



ACCESS TO REMEDY: THE NEXT FRONTIER?

The UN Guiding Principles on Business and Human Rights (UNGP) have encouraged and assisted companies to adopt policies and due diligence processes aimed at respecting human rights. Less progress has been made to implement the UNGP's framework for the provision of access to effective remedy for victims of business-related human rights abuse. This so-called "forgotten pillar" will receive specific attention in 2017.

In our second joint briefing for business,¹ the Global Business Initiative on Human Rights (GBI) and Clifford Chance provide an overview of some recent developments relevant to access to remedy for business - related human rights impacts.² Not only do these foreshadow how corporate accountability may broaden in the future but, equally importantly, they demonstrate how important it is that business is aware of these movements and trends, and considers taking the opportunity to contribute its unique perspectives to the development of policy and practice in this area.

1 WHAT DOES BUSINESS NEED TO KNOW?

Most progress has been made in implementing the second pillar of the UNGP, but this is beginning to change. Three inter-related 'pillars' underpin the UNGP: first, the State duty to protect human rights; second, the corporate responsibility to respect human rights; and third, access to remedy. Since 2011, States, business enterprises and other stakeholders have promoted, incentivised and invested resources in the operationalisation of the corporate responsibility to respect within business' operations and relationships. Whilst this has been a vital and welcome implementation of the second pillar of the UNGP, the other two pillars have not received the same degree of attention. Recently, a plethora of initiatives has been launched, aimed at better understanding the barriers to accessing remedy and proposing legal and practical reform. For example, last year, the UN Human Rights Council (HRC) adopted a [resolution](#) encouraging States and calling upon businesses to improve access in line with their respective obligations and responsibilities under the UNGP (**HRC Resolution**). It is also anticipated that the UN Working Group on Business and Human Rights will dedicate its 2017 report to access to remedy, which will help drive developments in this area.

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¹ Our first joint briefing, 'National Action Plans on Business and Human Rights', October 2015, is available here: https://www.cliffordchance.com/briefings/2015/10/national_action_plansonbusinessandhuma.html (**First Briefing**).

² This briefing is intended to provide a concise, factual summary of a sample of recent developments. The contents have been determined by the GBI Secretariat and Clifford Chance and any views expressed in this briefing do not necessarily reflect those of GBI member companies, or of Clifford Chance's clients. All links to websites embedded or referred to are accurate as of 13 March 2017.



Access to remedy should be provided through a coherent system of effective grievance mechanisms.

There are many ways to resolve grievances or claims and/or provide access to remedy for human rights abuses involving businesses (referred to here as 'grievance mechanisms'). The UNGP categorise the constellation of current grievance mechanisms into three broad types: the most well-known State-supported mechanisms are typically judicial, and are provided by national tribunals such as the courts. But the UNGP highlight the wide range of non-judicial avenues for redress that States can offer through administrative, legislative or other appropriate means. The UNGP also recognise that States have a role in facilitating access to mechanisms offered by non-State actors such as business enterprises, which can offer victims ways to air grievances, resolve legitimate claims and access remedy, if appropriate. At the same time, the architect of the UNGP, Professor John Ruggie, has highlighted that the existing "*patchwork of mechanisms*" is "*incomplete and flawed*". The UNGP seek to provide a framework for the improvement of these mechanisms individually and which forms the foundations of a coherent system or web of mechanisms.³

States have the primary duty to ensure access.

Everyone has a right to an effective State-based remedy for violations of fundamental rights recognised in law. This right is articulated in human rights treaties, building on Article 8 of the Universal Declaration of Human Rights. The State's duty as articulated in the UNGP involves ensuring effective judicial and State-based non-judicial mechanisms, promoting non-State mechanisms, and reducing the procedural and substantive barriers that result in access being denied. States have not been forthcoming in mapping out plans for improvement on access to remedy; for example, none of the National Action Plans on Business and Human Rights issued to date has addressed this area comprehensively.⁴

Business should provide access to grievance mechanisms that offer remedy in appropriate cases.

