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# CIVIL LITIGATION IN RESPONSE TO CORPORATE HUMAN RIGHTS ABUSE: THE EUROPEAN UNION AND ITS MEMBER STATES

*Jonas Grimheden\**

## CONTENTS

### I. INTRODUCTION

The European Union has a troublesome relationship with corporations and human rights. The single market was established to improve trade within the EU. As a block, the EU plays an important role globally – in negotiating conditions and ideally leading by example. At the same time, the EU was also established to overcome the divisions that lead to the World Wars, with human rights being central to its *raison d'être*.<sup>1</sup> Also, civil society organizations and citizens, as well as customers have high expectations for the EU in terms of setting and ensuring high human rights standards.<sup>2</sup> In this context, the EU – with a shared mandate with its 28 Member States in this area – struggles to meet competing demands between ‘business-friendliness’ and human rights protection.<sup>3</sup>

Significant multinational companies are headquartered in the EU, such as the automotive company Volkswagen of Germany, the Anglo-Dutch consumer goods company Unilever, the flat-box furniture store IKEA of Sweden, the oil and gas company Royal Dutch Shell in the Netherlands, and BNP Paribas providing financial service out of

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1. Gráinne de Búrca, *Europe’s Raison D’Etre* (N.Y.U. Law Sch. Public Law & Legal Research Paper No. 13-09, 2013), <http://ssrn.com/abstract=2224310> [<https://perma.cc/Q7K4-GL2M>].
2. *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011-14 for Corporate Social Responsibility*, COM (2011) 681 final (Oct. 23, 2011).
3. *Id.* at 2.

France.<sup>4</sup> There are some leaders on human rights among the 98 of the world largest publically traded companies covered coming from the EU Member States, such as Marks & Spencer Group, Adidas, Unilever, Total and Hennes & Mauritz.<sup>5</sup> However, some of these EU based companies are at the opposite end of the spectrum, including big luxury labels like Hermès International and Prada.<sup>6</sup> There are also reports from August 2017 that suggest the risk of severe labor exploitation has increased in Europe's supply chains due to the large influx of migrants in the last few years.<sup>7</sup> While many of these companies work proactively to prevent human rights abuse and even improve human rights, serious abuses have occurred.

Due to these abuses, the EU has taken action to hold businesses accountable, including binding EU legislation.<sup>8</sup> For instance, in 2016, the Council of Europe adopted recommendations on human rights and business.<sup>9</sup> In 2017, the European Union Agency for Fundamental Rights issued an opinion on what could be done, per the request of the Council of the EU – the governing body bringing together the 28 government of the EU.<sup>10</sup>

The aim of this Note is to assess the barriers victims of human rights abuse involving companies face in accessing effective judicial remedies in the European Union. As such, this Note looks at the EU experience regarding civil litigation for corporation-related human

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4. The World's Biggest Public Companies, FORBES (last visited Oct. 8, 2017), <https://www.forbes.com/global2000/list/#tab:overall>.
  5. *2017 Results*, CORPORATE HUM. RTS. BENCHMARK (last visited Oct. 8, 2017), <https://www.corporatebenchmark.org/>.
  6. *See id.* (listing Hermès International and Prada in the bottom 30% of companies with respect to human rights performance).
  7. *CI Regional Study: Europe*, GLOBAL SLAVERY INDEX (2016), <http://downloads.globallslaveryindex.org/GSI-2016-Regional-Study-Europe-1506708573.pdf> [<https://perma.cc/W55P-EUL2>].
  8. Beata Faracik, Implementation of the UN Guiding Principles on Business and Human Rights, DROI, 37 (2017).
  9. Eur. Consult. Ass., *Recommendation CM/Rec(2016)3 of the Committee of Ministers to Member States On Human Rights and Business*, EUR. CONSULT. (Mar. 2, 2016), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c1ad4](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1ad4) [<https://perma.cc/UAM5-BCHR?type=image>]; *see also*, *About the Committee of Ministers*, EUR. CONSULT. (last visited Oct. 1, 2017), <http://www.coe.int/en/web/cm/about-cm> [<https://perma.cc/2DAK-K95G>] (The Committee of Ministers are ministers for foreign affairs of the 47 member states of the Council of Europe).
  10. E.U. FRA, *Opinion of the European Union Agency for Fundamental Rights on Improving Access to Remedy in the Area of Business and Human Rights at the EU Level*, 3 (Apr. 10, 2017), [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017-opinion-01-2017-business-human-rights\\_en.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf).

rights abuses and explores efforts undertaken by the EU to ensure liability for these abuses, making additional recommendations for continued success. Section I deals with civil litigation in EU Member States and touches on relevant jurisprudence at the regional level, highlighting issues related to access to remedies in relation to business and human rights. Section II explores some recent measures taken by the EU to facilitate access to judicial remedies in this regard. Section III recommends additional safeguards to ensure that victims of human rights abuse are able to access effective judicial remedies in the EU and its Member States.

