

Questionnaire for Other Stakeholders regarding Access to Remedy in relation to Business-related Human Rights Abuses

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Note: CELS work has gathered experience in seeking redress for business-related human rights violations of indigenous communities, peasants and harms perpetrated within the real-state sector. Another significant experience of our institution has to do with the access to justice and reparations for crimes against humanity committed during the last military dictatorship in Argentina; this process has also dealt with the responsibility of economic actors. Our references to gross human rights violations draw from this experience.

1. What are the key elements of the right to an “effective” remedy under international human rights law that are relevant to Pillar III of the UNPS?

An effective remedy should allow every individual to seek integral reparation for human rights violations committed by business actors. According to international standards, this requires States to enable judicial mechanisms that can provide “restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”.¹

Regarding victims of human rights violations committed by business actors, the right to an effective remedy also entails the State obligation to provide access to justice. International standards on this specific matters include the obligation to disseminate information about all available remedies, take measures to minimize inconveniences to victims, provide assistance to victims and ensure the availability of all appropriate legal, diplomatic and consular means to ensure access to judicial mechanisms.²

These obligations should fall on both home and hosts states, for violations committed by transnational corporations.

2. What needs to be done to ensure that remedies for business-related human rights abuses are responsive to the experiences and expectations of the rights-holders, especially of vulnerable groups such as children, women, people with disabilities, migrant workers and indigenous peoples?

International standards already develop basic principles to ensure their adequacy to victim’s expectations. Particularly the special treatment of victims and the components of victim’s right to remedies.³ A corner-piece of this

¹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Article IX.

² Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Article VIII

³ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Article VI and VII

obligation lies on the States responsibility to impose adequate sanctions for those responsible of human rights obligations, both as a mean for satisfaction and deterring future violations

Ensuring the right to truth is also important for meeting expectations of rights-holders. Among other obligations, this requires States to cooperate and assist each other by exchanging information and cooperating in administrative, legislative and judicial measures. This should include the obligation to cooperate in generating and providing evidence to investigate gross human rights violations.⁴

3. How should states combine preventive, redressive and deterrent elements to enhance the overall effectiveness of remedies?

International standards acknowledge that “full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.”⁵ Providing access to effective judicial remedies for victims of business-related gross human rights violations, and ensuring the victim’s right to reparation would simultaneously allow states to deter and prevent further abuses by business actors.

Expanding this consideration to all business-related human rights abuse; this deterrent and preventive functions of judicial mechanisms requires also cooperation among states to eliminate impunity of transnational corporations. States must ensure that their national framework of judicial remedies adequately address business-related abuses and do not promote impunity for human rights violations, even if committed extra-territorially. International law should provide general guidelines for designing national mechanisms for the exercise of both universal and extraterritorial jurisdictions over business actors.

4. What should be the role of home as well as host states of business enterprises in providing access to effective remedy for victims of business-related human rights abuses?

Home and host states should share the obligation to prevent impunity for human rights violations. International human rights standards pertaining the victim’s rights to access justice require both of them to establish adequate judicial mechanisms to establish criminal and civil liability of corporate actors. Victim’s should be granted with the opportunity to decide under which jurisdiction they will exercise their right to justice.

Having due regard to the principle of *non bis in idem*, both home and host states should cooperate in facilitating prosecutorial access to evidence and documentation to determine the responsibility of transnational corporation in human rights violations. They should also cooperate in executing and enforcing judgments that find corporations responsible of gross human rights violations under international human rights law.

Furthermore, with regard to gross human rights violations, it is important to note that international law recognizes that “states have the primary

⁴ UN-Human Rights Council, *Right to Truth*, Resolution 9/11, A/HRC/9/L.12.

⁵ Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, Principle 2.

responsibility to exercise jurisdiction over serious crime under international law".⁶ This entails the duty to investigate, prosecute and punish those responsible of gross human rights violations.⁷ For this purpose, international principles goes as far as calling for states to implement appropriate provision for universal jurisdiction.⁸ Regarding the specific issue under question, it should follow from the foregoing that whenever the home or host state is unwilling or unable to deliver justice for gross human rights violations, the victim should retain the right to seize the judicial mechanisms of the other State.

5. Business enterprises have a responsibility to respect all “internationally recognized human rights”. What does this responsibility entail in relation to the right to an effective remedy under the International Bill of Human Rights?

It is important to recall that States hold original and central obligation to respect, protect and guarantee all human rights. However, article 29(2) of the Universal Declaration on Human Rights does acknowledge that private parties, including business actors, hold responsibilities. Regarding corporation’s duty to respect the right to an effective remedy, we could conceive the following basic obligations:

- The obligation to fully cooperate with judicial authorities in determining the responsibility of their staff in human rights violations. The corporate veil should bear no exception to this duty.
- The obligation not to hamper victim’s access to judicial remedies. This includes the obligation not to unduly increase the costs of litigation or otherwise affecting the capacity of victim’s to assert their rights.
- The obligation to provide adequate reparation under international standards for any human rights violation.
- The obligation to exert due diligence and human rights impact assessments whenever their activities risk of affecting rights. These assessments should be impartial and executed through processes that includes the potential victims and state authorities. These processes should incorporate communities in a public process of consultation to prevent human rights violations. This requires businesses to: communicate the specific actions that a corporation intends to carry out to affected communities; to provide all sufficient information in culturally accessible forms (including necessary translation); to incorporate affected communities in every stage of the assessment; to provide an adequate time for communities to process information and establish their position according to their own mechanisms. States should oversee and ensure the impartiality of these processes.