Though States are the primary duty bearers, the corporate responsibility to respect human rights entails business' engagement with access to remedy. Where a company identifies that it has caused or contributed to an adverse human rights impact, the

UNGP require the business to take an active role in remediation, either by providing for remedy itself or by cooperating in remediation through legitimate processes. The company may meet its responsibilities in a variety of ways, depending on the circumstances, including by the provision of operational-level grievance mechanisms led by themselves or in cooperation with other stakeholders. These mechanisms open up the possibility of providing fast and direct access for potentially affected rights-holders to bring and resolve grievances with companies, prevent further negative impacts where possible and, if appropriate, seek a remedy.

Business' role in the provision of access to remedy goes beyond operational-level mechanisms.

Some situations may necessitate business cooperation with other remedial processes, including judicial mechanisms. This may be appropriate where, for example, crimes are alleged; it might also extend to engaging in litigation in a manner that is consistent with the responsibility to respect human rights. Whether or not they are required to do so to meet the responsibility to respect, companies may also use their leverage to encourage or incentivise improved access to remedy on a broader level. This may be by using leverage through their value chains, or by encouraging States to lower barriers to accessing remedy through reforms.

Business is an indispensable stakeholder and can add value to developments aimed at improving access to remedy.

To date, States, international organisations and non-governmental organisations (NGOs) have been prominent participants in the debates on how to improve access to remedy. However, businesses have an important voice, and the involvement of the business community is key to achieving meaningful progress. Companies have a unique perspective, 'on-the-ground' experience and a legitimate role to play in contributing to discussion and collaborating in the development of positive outcomes within the third pillar. In this vein, the HRC Resolution calls on business to: (i) contribute actively to initiatives which aim (ii) promote a culture of respect for the rule of law, and (iii) participate in good faith in domestic judicial processes, as well as to establish effective operational-level mechanisms. Many of the initiatives in this area provide the opportunity for engagement by, and consultation with, all stakeholders, including business. Unless business is involved in the debate, there is a significant risk that its views, insights, perspectives and legitimate interests will not be reflected adequately going forward.

³ Protect, Respect, and Remedy: A Framework for Business and Human Rights, A/HRC/8/5, paras 87, 102 - 103.

⁴ First Briefing, 5.



2 POLICY AND LEGISLATIVE DEVELOPMENTS

Several policy initiatives are in train which seek to tackle barriers to access to remedy for business-related harms in a strategic manner, and which offer the opportunity for corporate engagement.

2.1 Inter-governmental policy initiatives

The Office of the High Commissioner for Human Rights (**OHCHR**) is the UN body that initiated the investigation into business and human rights that gave rise to the UNGP. It has been leading the current focus on access to remedy at the international level. The OHCHR's Accountability and Remedy Project seeks to examine how to achieve a fairer and more effective system of domestic law remedies in cases of business involvement in severe human rights abuses.

In June 2016, the OHCHR published a [report](#) which provides guidance to States on ways to enhance access to remedy (**OHCHR's Report**). The report focuses on six areas considered to need urgent attention, namely:

- (a) domestic law tests for corporate legal liability;
- (b) the roles and responsibilities of States in cross-border cases;
- (c) overcoming financial obstacles to legal claims;
- (d) criminal law sanctions;
- (e) civil law remedies; and
- (f) domestic prosecution bodies.

Each is considered from both a public and a private law perspective. The OHCHR's Report recommends that States review their domestic laws and develop policies and legal reforms which better reflect the practicalities and complexities of business management including the challenges raised by complex supply chains and that also improve the effectiveness of judicial remedies. The report refers States to a series of detailed policy recommendations which, if implemented, would expand the scope of corporate accountability currently available in many countries.

- The report recommends that domestic private law regimes apply principles for assessing corporate legal liability that focus on the quality of corporate management and the actions, omissions and intentions of individual officers or employees.
- It also suggests that States make appropriate use of strict or absolute liability to encourage greater levels of corporate vigilance, especially where risks of severe human rights abuse are high.