## II. EXPERIENCE FROM EU MEMBER STATE COURTS HIGHLIGHTING CONCERNS WITH ACCESS TO REMEDY

Among the many (overlapping) ways companies are held accountable for human rights abuse – in addition to preventive measures, ranges from civil society media campaigns to criminal and civil law; civil law is often the most common avenue.<sup>11</sup> Civil litigation, as with other options, brings with it a range of complications, much of which stems from the power imbalance that often exists between large companies and the individual victim or stakeholder.<sup>12</sup> Issues such as legal resources/assistance, costs, access to evidence, burden of proof, and procedural obstacles are the likely contributing factors to this imbalance.<sup>13</sup>

### A. Case Studies?

The most recent triggering case with repercussions in Europe could be said to have been the 2013 Rana Plaza factory collapse, which raised the issue of corporate behaviour and human rights.<sup>14</sup> This case exposed the abhorrent labor conditions of the Bangladeshi garment industry with implications for clothes retailers in the EU, such as the Spanish Zara and Italian Benetton.<sup>15</sup> In August of 2017,

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11. E.U. FRA, *supra* note 10, at 24.

12. *See id.* at 24-25 (explaining potential for business-related human rights abuse and the complication it brings regarding access to effective judicial remedies for victims).

13. *See id.* at 24-25 (explaining potential for business-related human rights abuse and the complication it brings regarding access to effective judicial remedies for victims).

14. *Bangladesh: 2 Years After Rana Plaza, Workers Denied Rights*, HUM. RTS. WATCH (Apr. 22, 2015, 12:45 AM), <https://www.hrw.org/news/2015/04/22/bangladesh-2-years-after-rana-plaza-workers-denied-rights> [<https://perma.cc/WZM8-X9D5>].

15. *See* Clare O'Connor, *These Retailers Involved In Bangladesh Factory Disaster Have Yet To Compensate Victims*, FORBES (Apr. 26, 2014, 5:29 PM), <https://www.forbes.com/forbes/welcome/?toURL=https://>

the Bengal government sentenced the factory complex's owner to three years imprisonment on graft charges.<sup>16</sup> Another 'incident' that garnered significant attention in Europe involved the German clothing retailer KiK. In 2012, a similar incident to that of the Rana Plaza accident took place in Pakistan, with KiK being the main customer of the factory.<sup>17</sup> A civil case was brought on behalf of some of the victims before a court in Germany, led by a German civil society organisation.<sup>18</sup> The court accepted jurisdiction over the case and issued legal aid in 2016.<sup>19</sup> Other organizations provided funding for the victims and witnesses to travel to Germany for the trial.<sup>20</sup> Parallel criminal proceedings were brought before courts in Pakistan and in Italy.<sup>21</sup> The link to the latter country is a company based in Italy having issued a certificate guaranteeing safety in the workplace in Pakistan just weeks before the accident.<sup>22</sup>

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[www.forbes.com/sites/clareoconnor/2014/04/26/these-retailers-involved-in-bangladesh-factory-disaster-have-yet-to-compensate-victims/&refURL=&referrer=#15190](http://www.forbes.com/sites/clareoconnor/2014/04/26/these-retailers-involved-in-bangladesh-factory-disaster-have-yet-to-compensate-victims/&refURL=&referrer=#15190) (discussing retailers' compensation for dangerous conditions that resulted in Rana Plaza's collapse) [<https://perma.cc/WZM8-X9D5>].

