



## Access to Remedy

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## Executive Summary in English

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The views expressed in this study are those of the authors and only the Swiss Centre of Expertise in Human Rights and the Swiss Institute of Comparative Law can be held responsible.

## INTRODUCTION

[1] The third pillar of the United Nations Guiding Principles on Business and Human Rights (UNGP) is the call for states to ensure that individuals who are the victims of abuse by companies have paths available to them to obtain redress for the violation of their human rights. The availability of redress for abuse is an integral part of the state's duty to protect individuals from violations of their human rights. As Art. 25, the "foundational principle" of the "Access to Remedies" part of the UNGP, states:

*"25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy."*

[2] With a focus on the need to offer practical, effective remedies to victims, the subsequent articles of Part III of the UNGP provide that ensuring victims' "access to remedies" may include not only judicial/legal processes and non-judicial state-based practices or procedures, but also non-governmental grievance mechanisms. Thus, in addition to states' actions and measures to improve access to remedies, the UNGP emphasize the importance of having multi-stakeholder initiatives or industry-led processes for remediation as well as redress mechanisms at the level of the business enterprise itself.

[3] Following the wishes expressed by the Swiss ministry of foreign affairs, this report focuses on state-based mechanisms, examining both judicial and non-judicial remedies. Enterprise-level operational mechanisms are not within the scope of the study as commissioned.

[4] In the report, the current status of the availability of judicial and non-judicial remedies in Switzerland for victims of human rights violations caused by an enterprise abroad is set forth first. Then follow comparative analyses of access to judicial remedies (Part III) and to non-judicial remedies (Part IV) in other States. The way in which the judicial and non-judicial remedies interact is then set out (Part V) before a statement on the international trends and recommendations for Switzerland (Part VI). The annexes contain detailed accounts of criminal, private international, tort, procedural, and corporate law, as well as the collective redress possibilities for victims' access to justice in Germany, France, Denmark, the UK and the U.S.

### I. JUDICIAL REMEDIES

[5] Judicial remedies for human rights victims may arise from civil liability of companies and/or their managers or from individual or enterprise-based criminal liability. The extent to which an individual harmed by a foreign company's actions can access the courts of the company's home state varies within and between civil and criminal law. The variations are not only in the substantive law, but also in the procedural rules that permit or deny victims' standing.

#### 1. Criminal Law

[6] Except for Germany, the legal systems studied all provide for the possibility of prosecuting companies. Thus, the company itself – as well as or instead of – the actual perpetrator, the

officer responsible for the conduct, or possibly the managers of a company may face criminal sanctions.

[7] Despite the openness to corporate criminal liability, in general, of the jurisdictions studied in this report, the report indicates that the degree to which a victim of a human rights violation will have access to remedies is currently low. This is due to: (1) the lack of statutory criminalization of company-inflicted human right abuses combined with (2) the jurisdictional limitations on courts faced with claims of human rights injuries sustained abroad at the hands of a foreign company. In addition, the often required *dual criminality* (the action must constitute a crime in both jurisdictions) limits the scope of possible prosecutions to violations which take place in a jurisdiction that recognizes potential criminal liability of corporations. However, where criminal liability in such cases exists, victims in several jurisdictions generally do have some rights to participate in the proceedings and to claim compensation.

[8] To access criminal law remedies, a victim must first ensure that the injury sustained was caused by an act or omission that falls within the provisions of criminal law in the court's jurisdiction. At present none of the jurisdictions studied recognize a specific crime of corporate abuse of human rights. Abuses, for example, resulting in physical injury or death, however, can be reported to police for prosecution under general statutes.

[9] Whether the court will consider a criminal accusation depends on both the domestic legal system's general attitude toward corporate criminal liability and the connections of the action and injury to the court's seat. In the systems examined in this report, most civil law countries generally recognize jurisdiction on the basis of active (nationality of the accused) and passive (nationality of the victim) personality for a relatively large number of relatively serious offences. The common law systems are more restrictive, recognizing prosecutorial jurisdiction for extraterritorial acts only when a national is accused of having committed particular types of crimes. Universal jurisdiction is granted for a small number of particularly serious criminal offences in all of the systems studied except the United States.