Illustrative examples of methods and steps to meet the report's recommendations are [appended](#) to the OHCHR's Report. The HRC Resolution welcomed the OHCHR's Report and urged States to develop a comprehensive strategy for improving access to remedy in line with its suggestions.

Work now begins on a second phase of the Accountability and Remedy Project that will focus on State-based non-judicial mechanisms and will seek to identify areas in which to improve the effectiveness of such mechanisms. In December 2016, an initial scoping [report](#) was released which focused on four areas: i) employee complaints/breach of labour standards, ii) consumer complaints in various contexts, iii) complaints about breaches of environmental standards, and iv) complaints about providers of security services. The public consultation period on this text ended on 30 January 2017. The latest [draft of the scoping paper](#) was released on 21 February 2017.

This international commitment to improving access to remedy for business and human rights abuses is also reflected at the regional level, most notably in Europe.

In March 2016, the Committee of Ministers of the Council of Europe adopted a [recommendation](#) on human rights and business (**COE's Recommendation**) which places expectations on its 47 member States to implement the UNGP and consider innovative ways of dealing with procedural barriers to accessing remedy:

- States are recommended to consider allowing domestic courts to exercise jurisdiction over civil claims against subsidiaries in a parent company's jurisdiction of domicile where the claims are closely connected with the parent company.
- States should ensure that claims against businesses are not unduly restricted by the application of doctrines such as 'act of State' or 'political question'.

The EU has welcomed the adoption of both the OHCHR's Report and the COE's Recommendation. Marking the fifth anniversary of the adoption of the UNGP by the HRC, the [EU Foreign Affairs Council](#) issued conclusions on business and human rights on 20 June 2016. As well as reconfirming its commitment to the UNGP, the Council noted that effective remedies are of crucial importance. In terms of proposed actions, the EU Foreign Affairs Council recommended that the Commission's forthcoming EU Action Plan on Responsible Business Conduct should have due regard to access to remedy and has commissioned an opinion from the EU Fundamental



Rights Agency on the ways in which barriers to access can be lowered within the EU.

2.2 Legislative developments, proposals and initiatives

At a national level, recent legislative initiatives have focused mostly on the implementation of the second pillar of the UNGP. For example, some States have introduced mandatory corporate reporting requirements aimed at addressing modern slavery.⁵ Such measures drive increased transparency (and arguably, human rights due diligence). But they do not purport to provide either direct access or relief to relevant rights-holders even if they might encourage companies to improve the practices they are asked to report on.

NGOs and politicians continue to advocate for more expansive legislation to address poor access to remedy. Recent efforts seek to expand the scope of the duty of care owed by companies so that victims of adverse human rights abuses can make claims against companies in certain cases. These include the following:

- The National Assembly in France passed a [bill](#) on 21 February 2017 which – if and when it takes effect - will require certain large French companies to implement a detailed due diligence plan in respect of their own activities, those of the companies they control and those of suppliers and subcontractors with which they have an established commercial relationship. The consequences of breach are serious and can result in the imposition of a fine of up to 10 million Euros. Defaulting companies may also be held directly liable for damages suffered by victims as a result of non compliance with these new obligations. Where a causal link between the damage caused and the non-compliance of the company can be proven, the fine may be increased to a maximum of 30 million Euros. The imposition and scope of this duty has been hotly debated between the National Assembly and the Senate, who argue that the text is unconstitutional. The bill will not enter into force unless and until the Constitutional Court has confirmed its constitutionality. Its decision is due by 23 March 2017. See further the CC briefing [here](#).