16. *Bangladesh Court Jails Rana Plaza Owner for Graft: Prosecutor*, CHANNEL NEWSASIA (Aug. 29, 2017, 08:01 PM), [<https://perma.cc/SEP6-Q3P4>] <http://www.channelnewsasia.com/news/asiapacific/bangladesh-court-jails-rana-plaza-owner-for-graft-prosecutor-9167428> (charges for corruption, violations of the building code and more are still pending).
17. Shamil Shams, *Germain Retailer KiK Compensates Pakistan's 'Industrial 9/11' Families*, DEUTSCHE WELLE (Feb. 9, 2017), <http://www.dw.com/en/german-retailer-kik-compensates-pakistans-industrial-9-11-families/a-37470138> [<https://perma.cc/GRH4-GR8T>].
18. *See Paying the Price for Clothing Factory Disasters in South Asia*, EUROPEAN CENT. FOR CONSTITUTIONAL AND HUMAN RIGHTS, [https://www.ecchr.eu/en/our\\_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html](https://www.ecchr.eu/en/our_work/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik.html)  
(The European Center for Constitutional and Human Rights is the German civil society organization) (last visited Sept. 30, 2017) [<https://perma.cc/37L9-DEMK>].
19. Shams, *supra* note 17.
20. Based on presentation by a lawyer involved in the case on 4 September 2017, in Brussels.
21. *See Factory Fire in Pakistan: Criminal Investigations into RINA in Italy*, EUROPEAN CENT. FOR CONSTITUTIONAL AND HUMAN RIGHTS, <https://www.ecchr.eu/en/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/proceedings-in-italy.html> (last visited Sept. 30, 2017) [<https://perma.cc/WQ88-EA2U>].
22. *Criminal Proceedings Against Ali Enterprises in Pakistan*, EUROPEAN CENT. FOR CONSTITUTIONAL AND HUMAN RIGHTS, [https://www.ecchr.eu/en/business-and-human-rights/working-](https://www.ecchr.eu/en/business-and-human-rights/working-conditions-in-south-asia/pakistan-kik/proceedings-in-italy.html)

A third example of a ‘leading case’ in Europe and arguably, the most well-known, involves the energy company Shell Nigeria who lost a case in a Dutch court in 2013<sup>23</sup>The court held the corporation responsible for oil pollution in Nigeria in 2005, environmental damage that affected the livelihood of many in the region.<sup>24</sup> Shell has been active since the 1930s in the country and there are a number of complaints in various fora about pollution and even complicity to murder.<sup>25</sup> This case serves as an example of how civil litigation can respond to corporate human rights abuses, but also as an illustration of the obstacles that exist. The Nigerian claimants, together with civil society organizations<sup>26</sup> filed the suit in 2008 in the Netherlands.<sup>27</sup> In the first instance, the court found that Shell Nigeria should have done more to prevent sabotage that led to the oil spill.<sup>28</sup> Claims against Shell’s parent company in the Netherlands were dismissed.

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- conditions-in-south-asia/pakistan-kik/proceedings-in-pakistan.html (last visited Sept. 30, 2017) [<https://perma.cc/AF6A-R3R5>].
23. See generally R. Ridderhof, *Shell and Ogoni People:(s)oil pollution in the Niger Delta*, PEACE PALACE LIBRARY: LIBRARY BLOG (Feb. 15, 2013), <https://www.peacepalacelibrary.nl/2013/02/shell-and-ogoni-people-soil-pollution-in-the-niger-delta/> [<https://perma.cc/6XDV-26FW>].
  24. *Shell Lawsuit (re oil pollution in Nigeria)*, BUS. & HUMAN RIGHTS RES. CENT., <https://business-humanrights.org/en/shell-lawsuit-re-oil-pollution-in-nigeria> (last visited Oct. 8, 2017) [<https://perma.cc/4TRS-4RHC>].
  25. *Nigeria: Shell Complicit in the Arbitrary Executions of Ogoni Nine*, AMNESTY INT’L, (Jun. 29, 2017 00:22 UTC), <https://www.amnesty.org/en/latest/news/2017/06/shell-complicit-arbitrary-executions-ogoni-nine-writ-dutch-court/> [<https://perma.cc/K85E-22PX>].
  26. See generally *Outcome Appeal Against Shell: Victory for the Environment and the Nigerian People*, FRIENDS EARTH INT’L (Dec. 18, 2015), <http://www.foei.org/news/outcome-appeal-shell-victory-environment-nigerian-people-friends-earth-netherlands> (detailing the efforts of civil society organization Friends of the Earth Netherlands in its support of Nigerian farmers against Shell) [<https://perma.cc/Y6NK-WZ5B>].
  27. See generally *Dossier Shell in Nigeria: Timeline*, MILIEUDEFENSIE, <https://milieudedefensie.nl/shell-in-nigeria/rechtszaak/belangrijke-momenten-van-de-rechtszaak> (providing key dates and developments of the Shell case in Nigeria) (last visited Sept. 30, 2017) [<https://perma.cc/Z4SD-PTNU>]; *Dossier Shell in Nigeria: Legal Documents*, MILIEUDEFENSIE, <https://milieudedefensie.nl/shell-in-nigeria/rechtszaak/documenten> (providing all legal documents filed for the case) (last visited Sept. 30, 2017) [<https://perma.cc/WN33-62FF>] (both pages in Dutch).
  28. *Shell Nigeria Case: Court Acquits Firm on Most Charges*, BBC NEWS (Jan. 30, 2013), <http://www.bbc.com/news/world-africa-21258653> [<https://perma.cc/XML6-4UWS>].