[10] The most frequent criminal law sanction faced by a convicted corporate defendant is the imposition of a fine. The amount may be fixed or limited by statute. In a number of jurisdictions, the court may also order compensation payments to be made to the victim. Further penalties to sanction the guilty corporation are found in the criminal law of France, the Netherlands, the United Kingdom and the United States, where measures range from probationary periods or bars on public procurement tendering and other commercial activities to dissolution of the company.

[11] Most jurisdictions provide for the right of victims to be involved in some way in the criminal process. The level of participation varies widely, with France, Germany, and the Netherlands even permitting victims to pose questions to the court and to request evidence. In these jurisdictions as well as in Denmark, victims also have a right to a lawyer, while in the common law jurisdictions reviewed, a Victim's Bill of Rights explicitly gives victims a right to be protected from the accused.

## 2. Civil Law

[12] Civil law remedies in the jurisdictions studied differ significantly, as the law of obligations, corporate law, and competition law differ among jurisdictions in ways that affect business and human rights based-claims. Most of the jurisdictions studied fail to impose clear and legally binding human rights obligations on private actors for behaviour abroad. The United States'

Alien Torts Claims Act could provide a basis for such an obligation, but its availability to foreign victims of human rights abuses has been limited by the Supreme Court. The French National Assembly's February 2017 passage of a law requiring large companies to exercise human rights diligence concerning their own as well as their subsidiaries' foreign activities makes France a significant exception to the general absence of such a statute. It is too early, however, to know how effective this law will be in actually opening the system to victim redress.

[13] Nevertheless, even where specific legislative duties of corporations are lacking, civil claims victims may generally raise claims of abuses by companies on the basis of contract or tort law. The standing of victims to bring such claims is subject to the ordinary requirements for civil claims. This can be particularly difficult to overcome if the violation occurred outside the jurisdiction of the home state and if either the victim or the perpetrator is foreign.

[14] Beyond the question of whether the violation of the victim's rights occurred in the company's home jurisdiction – a fundamental requirement for applying the law of this jurisdiction – other basic questions to be answered include:

- the extent to which a subsidiary – as opposed to a branch – of a home state company is potentially liable for its actions toward individuals in its jurisdiction of operation and, as a related question;
- whether the parent company can be liable by attribution.

[15] On the procedural level, the questions such as

- which party bears the burden of proof;
- the permitted scope of requests for evidence; and
- whether the statute of limitations still permits a claim of personal injury to be heard (as in a number of jurisdictions, the statute of limitations for such claims is only three or four years from the time of injury)

have a direct impact on plaintiff's likelihood not only of winning his or her case, but of being able to bring it at all.

[16] Finally, practical aspects of judicial processes may also hinder effective victim access to civil law remedies. These include access to representation, the availability of collective redress mechanisms as well as court and legal costs.

### 3. National Reports on Access to Judicial Remedies (Annex I)

[17] The Report contains an Annex with thorough coverage of the judicial remedies available to victims of business-inflicted human rights violations in Germany, France, Denmark, the United Kingdom, and the United States.

## II. NON-JUDICIAL REMEDIES

[18] Non-judicial remedies for human rights victims harmed by foreign companies are a separate source of possible action. This report examines four types of nationally based non-judicial remedies: National Contact Points, National Human Rights Institutions, Ombudspersons, and the development finance institutions.

## 1. National Contact Points

[19] National Contact Points (NCP) are bodies to whom complaints against multinational companies can be brought. Not necessarily solely state-based, the establishment of a NCP is a requirement of the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises for every member state. As a result, NCP have the advantage of permitting complaints concerning corporate actions occurring in any of the member states' territories.

[20] The wide discretion left to governments to organise their NCP, however, leaves little upon which one can generalise. From the institutional structures and financing to the procedures of the complaint mechanism, the extent of their investigatory powers, and the relief offered to victims, these bodies differ significantly from state to state. The most successful of the NCP are well-funded, adequately staffed, and independent bodies that can investigate and mediate in ways that make their services easily accessible to those who have grievances against companies.