- The [Responsible Business Initiative](#) is calling for the Swiss constitution to be amended to require Swiss companies (whether large or small) to incorporate processes for due diligence on human rights and environmental issues related to their activities, to remedy actual damage and to take appropriate measures to prevent potential damages throughout the business. Swiss companies would be required to ensure that such rights and standards are also respected by entities controlled by them (either as subsidiaries or through business relationships) unless they can demonstrate that they have complied with the requisite standard of care in carrying out due diligence and either taken measures to prevent potential harm, or can demonstrate that the harm would have occurred despite such measures. The initiative was handed over to the Swiss government on 10 October 2016 supported by 120,000 votes; if not retracted by Parliament, the proposed amendments should proceed to a public vote.
- On 18 May 2016, members of eight European parliaments launched a 'green card initiative' calling for a duty of care on European-based companies towards individuals and communities whose human rights and local environment are affected by their activities. A 'green card initiative' is a relatively new measure by which EU governments can jointly request the European Commission to take legislative action.
- Most recently, Amnesty International and ICAR have released a [set of principles](#) designed to assist governments and prosecutors better prosecute corporate crime that involves a violation of internationally recognised human rights.

2.3 Proposed treaty

Corporate accountability in respect of human rights abuses is undergoing re-examination at the international level. In October 2016, the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (OEIWG) met for the second time pursuant to the HRC's resolution to "*develop an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*".⁶ The session focused on the possible content, scope, nature and form of a treaty. A wide range of issues relating to the increased accountability of business, as well as increased bases for access to

⁵ See further, R Lindsay et al, "Hardly Soft Law – The Modern Slavery Act 2015 and the Trend Towards Mandatory Reporting on Human Rights", IBA Business Law International, Vol 18 No 1 (January 2017) www.ibanet.org/Publications/business-law-international-january-2017.aspx.

⁶ A/HRC/RES/26/9.



remedy for victims were considered. By the time the OEIWG meets in 2017, it should have a draft text of the treaty to consider. Business representation in consultations and discussions around the treaty has, to date, been fairly limited, although both the International Chamber of Commerce and the International Organisation of Employers have observer status in relation to the treaty process and made [written](#) and [oral](#) submissions during the second session.

3 JUDICIAL MECHANISMS

Judicial mechanisms lie at the "*core of ensuring access to remedy*."⁷ Ensuring access to an effective judicial remedy is complex and involves issues such as national judicial structures, institutional capacity, claimants' access to resources and funding, as well as policy and enforcement constraints.

Having overcome any practical barriers, the first legal hurdle for a claimant is to establish that the relevant court has jurisdiction over the matter and the parties. This has proven challenging in many human rights-related claims in which rights-holders attempt to seek a remedy directly against a parent company in its home jurisdiction for the activities of a subsidiary occurring abroad. Such claims are attempted for a variety of reasons including barriers to accessing effective remedies from the courts where the harm occurred, and the fact that a parent company may be better placed financially to satisfy a successful claim.

Access to a judicial remedy also requires demonstrating a recognised legal basis for the claim, and the possibility of adequate and appropriate forms of remedy for harm suffered. Claimants in such cases increasingly allege that the parent company has breached a duty of care owed to the rights-holder, or that the 'corporate veil' should be pierced (or disregarded) to enable parent company liability for the activities of its subsidiaries.

There are increasing calls to lower the jurisdictional and substantive barriers to claims in such circumstances.

Recent policy statements have been addressed above. This section summarises a few illustrative cases which indicate how courts have recently approached corporate liability for human rights abuses committed overseas.

In Canada, several claims against companies have overcome jurisdictional hurdles and are progressing through the courts.

In [Araya v Nevsun](#), three Eritrean refugees claim, on behalf of themselves and more than 1,000 Eritrean workers, that Nevsun Resources Ltd (**Nevsun**) is liable in negligence and for breaches of customary international law (**CIL**) including forced labour, torture, slavery, and crimes against humanity.

The claims relate to Nevsun's alleged complicity in the use of forced labour at the Bisha mine in Eritrea by Nevsun's local sub-contractors.

Nevsun applied for the claims to be struck out on several jurisdictional and preliminary grounds, including that: (i) Eritrea was the most appropriate forum to hear the claim; (ii) the claims related to acts of a foreign State were not justiciable by the Canadian court; and (iii) claims based on a breach of CIL are not actionable in common law and should be struck out. In October 2016, the court dismissed these applications.