Both parties appealed the decision; Shell for holding the company responsible and the plaintiffs for the dismissed claims against Shell's parent company.<sup>29</sup> The appeals court ruled that Shell notably should provide access to certain company documents, a first in a Netherlands court.<sup>30</sup> The appeal court's decision is not expected until late 2017 and there is a strong possibility that an additional appeal to the supreme court will considerably delay justice for these victims.<sup>31</sup>

In 2012, a similar suit was brought against Shell before the London High Court for two oils spills that occurred four years earlier.<sup>32</sup> Ultimately, the court dismissed the case for lack of jurisdiction due to the absence of a sufficiently strong connection to the UK.<sup>33</sup> Despite the UK court's finding, the case has been litigated before courts in two EU Member States, with different outcomes,<sup>34</sup> underscoring the need for an 'EU area of justice,' as the ambition is, that is more uniform in its approach..

Many business and human rights cases have been litigated in UK courts, where experiences from lawyers arguing cases against companies can be drawn from testimonies before parliamentary bodies. For instance, problems have been identified in relation to insufficient level of damages based on the cost of living in a country where the damages has occurred<sup>35</sup>, while litigation is pursued in a country where a multinational corporation has its seat, with high legal costs.<sup>36</sup>

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29. FRIENDS EARTH INT'L, *supra* note 26.

30. *Id.*

31. Cees van Dam, Preliminary Judgments Dutch Court of Appeal in the Shell Nigeria Case 9, available at <http://www.ceesvandam.info/default.asp?fileid=643> (last visited Sept. 30, 2017).

32. Complaint at 2, Bodo Community v. Shell Petroleum Development Company of Nigeria Ltd. No. HQ11X01280 [2012] EWHC (QB) [¶ 1-2] (Eng.).

33. Okpabi v. Royal Dutch Shell [2017] EWHC (QB) 89 [119] (Eng.).

34. Noted at EU workshop on Business and Human Rights; UNGPs six years later: appraise the progress & fill the gaps, 4 September 2017, in Brussels (under the Chatham House rule).

35. See Council Regulation 864/2007, of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L 199) 40, 15 (explaining that the damages claimed by one party matter when determining the scope of law).

36. See JOINT COMMITTEE [OF LORDS AND HOUSE OF COMMONS IN THE UK] ON HUMAN RIGHTS, ORAL EVIDENCE: HUMAN RIGHTS AND BUSINESS, 2016-10, HC 443, at 6, available at: <http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/human-rights-and-business/oral/41724.pdf> (UK) (explaining the cost and risks of legal justice abroad are enormous).

B. *Lessons from Various Reports?*

1. National Courts

Individual case analyses across the 28 EU Member States are highly complex given that each Member State has its own distinct legal system and official language in place.<sup>37</sup> As much a union as one would like the EU to be, it is in many ways a very diverse and heterogeneous set of legal systems. Harmonization has been achieved in a range of areas, such as civil jurisdiction and in some cases, criminal procedures, but the situation on the ground varies tremendously.<sup>38</sup> This variation can be seen in relation to justice in the European Justice Scoreboard of the EU, and to a greater extent, in the Council of Europe's regular assessment through the work of the European Commission for the Efficiency of Justice ("CEPEJ").<sup>39</sup> For instance, the EU Justice Scoreboard, listing some 60 different categories, shows that the perceived independence of courts and judges among companies range from being seen as very or fairly good by more than 80 percent in some EU Member States while in others, the same bracket reaches less than ten percent.<sup>40</sup> Therefore, in order to provide contrast to the aforementioned case studies, the following section will draw on recent assessments made across the EU as well as more widely, which identify obstacles as well as ways forward