## 2. National Human Rights Institutions

[21] National Human Rights Institutions (NHRI) are a second form of state-based bodies that may offer non-judicial remedies to victims of corporate abuses. The role of a NHRI, as set out in the UN General Assembly's 1993 adoption of the *Principles relating to the Status of National Institutions* ("Paris Principles"), is to "promote and protect human rights" within the country by issuing "opinions, recommendations, proposals and reports", ensuring that domestic legislation is in harmony with international human rights law, encouraging the adoption of further international legal instruments, cooperating on national reports to human rights bodies, educating the public about human rights, and publicizing efforts to combat discrimination. Their principle tasks may include offering advice to victims of human rights violations about possible remedies, and may extend to investigating complaints, offering conciliation services, and making recommendations to authorities on legislation or administrative practices.

[22] The Paris Principles, like the UNGP, are open as to the formal structure of NHRI. However, these documents insist that the institutions are to be formally established entities composed of representatives from a variety of institutions and interests (academic, NGO, governmental, religious) and that they be independent from the government in structure and financing.

## 3. Ombudsperson Office

[23] As an additional remedial mechanism, states may establish an ombudsperson office to address grievances relating to business and human rights. Often utilized in institutions as a neutral instance through which complaints from one actor against another actor internal to the institution can be brought to the attention of hierarchically higher officers, a public office of an ombudsperson is generally established by the legislature or executive as a means to ensure governmental offices adhere to laws benefitting the public. The Report reveals that the role of ombudsperson offices in the investigated systems varies greatly in function and scope. While there were no examples of ombudspersons for business and human rights *per se*, there were several examples of ombudspersons for specific aspects of the business and human rights relationship – offices specifically established to focus on anti-discrimination, data protection, or the rights of children, for example, or offices that review the legality of

administrative decision- making of public authorities.

[24] Whereas all ombudsperson offices can investigate complaints from individuals or groups, the competence to investigate violations *ex officio* is rare. Similarly, while the authority to issue recommendations to the violating governmental actor as to how to remedy its behaviour is common to most offices, some of the offices examined additionally have quasi-judicial powers to issue orders directing particular behaviour or the payment of fines. While the latter competences are the exception, the potential for offering an effective remedy to individuals whose human rights have been harmed by corporate acts exists, given adequate authority to investigate complaints against state agents and corporate actors and to respond decisively.

[25] For the business and human rights field, further development of ombudsperson offices will require considering the expansion of the subject-matter scope of these offices (to cover more human rights), broadening the targets of complaints (to include actions of private actors), and clarifying the offices' competence to address violations of human rights that occur extraterritorially.

#### 4. Export Finance Institutions and Development Finance Institutions

[26] The final state-based non-judicial remedy mechanisms studied are those related to public financial instruments, in particular export credit agencies and national ("bilateral") development finance agencies. Export credit agencies (ECA) are institutions offering export transaction based private enterprises funds or insurance coverage to engage in export activities abroad. Whereas many ECA provide direct lending some are more constrained and provide only insurance cover ("pure cover"). For the latter, the export transaction is completed, once the insurance contract is terminated. By helping reduce the financial risks of doing business, ECA financing can indirectly support economic growth in developing countries. Moreover, it may motivate companies to do business in geographic areas that would otherwise involve a substantial (and therefore unacceptable from an economic perspective) degree of uncertainty.

[27] Development Finance Institutions (DFI) are government-backed institutions that invest in private-sector projects in low- and middle-income countries. DFI are generally structured as bilateral organizations that seek to invest in commercially sustainable projects often along private investors.

[28] The UNGP suggest that states require any funding directed to businesses' foreign activities under ECA or development agencies to be made conditional on the recipient company's carrying out human rights due diligence where appropriate. By offering their own grievance mechanisms, financing agencies can provide remedies for victims within a broader system of remedy in line with UNGP 25. In addition, such mechanisms can enhance their due diligence procedures.

[29] The comparative report shows that non-judicial remedy mechanisms are not yet widely found in the ECA frameworks of the reviewed countries, with the exception of the United States. However, there are such mechanisms in Canada and several other jurisdictions not within the scope of the study. Given the lack of in-depth experience with such mechanisms, questions as to the most effective way to ensure access to remedies remain open.

[30] Most of the bilateral DIF reviewed contain grievance mechanisms. The report indicates no standard model of mechanism, with some being internal to the financing institution and others being independent.