Firstly, the court found that there was a real risk that the claimants would not get justice in Eritrea; Nevsun had failed to establish that the comparative convenience and expense favoured Eritrea as the appropriate forum; and the presumption that the Canadian court had jurisdiction over Nevsun (a Canadian defendant) applied. Secondly, though the act of State doctrine is applicable in Canada, the court was not prepared to dismiss the claimants' claims without a full trial. Thirdly, it is at least arguable that CIL does form part of Canada's common law. Nevsun successfully applied for the representative action to be dismissed; only the claims of the three named claimants will progress to an examination of the merits.

In [Choc and others v Hudbay](#), three claims against Hudbay Mineral Inc. (**Hudbay**), a Canadian mining company, concern alleged serious human rights abuses by security personnel working at its subsidiary's mining operations in Guatemala. Resisting applications to strike out, the court permitted the claims to proceed on the basis that it was not "*plain and obvious*" that Hudbay did not owe a duty of care to the plaintiff or (in relation to one of the claims) that the corporate veil should not be lifted to establish Hudbay's liability for the actions of its subsidiaries. Amnesty International made submissions to the court citing international norms, authorities and standards in support of its view that a duty of care may arise where a parent company has been involved in gross human rights abuses. In the course of its submissions, Amnesty referred not only to the UNGP (which highlight the heightened risk of complicity in conflict areas), but also to the Voluntary Principles on Security and Human Rights (the **Voluntary Principles**). The Voluntary Principles provide standards for

⁷ UNGP, Principle 26.



corporations to follow when seeking to ensure the safety and security of their operations commensurate with a respect for human rights. Amnesty highlighted that Hudbay had noted that the Voluntary Principles guided its corporate conduct.

In England, the claimants in [Lungowe v Vedanta](#) have also overcome jurisdictional challenge. The claims in negligence are made by 1,826 Zambian villagers against Konkola Copper Mines plc (**KCM**) (a Zambian company) and Vedanta (its UK-domiciled parent company) for harm including damage to property and loss of income and amenity as a result of environmental pollution allegedly caused by KCM's operations at its Zambian copper mine. Both Vedanta and KCM challenged the jurisdiction of the English court. Dismissing both challenges, the court held that jurisdiction over Vedanta was established because Article 4 of the so-called Recast Brussels Regulation (Regulation (EU) No 1215/2012) requires EU member States to accept jurisdiction over claims (and not stay them) where a defendant is domiciled in the relevant State. Since KCM was a necessary and proper party to the claim against Vedanta, the court held that England was the appropriate forum to hear the claims against both defendants.

In reaching its decision, the court had to determine whether the claim against Vedanta was arguable. Holding that it was, Coulson J acknowledged that English law recognised the possibility of establishing a claim in negligence against a parent company based on the actions of its subsidiary, and that such claims could, depending on the facts, be made by residents affected by the subsidiary's operations (and not just by employees of the subsidiary). Similarly, the claim against KCM was not without any real prospect of success. Though it was not determinative of the issues, the court recognised that there were considerable barriers to accessing justice in Zambia. These included the lack of funding (e.g. by way of conditional fee arrangements which are prohibited in Zambia). Two appeals in relation to the jurisdiction decision are expected to be heard in June 2017; if they fail, the merits of the claims will be considered.

By contrast, in [HRH Emere Godwin Bebe Okpabi and ors v Royal Dutch Shell PLC \(RDS\) and Shell Petroleum Development Company of Nigeria Ltd \(SPDC\)](#), claims by 20 individuals representing the Ogale (a community of 40,000 people based in Nigeria) and by 2,335 claimants from the Bille Kingdom in Nigeria, were dismissed by the English court. SPDC is incorporated in Nigeria and is the operator in a joint venture with a Nigerian State-owned entity and others. Its holding company, RDS, is