When companies commit human rights abuses, civil litigation has been used in several EU Member States with varying outcomes. As such, some studies are worth considering in order to highlight the EU experience with civil litigation in this regard. In one study, researchers sampled 74 lawsuits concerning alleged human rights violations

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37. See GLORIA GONZÁLEZ FUSTER, THE EMERGENCE OF PERSONAL DATA PROTECTION AS A FUNDAMENTAL RIGHT OF THE EU 8 (2014) ("EU law is also intertwined with the national legal systems of EU Member States.").
38. See RESEARCH HANDBOOK ON EU INSTITUTIONAL LAW 425 (Adam Lazowski & Steven Blockmans, eds., 2016) ("The purpose of harmonized EU procedural rules, both civil and criminal, is to ensure effective access to justice and a fair trial...").
39. See *About the CEPEJ*, C About tF EC About the CEPEJ (Adam Lazowski & Steven Blockmanse national legal sysesentation/cepej\_en.asp (explaining the background of the CEPEJ [<https://perma.cc/H6R8-YGP7>]; See also *Evaluation of European Judicial Systems*, C also EvF EC also Evaluation of European Judicial Systemsmanse national legal sysesentation/cepej\_en.asp (comparing European judicial systems and the exchange of knowledge on their functioning) [<https://perma.cc/KT7C-XTHQ>]).
40. *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions – The 2017 EU Justice Scoreboard*, at 37, COM (2017) 167 final (Apr. 10, 2016).

involving 54 multinational corporations and discovered that almost a third of the sample lawsuits involved corporations headquartered in EU Member States, namely Finland, France, Germany, the Netherlands, and the UK.<sup>41</sup> Amongst the total sample, there was a repetitive pattern of corporation-related human rights abuse in the extractive industries but also, more surprisingly, in the technology, pharma, and automotive industries.<sup>42</sup>

A world-wide study conducted by the London-based Business & Human Rights Resource Centre and Amnesty International provides an analysis of problems and solutions to improving access to remedies in cases involving corporation-related human rights abuse.<sup>43</sup> Based on expert consultations and analysis, four main challenges are identified: (1) controlling company liability, (2) forum *non-conueniens*,<sup>44</sup> (3) mandatory collection and disclosure of information, (4) access to information.<sup>45</sup> For each of these areas, a number of solutions are identified, such as controlling company liability, a duty to prevent harm, presumption of liability, and flexibility to choose the most appropriate law in cross-border settings.<sup>46</sup> The four main challenges identified in the Business & Human Resource Centre and Amnesty International study are addressed in turn.

One concern, in regards to forum *non-conueniens*, is the potential of abuse, which could deflect jurisdiction to systems where effective justice is not possible. However, in the EU, there are procedural safeguards to prevent such abuse in EU's jurisdictional regime, which were recognized in the Court of Justice of the European Union's<sup>47</sup> ("CJEU") decision in the *Owusu* case.<sup>48</sup>

In terms of collection and disclosure of information, the third challenge, the study recommends a legal obligation for corporations to collect and ensure the reliability of certain predefined data and

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41. Cees van Dam, *Enhancing Human Rights Protection: A Company Lawyer's Business* 46-54 (2015), available at <http://www.ceesvandam.info/default.asp?fileid=656>.

42. *Id.*

43. *Creating a Paradigm Shift: Legal Solutions to Improve Access to Remedy for Corporate Human Rights Abuse*, AMNESTY INT'L (2017), available at [https://business-humanrights.org/sites/default/files/documents/AI\\_BHRRRC\\_Elaborating\\_Solutions\\_Report\\_Template\\_1%20Sep%202017.pdf](https://business-humanrights.org/sites/default/files/documents/AI_BHRRRC_Elaborating_Solutions_Report_Template_1%20Sep%202017.pdf).

44. *Id.*

45. *Id.*

46. *See id.* at 5-10 (providing detailed explanations of proposed duties of corporations to mitigate and prevent human rights violations).

47. *Id.* at 11.