### III. INTERNATIONAL TRENDS AND RECOMMENDATIONS

#### 1. Important International Drivers

[31] This report identifies not a uniform trend but important drivers at the international level to foster the implementation of the access to remedy pillar in the UNGP. The general international consensus to improve victims' access to remedy is *inter alia* reflected in the Access to Remedy Project initiated by the Human Rights Council, the EU funded project on Removal of Barriers to Access to Justice, and the recent G20 leaders' declaration of July 2017 announcing their support for access to remedy and non-judicial mechanisms such as the NCP system.

[32] Against this general background, states' approaches to access to remedies are highly diverse both within Switzerland and across Europe and North America. The study shows that the extent to which the examined systems refer to and fulfill the requirements of the UNGP varies substantively and procedurally. As a result, there is not a uniform trend throughout all systems but rather a number of elements which can be identified as potential drivers for future developments of state-based remedy mechanisms:

1. *Existing non-judicial mechanisms* are gaining importance for resolving business-related human rights grievances. In this regard, the number of human rights related cases brought before National Contact Points for the OECD Guidelines on Multinational Enterprises has increased significantly since 2011.
2. *Existing judicial mechanisms* are increasingly used by victims and civil society organisations to test the ground for holding companies accountable, both for their own actions as well as for the actions of their subsidiaries abroad. The resulting questions have so far only been addressed by a few countries, often with differing approaches and often only in specific contexts, such as business operations in conflict-affected areas.
3. None of the legal regimes explored in this study provides a clear answer on the *legal interplay between judicial and non-judicial remedies*. Given the increasing number of non-judicial procedures, there have been very different approaches as to their implications for, or even reliance on, judicial proceedings. In the absence of an international trend, a number of practical questions in this context need to be addressed such as confidentiality or the possibility of waiver or temporary stay of judicial proceedings.

#### 2. Switzerland's position in the international context

##### 2.1. Judicial Remedies

[33] In the area of *judicial remedies*, the 2016 Report of the OHCHR offers "Guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse" (Guidance). The Guidance distinguishes between enforcement of public law offences and private law claims. It provides a framework that allows for contextualizing the access to remedy framework in the two areas.

[34] With regard to corporate *criminal liability*, Swiss criminal law provides for criminal corporate liability, although either restricted to cases where an individual cannot be held responsible due to "organizational failure" (a concept which remains relatively unclear) or limited to specific offences (mainly bribery-related and financial offences). Therefore, Swiss criminal law



will not necessarily include all grave human rights abuses. While the uncertainties and limitations of Swiss corporate criminal law are common features of corporate criminal liability in many jurisdictions, this does not protect it from falling short of features provided for in the OHCHR Guidance (that can be found in some jurisdictions).

[35] Other factors mentioned in the Guidance, such as responsibility for supply chains or group operations, are generally not addressed explicitly in most legal frameworks under review. French law provides an exception to this. Swiss criminal law follows the more common pattern, as, under the current legal framework, there is no primary liability for acts of subsidiaries.

[36] Another feature of criminal liability is the possibility for the *victim to participate in proceedings*. According to the OHCHR Guidance, criminal sanctions should allow for an “effective remedy for the relevant loss” (Policy Objective 11), and the victim should be consulted. There are various international instruments that require considerable protection of the victim’s interests. From a comparative perspective, there are substantially different approaches to offering victims the possibility of taking part in criminal proceedings. From an international comparative viewpoint, Swiss law generally provides a high degree of victims’ participation and protection, though victims’ assistance is limited for foreign victims of criminal acts committed abroad.

[37] For *jurisdiction and applicable law* – a key issue in cross-border cases – there are relatively few differences within the European context. In all jurisdictions under review, there will generally be jurisdiction against parent companies domiciled within a state. This is also the case under Swiss law. It will, however, be more difficult to find jurisdiction over subsidiaries domiciled within the state. For companies not domiciled within a state, additional fora are (i) the place where a tort was committed (such as, arguably, decisions taken), (ii) a forum resulting from joinder of actions, or, in some jurisdictions (including Switzerland), (iii) a forum of necessity that could be construed to include cases of grave human rights violations. More notably, Switzerland does not have mechanisms that would allow a court to refrain from exercising its jurisdiction (*forum non conveniens*), as common law jurisdictions generally have. As to applicable law, there is a general rule (valid also in Switzerland) dictating application of the law of the place where the “tortious act” was committed, so the law of the home state of the corporation will generally only apply to acts (including possibly decisions taken) in Switzerland. Many jurisdictions also allow application of the law of the forum if imperative reasons of public policy (*ordre public*) so require. Swiss law is in line with international trends in this respect, too, although there is considerable uncertainty concerning whether courts would construe the exceptional clauses in this way.