incorporated in the UK and headquartered in the Netherlands. The English court held that it had jurisdiction over RDS since it was incorporated in the jurisdiction. However, it also found that there was no good arguable case that RDS owed a duty of care to the claimants under English law. In reaching this conclusion, the court considered *Chandler v Cape* [2012] EWCA Civ 525 which had clarified that, in certain circumstances, employees of a subsidiary can make a claim in negligence against the subsidiary's parent company on the basis that the parent owes those employees a duty of care. It also re-confirmed that, in principle such claims are not confined to employees but may, in appropriate circumstances, be available to residents affected by a company's activities. However, considering the factual issues, including that RDS and SPDC operated as wholly separate entities (both legally and operationally), the court decided that such a duty of care was not arguable in this case and the claims against RDS were dismissed. As a consequence, the claims against SPDC also fell away. This judgment has been appealed and a hearing is expected by early 2018.

Another recent case involving similar arguments has been rejected at an early stage. In [AAA v Unilever PLC and Unilever Tea Kenya Ltd](#), the claimants are 218 Kenyan individuals employed at a Kenyan tea plantation operated by Unilever Tea Kenya Ltd (the 2nd defendant and a subsidiary of Unilever PLC). The claims arose out of the post-election ethnically-driven violence in Kenya in 2007 which was, in this specific instance, directed at and adversely affected the employees based at the plantation and its nearby town (resulting in, among other things, several deaths).

In summary, the claimants alleged that both defendants owed a duty of care to protect these employees from the risks of such violence, which in breach of this duty, they failed to do (despite operationalising a crisis management plan on the night of the violence). The judge held that it is not appropriate to impose a duty of care on Unilever PLC for the harms caused in this case as such harms were not foreseeable. Moreover, the judge held that whilst in theory it is possible that a parent company can be liable for the actions of its subsidiaries based on *Chandler v Cape* (cited above), the claimants in this case had failed to show that there was a real issue to be tried. The court also found that the case against the 2nd defendant was not likely to have any prospect of success. On these bases (among others), the claims were dismissed.



Although most recent cases have involved alleged civil liability, corporate entities and/or their employees or representatives continue to be exposed to potential criminal prosecutions for activities that cause severe human rights-related abuses. For example, last year, a company was convicted for human-trafficking related offences in the UK.⁸

4 OTHER STATE-BASED MECHANISMS

Non-judicial grievance mechanisms offered by States can range from those provided by national human rights institutions, labour tribunals, ombudsmen, National Contact Points (**NCP**) established pursuant to the OECD Guidelines for Multinational Enterprises in member countries of the Organisation for Economic Cooperation and Development (the **OECD**), to multi-stakeholder initiatives (**MSIs**) involving States. A few notable developments are mentioned here.

In December 2015, the Philippines' national human rights institution, the Commission on Human Rights, accepted a [petition](#) from several NGOs, which requests an investigation into some 50 major oil and gas companies on the basis that they acted contrary to their responsibility to respect human rights and should be held accountable for the effects of their greenhouse gas emissions. The investigation is ongoing, and the Business and Human Rights Resource Centre, one of the petitioners to the Philippines Commission on Human Rights, has [published](#) the response of several companies to the petition. Almost (but not all) did not accept the petition, asked to be removed or for the petition to be halted. On 21 February 2017, the NGOs submitted a response to these objections.

Since 2011, the OECD Guidelines for Multinational Enterprises have included specific guidelines on human rights. As a result, the OECD's NCP mechanism (whereby specific instances of alleged breaches of the guidelines may be referred to NCPs) is increasingly used to pursue complaints that business enterprises have breached the guidelines by conducting inadequate human rights due diligence.

The OECD process in turn has been under scrutiny by civil society organisations:

- In February 2016, Amnesty International issued a [report](#) analysing the functionality of the OECD UK NCP, providing procedural and substantive

recommendations aimed at improving the effectiveness of the OECD NCP process.

- In June 2016, OECD Watch published a "4 x 10" bullet-point plan to highlight what it considers governments must do to strengthen the effectiveness of the guidelines.
- Recently Corporate Accountability Research published a [report](#) on NCPs and how to better navigate conflict to provide remedy to vulnerable communities offering recommendations as to how the mechanisms could be strengthened.