48. Case C-281/02, *Owusu v. N.B. Jackson*, 2005 E.C.R. I-01383, ¶ 41.

information for specific projects or activities were there is an enhanced risk of abuse.<sup>49</sup> Due diligence obligations should include disclosure of reliable information and data to potentially affected persons.<sup>50</sup> Also, discovery procedures should be in place, which allow for sufficiently open ended requests for information to be effective.<sup>51</sup>

In addition, a major EU funded research project, on business and human rights in the EU, released its final report in 2017.<sup>52</sup> The following are among the overarching conclusions of the project:

- EU Member States should allow for jurisdiction in civil claims against subsidiaries irrespective of where they are based, if the parent company is domiciled in that EU Member State;
- Actions should be possible to join by default, against a parent and subsidiary, with the defendant having to prove that the link was not sufficiently strong between the two business entities;
- A rebuttable presumption should be established that a subsidiary is dependent on business decisions from the parent company, for a defendant company to prove otherwise so as to place the burden of proof on the stronger party with access to needed documentation and resources;
- Clear forum necessitates rules in the EU should allow for cases to be brought even if a company is not domiciled in the EU, as long as a sufficiently strong link exists;
- The choice of law exception for environmental cases, allowing for damage levels to be based not only on the place where the damage occurred, but also where the

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49. Amnesty Int'l, *supra* note 25, at 14.

50. *See Id.* at 14 (detailing the elements of proposed law requiring corporations to regulate information pertaining to human rights for activities or projects).

51. *Id.* at 21; *See also*, U.K. R. Civ. P. 31 (outlining discovery procedures in the United Kingdom).

52. JUAN JOSÉ ÁLVAREZ RUBIO & KATERINA YIANNIBAS, HUMAN RIGHTS IN BUSINESS: REMOVAL OF BARRIERS TO ACCESS TO JUSTICE IN THE EUROPEAN UNION (2017), *available at* [<https://perma.cc/9K9S-UD88>] (report detailing a research conducted on business and human rights in the EU).

damage was initiated, should be considered also for human rights cases.<sup>53</sup>

Another recent report, from August 2017, entitled “Removing barriers to justice: How a treaty on business and human rights could improve access to remedy for victims,” analyses five well-known court cases, including the aforementioned case involving Shell.<sup>54</sup> The study identified several barriers based on these case analyses, including equality of arms-related concerns, burden of proof, legal costs, weak due diligence, and length of proceedings in addition to jurisdictional issues and corporate liability.<sup>55</sup> Furthermore, a recent estimate of the number of foreign direct liability cases that have been pursued in European courts over the last 25 years, considers that some 40 corporation-related human rights abuse cases have been brought.<sup>56</sup> Of these, half have been civil law cases.<sup>57</sup> So far, few civil cases have led to decisions holding the corporation liable.<sup>58</sup>

## 2. Regional Courts

Apart from national courts in the EU, two regional courts are relevant in the assessment of corporation-related human rights abuse cases namely, the CJEU and the European Court of Human Rights (“ECHR”). The ECHR is a Council of Europe monitoring mechanism, which has 47 states within its jurisdiction, including all 28 EU Member States.<sup>59</sup> It is also worth noting the EU itself is poised to become a State Party to European Convention on Human Rights and

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53. *Id.* at 140.

54. DANIEL BLACKBURN, INT’L CTR. FOR TRADE UNION RIGHTS, REMOVING BARRIERS TO JUSTICE: HOW A TREATY ON BUSINESS AND HUMAN RIGHTS COULD IMPROVE ACCESS TO REMEDY FOR VICTIMS (2007), available at <https://perma.cc/3ESU-GSF9>.

55. *See Id.* at 37-58 (analyzing existing legal barriers to finding for corporate liability).

56. Rubio, *supra* note 52, at 41.

57. LIESBETH ENNEKING ET AL, ZORGPLICHTEN VAN NEDERLANDSE ONDERNEMINGEN INZAKE INTERNATIONAAL MAATSCHAPPELIJK VERANTWOORD ONDERNEMEN [Obligations of Dutch companies for international corporate social responsibility] (2015), at 440, available at <https://www.rijksoverheid.nl/documenten/rapporten/2016/04/21/zorgpl-zorgpl-van-nederlandse-ondernemingen-inzake-internationaal-maatschappelijk-verantwoord-ondernemen> (Dutch) [<https://perma.cc/6CCF-UZR9>].