[38] In the field of *corporate and tort law*, it should be noted that the jurisdictions under review generally do not comply with the basic principle of the OHCHR Guidance of establishing clear rules when it comes to liability for acts of subsidiaries in the area of business and human rights. With the exception of recent statutory due diligence obligations introduced in some jurisdictions and often limited to specific issues (conflict minerals, child labour), the cases decided by several courts leave the result of any particular future case uncertain. While the current Swiss legal framework is arguably clear and restrictive, it remains possible (as cases in other jurisdictions have shown) that test cases will be brought before Swiss courts to explore the limits of the current legal framework.

[39] With regard to *burden of proof*, the Guidance refrains from giving precise indications, referring only to the need to strike an appropriate balance. The comparative analysis shows a trend in some jurisdictions such as the Netherlands or France (though not in all), to reverse or slightly adjust the burden of proof (in favour of the victim) in some relevant liability

cases. In Swiss law, there do not currently appear to be similar developments.

[40] The final element addressed in the Guidance is that of the *financial obstacles to private law claims*. According to Policy Objective 15, claimants should have access to diversified sources of litigation funding such as *pro bono* legal services, state funding in cases of hardship, and even collective redress mechanisms and private funding arrangements (including contingency fee arrangements). This is an area where the jurisdictions under review vary considerably. Some provide (mainly) state funding to litigants, others provide for contingency fee arrangements. Swiss law has mechanisms similar to many European jurisdictions but radically different from the ones in the United States. The only common trend in this area is an increasing willingness, also within continental European jurisdictions, to introduce mechanisms of collective redress. The European Union has adopted recommendations in this context. While Swiss law does not seem particularly reluctant, as compared to other jurisdictions, it is not particularly innovative, either. A proposed amendment of the CPC aims to reduce financial obstacles and introduce possibilities for mass claims. This would be in line with the current international trend.

## 2.2. Non-judicial remedies

[41] In contrast to judicial remedies, the OHCHR has not yet published Guidance on non-judicial remedies but has been mandated by the Human Rights Council to conduct research on the subject. In this context, the OHCHR published a scoping paper in February 2017. It calls for coordinating non-judicial and judicial mechanisms with a view to offering a coherent framework for victims of corporate human rights abuses. The study identifies two key functions of non-judicial remedies: *complaint handling* and (alternative) *dispute resolution*. These key functions are complemented by a set of “other” important functions for providing effective access to remedy, such as preventative work, supervisory functions and regulatory analysis.

[42] Apart from the NCP, there is no state-based non-judicial mechanism in Switzerland specifically designed to address business-related human rights abuses. However, a variety of existing instruments can also be used in this context. Within the access to remedy framework, existing institutionalised non-judicial mechanisms in Switzerland serve different purposes:

- Ombudsperson offices may receive *individual and collective complaints* in areas defined by law or non-binding instruments related to existing law. Typically, ombudspersons in Switzerland can issue recommendations but not binding decisions.
- The Swiss NCP receives *complaints* and may offer mediation services. According to its mandate, it cannot provide for compensation.
- A third group of bodies in Switzerland, such as the Federal Commission against Racism, does not receive complaints but offers *consultation services* for victims. In addition, arbitration and conciliation bodies may receive complaints, offer mediation or arbitration and in some cases provide compensation or reconciliation.

[43] This variety of approaches, both with regard to purposes and institutional models, is not unique to Switzerland but can be found in all the reviewed jurisdictions. It raises questions about the coordination among the different mechanisms with regard to their functions and their integration into the broader legal system.

[44] Several states have launched initiatives in the context of their National Action Plans on Business and Human Rights (NAP) for better coordinating and/or enhancing access to non-judicial remedies. The jurisdictions reviewed for this study, pursue different approaches in this regard with many focusing on the key role of the NCP in providing a remedy mechanism and

others emphasizing the NHRI's mandate as a coordinating or even monitoring body.

