysis in Volume 2).