58. Rubio, *supra* note 52, at 41.

59. *47 Member States*, COUNCIL OF EUROPE (last visited Oct. 8, 2017), <http://www.coe.int/en/web/portal/47-members-states> [<https://perma.cc/QJ3N-PQSF>].

thus, as a whole, will fall under the jurisdiction of the ECHR.<sup>60</sup> While the EHCR, does not establish extra-territorial jurisdiction, it does reinforce fair trial guarantees in cases where jurisdiction has been established.<sup>61</sup> Treaty Bodies of United Nations conventions have similarly stressed effective access to justice, but also emphasised this in extra-territorial cases.<sup>62</sup>

### III. MEASURES TAKEN IN THE EU TO IMPROVE ACCESS TO EFFECTIVE JUDICIAL REMEDIES

The EU has taken a number of steps to ensure liability for corporation related human rights abuses, including legislative measures.<sup>63</sup>

#### A. *Jurisdictional Improvements*

First, in 2012,<sup>64</sup> the EU adopted a recast Brussels I Regulation, which replaced the 2001 regulatory framework on civil and commercial jurisdictional rules within the EU.<sup>65</sup> Central to the recast Brussels I Regulation is the rule that “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”<sup>66</sup> Similarly, in regards to choice of law, the EU has harmonized civil jurisdiction rules within the EU through the Rome Regulation (Rome II).<sup>67</sup> The ‘Brussels Regime’ on jurisdiction, leaves subsidiary or residual jurisdiction to be established by EU Member States.<sup>68</sup> What does this do to help human rights victims, need analysis/conclusion that ties it all together – need to tie to the whole forum-non conviens issue brought up earlier.

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60. See, e.g., Article 218(11) TFEU – Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Opinion, 2014 ECLI:EU:C:2014:2454 (Dec. 18), at ¶ 181 (holding that the EU is subject to the control of the ECHR).
61. Markovic v. Italy, 2006-XIV Eur. Ct. H.R. 235, ¶ 54, available at <http://jus.igjk.rks-gov.net/199/> [<https://perma.cc/MQD9-DWWY>].
62. See, e.g., U.N., Econ. & Soc. Council, Gen. Comment No. 24 (2017) on State Obligations Under the Int’l Covenant on Econ., Soc. and Cultural Rights in the Context of Bus. Activities, U.N. Doc. E/C.12/GC/24 (2017), at ¶ 40 (emphasizing the need to prevent human rights violations).
63. See Rubio, *supra* note 52, at 3 (discussing developments in the interrelation between business and human rights in the EU).
64. *Id.* at 23.
65. Commission Regulation 1215/2012, 2012 J.O. (L 351) (EU).
66. domiciled (“habitual residence”, Article 4).*Id.* at 7.
67. Commission Regulation 864/2007, 2007 O.J. (L 199) (EC).
68. Commission Regulation 1215/2012, *supra* note 65, at 7.

*B. Better Remedies*

Additionally, the EU has sought to improve access to justice through the Recommendation by the European Commission on collective redress.<sup>69</sup> Legislation in particular sectors, aimed at strengthening due diligence of companies supply chains, for example related to minerals, will soon be adopted.<sup>70</sup> Again, what does this do to help human rights victims, need analysis/conclusion that ties it all together.

*C. Other Measures*

The EU has also adopted assessments and overviews, with the 2015 European Commission's Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights, being among the most essential.<sup>71</sup> Other initiatives includes multilateral fora like the Organization for Economic Co-operation and Development ("OECD").<sup>72</sup> The EU has implemented targeted efforts to encourage more responsible business conduct such as, when the EU initiated the Bangladesh Sustainability Compact.<sup>73</sup>

IV. CONCLUSIONS / ADDITIONAL MEASURES NEEDED IN THE  
EU TO IMPROVE ACCESS TO REMEDY

In 2016, the European Union Agency for Fundamental Rights was asked by the Council of the EU to adopt an expert opinion on

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69. Commission Recommendation 2013/396, 2013 O.J. (L 201) (EU).
70. *See Proposal for a Regulation of the European Parliament and of the Council*, at 5, COM (2014) 111 final (Mar. 5, 2014) ("The due diligence framework requires responsible importers of the mineral and metal within the scope of the Regulation to...carry out independent third-party audits of supply chain due diligence at identified points in the supply chain; and to report on supply chain due diligence."); Regulation 995/2010, 2010 O.J. (L 295) at 27 ("Operators shall exercise due diligence when placing timber or timber products on the market. To that end, they shall use a framework of procedures and measures...referred to as a 'due diligence system'").
71. *Commission Staff Working Document on Implementing the UN Guiding Principles on Business and Human Rights – State of Play*, at 2-3, COM (2015) 144 final (Jul. 14, 2015).
72. OECD (2011), *OECD Guidelines for Multinational Enterprises* 7, OECD Publishing, <http://dx.doi.org/10.1787/9789264115415-en> [<https://perma.cc/34LD-QLTS>]; *Members and Partners*, OECD (Sept. 19, 2017), <https://www.oecd.org/about/membersandpartners/> [<https://perma.cc/MB3T-S7Y5>].
73. European Commission Directorate-General for Trade, *Bangladesh Sustainability Compact: Third Implementation Follow-up Meeting* (Sept. 20, 2017), <http://trade.ec.europa.eu/doclib/events/index.cfm?id=1651> [<https://perma.cc/G54P-MQXJ>].