Parliamentary mechanisms have been used to examine the issue of access to remedy more widely. In the UK, the [Joint Committee on Human Rights](#) is undertaking an enquiry on business and human rights to investigate how successfully UK businesses are implementing the UNGP. This includes examining whether enough is being done to provide victims with access to remedy and, if not, what improvements could be made. The committee has sought submissions from companies. In particular, several UK-based high-street companies have been asked to respond to allegations concerning the employment of Syrian refugees in Turkish factories in those companies' supply chains. The enquiry continues.

There are also calls for other mechanisms, not traditionally designed to address victims' rights, to be reformed to facilitate access to remedy. This has arisen, for example, in the context of the independent accountability mechanisms of development banks, which are often State-based lending institutions or international organisations. In January 2016, various organisations worked together to publish a [report](#) entitled "*Glass Half Full? The State of Accountability in Development Finance*". The report examines several mechanisms against criteria in the UNGP proposes adaptations aimed at rendering such mechanisms accessible to 'complainants'. Possibilities include creating remedy funds to compensate complainants directly for the failures of development institutions to properly oversee the impacts of the finance provided to corporations.

5 OPERATIONAL-LEVEL MECHANISMS

The most common non-State-based, non-judicial mechanisms for business-related human rights impacts are operational level, or 'company led', grievance mechanisms (**OGM**). To date, public and corporate engagement in this area has prompted the development of guidance for companies (for example, by the International Petroleum Industry Environmental

⁸ *A Galadikas and ors v DJ Houghton Catching Services Ltd and ors* [2016] EWHC 1376 (QB).



Conservation Association ([IPIECA](#)) and [Shift](#)). Most recently, a comprehensive [set of reports](#) issued by Corporate Accountability Research provides an in-depth analysis of several non-State-based non-judicial mechanisms highlighting how to use these mechanisms and their effectiveness.

There are fewer public examples of information-sharing between peer organisations of approaches to and lessons learned from the design and implementation of OGMs in line with the UNGP.

One notable exception is the publication by Barrick Gold Corporation (**Barrick**) of an [independent assessment](#) of the remedial framework implemented by the Porgera Joint Venture (**PJV**) in 2012. The Olgeta Meri Remedy Framework was designed to manage allegations of human rights abuses by PJV security employees at a gold mine in Papua New Guinea. The assessment examined whether the Framework lived up to the expectations of the UNGP and provides a detailed analysis of a remedy framework against the UNGP. It serves as a useful tool for cross-sector learning and identifies issues that are likely to be relevant for the design of OGMs more generally. These include questions regarding the types of abuse that should appropriately be considered by OGMs, and whether they are ever an adequate remedial forum for allegations of serious human rights harm; and the use of legal waivers.

There are two recent examples of MSIs developed not only by corporate stakeholders, but also in collaboration with representatives of potentially affected rights-holders. Both were instigated as a response to the Rana Plaza collapse in 2013. Since 2013, more than 200 brands and retailers have committed to build a safe and healthy Bangladeshi Ready Made Garment industry by signing the [Accord on Fire and Building Safety in Bangladesh](#) (the **Accord**). Signatories also include eight trade union bodies and four NGO 'witness' signatory organisations. The Accord creates an independent inspection system, and publicly discloses all factories covered by the agreement, inspection reports, and corrective remediation plans. The Accord is governed by a steering committee comprised of trade unions and companies and chaired by a neutral individual chosen by the International Labour Organisation, whose decisions may be challenged by any signatory to the Accord through arbitration. Similarly, the 28 global retail members signatory to the [Alliance for Bangladesh Worker Safety](#) (the **Alliance**) collaborate to set standards and carry out factory inspections to uncover violations of safety standards. The Alliance also focuses on worker safety and empowerment as

well as promoting means to raise grievances and safety concerns through a Worker Helpline.