6. What does “cooperate” in remediation of adverse human rights impacts “through legitimate processes” entail for business enterprise under Principle 22 of the UNGPs?

⁶ Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, Principle 2.0

⁷ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Article III

⁸ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Article III

Cooperation with judicial mechanism is a central part of this duty. Business actors should provide courts with all information, documentation and other evidence necessary for determining corporate responsibility of human rights violations.

Whenever a corporate actor is somehow implicated in human rights violations, the obligation to cooperate requires that they take part in ensuring that those individuals responsible receive adequate sanctions. When appropriate, they should also cooperate in the transitional justice processes, including the reparation of victims and the right to truth.

Under other circumstances, cooperation in legitimate process should require business actors to willingly and effectively participate in the judicial or non-judicial mechanisms provided by the state. Any process should only be considered legitimate insofar as victims take a central role in them and power disparities between the implicated parties are compensated for.

7. What role should non-state-based societal organs such as intergovernmental organizations, international financial institutions, civil society organizations, trade unions, human rights defenders, lawyer's associations and business associations' play in facilitating access to effective remedy in cases related to human rights abuses?

Every of the mentioned actors should have a role responding to their particular nature. However, they should have two primary functions: 1) to assist victim's access to judicial and non-judicial mechanisms to seek reparations for human rights violations. 2) to abstain from curtailing victim's access to such mechanism. Each non-state based societal organ shall assume this role according to their specific position and capacities.

Cooperation among these type of non-state organs is vital for compensating flaws in the material, financial or legal inaccessibility of remedies. However, international law should consider that the results of this cooperation could substitute the state's obligations of ensuring adequate access to all victims of human rights. Responsibility for guaranteeing this right shall remain upon states.

8. How can the concept of reparations under international law be used to develop a remedy typology for business-related human rights abuses?

The standard of integral reparation should provide the basic components of reparations. Any effective remedy should be able to ensure victim's access to all aspects of integral reparations, including compensation, satisfaction, restitution, investigation and guarantees of non-repetition.

Pursuant to these standards, effective remedies should also ensure that victims, their families and heirs are able to access them, either individually or collectively.⁹

9. Please share good practice examples, landmark judicial decisions or other regulatory innovations contributing to strengthening access to effective remedy for business-related human rights abuses.

In 2015, the Argentinian Congress approved the creation of a Special Commission for the Investigation of Business complicity in crimes against humanity. This Special Commission aims to shed light upon the role of economic

⁹ Report of Diane Orentlicher, independent expert to update the Set of principles to combat impunity - Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, Principle 19

actors in supporting, abetting or otherwise being complicit with the last dictatorial regime. A group of UN Experts supported the creation of this Commission, stating that it “represents a great opportunity to establish the truth and promote accountability for past violations committed with the complicity or active participation of the business sector”.¹⁰ However, while the legislative process approved its creation up to this date the Commission has not entered into functions.

Another significant contribution for the access to remedy was the report “*Responsabilidad Empresarial en delitos de lesa humanidad*”¹¹. This report resulted from a collaborative project between CELS, FLACSO and the Argentinian National Government. It develops detailed insights into the role that 22 national and international corporations had in the commission of crimes against humanity during the last military dictatorship. Most of these cases are being subject to criminal prosecution before Argentinian judges. Among its most notable examples, we find the investigation of *Molinos La Plata* and the activities of *Mercedes-Benz* and *Ford* in Argentina.

Building on that contribution, it is relevant to note that during 2016, the Argentinian judicial system delivered its first judgment establishing the responsibility of *Marcos Jacobo Levin*¹² (former CEO of Veloz del Norte) in crimes against humanity.¹³ This case represents a significant step towards guaranteeing effective remedies for human rights violations, and could help spearhead the ongoing investigations that Argentina pursues in accordance to its international obligations.

10. Please provide any additional comments, suggestions or information which you think may be relevant for the Working Group’s forthcoming report on access to effective remedy for business-related human rights abuses or for strengthening access to remedy generally.

The Memory, Truth and Justice process of Argentina can provide an example for achieving access to remedies. Since the amnesty laws were abrogated, the Argentinian judicial authorities have brought justice for gross human rights violations committed during the last military dictatorship.

Unlike other transitional justice mechanisms, it privileges judicial mechanisms and establishes responsibility beyond those directly responsible. As of today, the memory, truth and justice process has sanctioned military leaders, army personnel, members of other security forces and civilians that participated in crimes against humanity. Most recently, judicial processes have placed a greater attention over the responsibility of business actors. We expect that during the forthcoming years, this trend will provide crucial examples and experiences of how States (and particularly judicial authorities) could ensure victims access to effective remedies for business-related abuses.

¹⁰ OHCHR, *Argentina Dictatorship: UN experts back creation of commission on role business people played*, 10 november 2015, available at: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16733&LangID=E>

¹¹ Available at <http://www.cels.org.ar/especiales/empresas-y-dictadura/#juicios-y-memoria>

¹² Tribunal Oral Federal de Salta, *Causa C/Almiron, Victor Hugo1, Bocos, Victor Hugo1, Cardozo, Enrique Victor1 y Levin, Marcos Jacobo2*, Expediente nro. 4076/14 (FSA 14000695/11), May 23, 2016, available at: <http://www.cij.gov.ar/nota-21588-Lesa-humanidad--difunden-los-fundamentos-del-fallo-que-conden--en-Salta-a-un-empresario-y-otros-tres-acusados.html>

¹³ For a brief description of this case, please refer to: <http://buenosairesherald.com/article/211580/first-businessman-sentenced-for-dictatorship-crimes>.