[45] In line with other countries, the Swiss NAP mentions the key role of the NCP as a forum for mediation and the settling of disputes. With the proposal to examine the potential of representations abroad to serve as an easily accessible forum for supporting the settlement of disputes, the Swiss NAP could – depending on the outcome – cover new grounds. Unlike other countries, the Swiss NAP does not mention existing non-judicial mechanisms which are not specifically designed for addressing business-related human rights issues but could nevertheless be used for this purpose.

[46] Overall, with its current landscape of state-based non-judicial mechanisms Switzerland positions itself somewhat in the middle of the countries reviewed for this study, thus it is neither at the forefront nor lagging behind. This being said, distinctions may be made: With the NCP playing a very important and recognized role for settling and mediating disputes – and thereby being rather at the forefront than in the middle – the lack of available remedy or compensation measures has not yet received the same level of attention as in other countries or the OHCHR. Finally, like other countries, Switzerland has other less specific mechanisms which may be used for business-related human rights disputes.

### 3. Recommendations

#### 3.1. Need for Conceptualization

[47] The access to remedies system is currently highly under-conceptualized in Switzerland. This is not only true for Switzerland but as confirmed by the OHCHR's recent studies for other (compared) countries alike. While there are numerous state and non-state based non-judicial mechanisms for access to remedies in Switzerland, there is limited awareness of what these institutions do and how – if at all – they work together, e.g. how the results of non-judicial mechanisms play into judicial mechanisms. The link between non-judicial and judicial mechanisms needs to be clarified conceptually in order to avoid operational difficulties.

[48] The theory behind non-judicial access to remedy mechanisms should be investigated in order to set a foundation for a more unified approach to addressing human rights violations outside the courts. While the practical benefits of fostering non-judicial resolution of disputes are clear, the theoretical underpinnings of these mechanisms are not. Clarity would shed light on the extent to which these mechanisms do indeed foster more complete enjoyment of human rights by disadvantaged individuals.

#### 3.2. Policy Recommendations

[49] Before taking any further steps, a *political decision* needs to be taken on how Switzerland wants to position itself in the context of the described recent international developments and emerging trends. The current lack of clarity has different consequences: Open or unclear procedural or substantive provisions may incentivize the filing of pilot proceedings to test the system and trigger an interpretation by a court or the respective non-judicial mechanism. Such proceedings have been launched or are currently ongoing in several countries.

[50] From a legal perspective, Switzerland has three basic options, all of which come with advantages and disadvantages:

- a) *Scenario (1)*: In a first scenario, Switzerland could opt for not taking any additional measures but *wait and see* how the identified trends and international developments

manifest themselves and what their impact on Switzerland and Swiss companies will be. Overall, scenario (1) would be a *re-active* concept, rather than a pro-active or active approach as described in scenarios (2) and (3).

- b) *Scenario (2)*: In contrast to scenario (1), Switzerland could opt for being *at the forefront* by developing a comprehensive access to remedy framework, including both judicial and non-judicial remedies. With such a *pro-active* approach Switzerland would be among the pioneers should it opt for not only clarifying existing regulatory uncertainties but also for completing the existing fragmented access to remedy framework with the addition of an overarching concept and the missing elements for effective compensation and remedy.
- c) *Scenario (3)*: The third scenario which Switzerland may opt for is somewhere in the middle between scenarios (1) and (2) and can be described as an *active* approach. It would entail clarifying existing uncertainties and gaps to the extent that international developments and trends can be identified. It would be a dynamic, progressive approach by attempting to be in sync with international developments.

[51] Whether Switzerland opts for scenario (1), (2) or (3) is not, primarily, a legal issue but rather a political decision. This report presents the following recommendations for addressing some of the key issues identified in this study to improve access to remedy, their implications depending on the political scenario chosen by Switzerland:

- (1) The first suggestion is that Switzerland *increase the visibility* of its access to remedies mechanisms. Such a measure could be envisaged under all three scenarios.
- (2) Except for scenario (1), a broadly inclusive *multi-stakeholder dialogue* which includes not only representatives of business, government and civil society but also of existing remedy mechanisms, such as members of the judiciary, attorneys, the NCP, ombudspersons, could represent a good initial step towards obtaining a clearer picture of perceived obstacles for an effective and adequate access to remedy in line with the UNGP. Under scenario (2), it could serve as a basis for achieving agreement on potential next steps for complementing existing judicial and non-judicial remedy mechanisms with a view to implementing the third pillar of the UNGP. In scenario (3), such a dialogue could help identify relevant international developments and explore options for their implementation in Switzerland (binding, non-binding etc.).
- (3) With a view to coherence in the area of state-based non-judicial mechanisms, it would help to *unify or align the procedures of the state-based non-judicial mechanisms* more than they are currently. Under scenario (1) this recommendation would not go beyond the mapping of existing mechanisms as outlined in this study. In scenario (3), the mapping would first be complemented by a categorisation according to the criteria developed by the OHCHR. The next step in this scenario (3) would then be an analysis of whether international trends and developments call for adaptations. In scenario (2), the results of the mapping, the categorization and the analysis of the OHCHR's findings on international developments will serve as a basis for the development of a comprehensive framework for access to non-judicial remedies in Switzerland.
- (4) An alternative to establishing harmonized rules for the different non-judicial remedies would be to have a "*one-stop shop*" for complaints, from which the complainant would be directed to the most effective mechanism for the particular case. Under scenario (3), implementing this recommendation would entail providing a portal for accessing *existing* mechanisms. In line with international developments, such a guiding – not a monitoring –

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function could, for example, be part of the mandate of a Swiss NHRI. In scenario (2), Switzerland could consider creating a new body or vesting an existing institution with the coordination of existing procedures. From a legal perspective, the key concern that existing mechanisms are not always visible for victims, would be addressed with the introduction of a guidance system.

- (5) Institutionally, the comparative analysis in this study shows that *National Human Rights Institutions* and *National Contact Points* are obvious potential platforms for improving access to remedy. At this stage, NHRIs are not commonly vested with a mandate to investigate business related human rights disputes. Strengthening the institutional framework for access to remedy in Switzerland could, under scenario (2), include entrusting a future Swiss National Human Rights Institution based on the Paris Principles with a mandate to provide human rights remediation and thereby go beyond what can currently be considered an international trend. Under scenario (3), Switzerland could consider strengthening its NCP by attributing additional staff positions and further clarifying the roles of the different actors (e.g. advisory council). This would permit the NCP to play a more active role, particularly with regard to promoting the OECD guidelines and thereby also the UNGP, and increase its visibility and transparency.
- (6) For judicial remedies, scenario (1) would leave it to the courts to clarify the criminal liability of Swiss-domiciled corporations with regard to their actions abroad and, to plaintiffs to explore how far courts are willing to go when assessing civil liability of corporations, especially with regard to the burden of proof. Under scenario (3), legislative intervention could clarify the notion of organizational failure in corporate criminal liability, potentially inspired by examples in Canada or the Netherlands. In addition, as intended by the recently proposed amendments to the CPC, Switzerland might introduce mechanisms of collective redress as other European jurisdictions have done. Such mechanisms could be generally applicable or specifically address victims of corporate human rights abuses.

Under scenario (2), an essential measure would consist in introducing clear obligations for corporations to monitor and mitigate the potential adverse human rights impact of their activities (including through subsidiaries) abroad (human rights due diligence). Corresponding tort provisions should make it clear that proof of appropriate human rights due diligence would lead to exoneration from liability. The French legislation adopted in 2017 would provide an example for such a measure. A more limited approach (though rather atypical for the Swiss regulatory tradition) would consist in adopting legislation only with regard to a specific issue (e.g. child labour). In addition to the changes in substantive law, scenario (2) might also entail a regulation of litigation funding, given the current limitations on legal aid.

- (7) The Swiss Investment Fund for Emerging Markets (SIFEM) could be encouraged to further explore the potential of establishing or participating in mechanisms allowing victims to directly raise complaints about client projects by sharing experiences with DFI that already have such mechanisms. Under scenario (2) SIFEM could explore possible options to participate in the joint grievance mechanism currently established by FMO and DEG within the framework of EDFI association<sup>1</sup>.

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<sup>1</sup> Given the broad membership of EDFI on the one hand and the innovative concept of the new joint grievance mechanism, one could argue that Switzerland would position itself somewhere between scenarios (2) and (3).

Finally, with regard to scenarios (2) and (3), it is suggested that the Swiss Export Risk Insurance consider updating its current complaint strategy by taking into account the effectiveness criteria of UNGP 31.