There have also been proposals for new types of mechanisms. In 2015, the Working Group on International Arbitration Tribunal on Business and Human Rights issued the [sixth version of its proposal](#) for a specific arbitral tribunal for disputes involving multinational businesses, their business partners, and victims of abuses. The proposal suggests that an international arbitration tribunal would significantly reduce the time and cost involved in resolving human rights disputes, and would allow victims access to independent, impartial arbitrators with high levels of relevant expertise.

6 FRAMING THE FUTURE

The NGO community has long called for broader corporate accountability and has been testing the limits of the remedial mechanisms available to victims of human rights abuses. Leading companies have also expressed concerns regarding the design, robustness, availability and accessibility of appropriate mechanisms, including at the State-based level.

To date, many business' attention has focused primarily on providing access at the grass-roots level for airing grievances and resolving issues. However, how these mechanisms can and should be used to provide access to remedy is not universally well understood. An awareness of the function and purpose of the different grievance mechanisms currently available and their place in providing remedy to rights-holders is a first step in understanding and improving access to remedy.

One overarching challenge for the international community going forward will be to ensure that these different types of mechanisms operate together coherently so that effective remedies may be pursued through the mechanism that most suits the nature and circumstances of particular claims. A focus on a cohesive system of remedy may better enable the strengths of different mechanisms to be leveraged, and gaps to be filled more effectively.

Finding effective ways to make meaningful progress to improve access to remedy will be a focus area for many in 2017. Questions and opportunities that it may be productive to explore include:

- How can the business and human rights community develop a coherent approach to understanding (and improving) the web of diverse grievance mechanisms already in place? What different roles do each of these mechanisms play, and should we begin by focusing on these



strengths? How do (or should) these mechanisms “link up”, if at all?

- What is needed to support meaningful and effective dialogue across stakeholder groups, particularly on the sensitive and emotive issues associated with access to remedy?
- What unique perspectives, insights, practices and lessons learned do leading business practitioners have, that might help build solutions to access to remedy-related challenges? How can these be shared with, and explored by, other stakeholders?

It seems important that new ways of working and thinking about access to remedy be found if real progress is to be made. That will require engagement, openness to ideas and smart thinking from a broad range of stakeholders.

7 RESOURCES

POLICY

1. [UN HRC Resolution 32/10 \(29 June 2016\) UN Doc A/HRC/RES/32/L.19](#)
2. [UN HRC, "Improving accountability and access to remedy for victims of business-related human rights abuse" \(10 May 2016\) UN Doc A/HRC/32/19](#)
3. [UN OHCHR, "Illustrative examples for guidance to improve corporate accountability and access to judicial remedy for business-related human rights abuse – Companion document to A/HRC/32/19 and A/HRC/32/19/Add.1" \(5 July 2016\)](#)
4. [UN OHCHR "Access to remedy for business-related human rights abuses: A scoping paper on State-based non-judicial mechanisms relevant for the respect by business enterprises for human rights: current issues, practices and challenges \(February 2017\)](#)
5. [Council of the European Union, Foreign Affairs Council, "Council Conclusions on Business and Human Rights" \(20 June 2016\) Doc 10254/46](#)
6. [Council of Europe, Committee of Ministers, "Recommendation CM/Rec\(2016\)3 of the Committee of Ministers to member States on human rights and business" \(2 March 2016\)](#)

PROPOSED LEGISLATION

1. [Assemblée Nationale, Entreprises: devoir de vigilance des entreprises donneuses d'ordre](#)
2. [European Coalition for Corporate Justice, "Members of 8 European Parliaments support duty of care legislation for EU corporations" \(31 May 2016\)](#)
3. [Swiss Coalition for Corporate Justice](#)
4. [UN HRC, "Draft report on the second session of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights \(version of 28 October 2016 – corrected by Secretariat\)" \(28 October 2016\)](#)

LITIGATION AND INVESTIGATIONS

1. [Greenpeace and ors, "Petition: Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations" \(28 July 2016\); BHRRC, "Fossil fuel firms respond to petition before Philippines Human Rights Commission on human rights & climate impacts"](#)
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