“possible avenues to lower barriers for access to remedy at the EU level”.<sup>74</sup> The Agency issued an Opinion in April 2017,<sup>75</sup> providing EU-specific advice based on the 2016 Council of Europe request and on guidance provided by the United Nations. The Opinion deals with judicial and non-judicial remedies, as well as supportive ‘flanking measures’.<sup>76</sup> The Opinion covers both criminal and civil law and situates the analysis of what measures are necessary to achieve effective judicial remedies in the EU for victims of human rights abuses perpetrated by corporations.<sup>77</sup> Above all, the EU must focus and encourage the Member States to make improvements.<sup>78</sup> More specifically, the Opinion deals with:

- Facilitating access to civil justice through litigation funds, reduced barriers and other incentives to ensure that the right cases are brought before courts
- Making better use of existing EU criminal law instruments and ensuring effective criminal investigations
- That agreement is needed on:
  - Minimum standards on non-judicial mechanisms
  - Better coordination and peer review
  - Greater transparency and data collection
  - More attention to vulnerable groups<sup>79</sup>

In all there are 21 specific recommendations, I offer two concrete examples of these, suggesting some improvements that ought to be feasible:

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74. Council Conclusions (EC) No. 10254/16, at 5 (June 29, 2016).

75. *Opinion of the European Union Agency for Fundamental Rights on Improving Access to Remedy in the Area of Business and Human Rights at the EU Level*, 2017 FRA 1/2017, 3.

76. *Id.* at 22.

77. *See Id.* at 71 (explaining the UN Guiding Principles’ process to achieve judicial remedies in the EU for victims).

78. *See Id.* at 15 (“The 2016 Council of Europe Recommendation... underlines the need to adopt National Action Plans, and the EU has also strongly encouraged Member States to adopt such plans.”).

79. *Id.* at 8-66.

1. On collective redress, the 2013 European Commission Recommendation on this is up for review with a public consultation just concluded.<sup>80</sup> The assessment is likely to conclude that the Recommendation has not had any major impact.<sup>81</sup> This conclusion could be a good starting point to expand standing in EU courts.
2. A comparative overview mapping the availability and usage of existing mechanisms. The purpose of such an overview is four-fold:
  - (1) guiding potential users, (2) creating additional peer pressure between Member States, (3) providing a much needed baseline for the EU on what changes are needed as a counter argument to Member States who respond to proposals by claiming sufficient measures are already in place or additional measures are unnecessary, and (4) ensuring uniformity and checking compliance with the recommendations and guidance issued by the Council of Europe and the United Nations in particular.

This Note has briefly considered the issues that arise during civil litigation of corporation-related human rights abuses by looking at the relatively small amount of cases that have been brought before courts in EU Member States. With only few cases having led to corporations being held responsible access to remedy could seemingly be more effective. Through various means, the EU has pushed for improvements, but the shared competence between the EU and its Member States, alongside the complexity of trying to harmonize or provide minimum standards across the legal systems of 28 Member States makes this a very cumbersome task. Some rather straight forward measures, such as creating a baseline of the situation across EU Member States or more challenging, but still relatively modest, ensuring effective collective redress. These measures are necessary, feasible, and would significantly improve victims of human rights abuses access to effective judicial remedies in the EU.

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80. *Call for Evidence on the Operation of Collective Redress Arrangements in the Member States of the European Union*, EUROPEAN COMMISSION (May 22, 2017), [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=59539](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59539) [<https://perma.cc/XLA6-CFAU>].

81. See Mantas Pakamanis, *The role of class actions in ensuring effective enforcement of competition law infringements in the European Union*, 2 Int'l Comp. Jurisprudence 122 at 125 (2016) ("In conclusion, the Recommendation 2013/396/EU is a very tenuous step by the European Commission to achieve effective collective redress system across the European Union, *inter alia* for competition law infringements, as it is not binding and suggests the application of an opt-in principle.").