



Response of the International Corporate Accountability Roundtable (ICAR) to the Questionnaire for Other Stakeholders regarding Access to Remedy in relation to Business-related Human Rights Abuses

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 UNGPs?*

The right to a remedy under international law encompasses an obligation to implement requisite legislative and administrative measures, investigate violations and take action against those responsible, and provide victims with access to justice that results in effective remedy.¹ As noted in UNGP25 and the commentary thereto, an “effective remedy” has both procedural and substantive elements to it. It must be accessible to victims and provide them with redress.² States are obligated to enact legislation and policies that eliminate the barriers to effective remedies.³ Both home and host state governments must open their judicial systems to victims of corporate human rights abuses and work to ensure that these systems are both effective and fair. In extraterritorial situations, home States should cooperate with host States to make certain that victims have access to effective remedy.⁴

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?*

To ensure that remedies are responsive to victims, particularly vulnerable ones, they must be undertaken from a rights-based approach.⁵ This means designing mechanisms centered on victims’ needs by including victims in the design process and consulting them throughout implementation. The resulting remedy should be geographically accessible, representing both the language and culture of the victims, and should capture the needs of marginalized groups.

For company-based operational grievance mechanisms, one way in which to ensure that these mechanisms are responsive to the needs of rights-holders is for States to mandate that corporations undertake human rights due diligence, consisting of an obligation to identify, prevent, mitigate, and

¹ General Assembly, *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* (16 December 2005) A/RES/60/147 at 4-5 (s. 3), available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/60/147.

² United Nations Human Rights Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (2011) at 27, available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

³ Gwynne Skinner, Robert McCorquodale, & Olivier De Schutter, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (December 2013) at 25-6, available at <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58657dfa6a4963597fed598b/1483046398204/The-Third-Pillar-FINAL1.pdf> [The Third Pillar].

⁴ *Ibid* at 30.

⁵ Amol Mehra, *Director’s Letter: Roadmap for a Rights-Based Economy* (13 March 2017), available at <https://www.icar.ngo/news/2017/2/24/rules-for-a-rights-based-economy>.

account for how they address their impacts on human rights. Through this process, companies can better understand the experiences and expectations of the rights-holders to most effectively participate in the remedial process.⁶ By mandating publication or disclosure of this due diligence, including the policies, practices, results, and any prevention or mitigation taken to address the risks, States can ensure public accountability for the ways that companies engage with rights-holders in the delivery of remedy.⁷ This information will also assist States in understanding the challenges that victims face, enabling governments to reform their own remedial mechanisms to make them more effective.

The due diligence obligation must be broad, encompassing the entities with which the company has a business relationship, such as a subsidiary, supplier, or contractor.⁸ It is also important that the obligation is not just an “on paper” compliance policy. Companies must adopt and apply adequate and effective measures in relation to all human rights risks from the top down, with accountability mechanisms in place for management, and ideally a fiduciary duty for directors.⁹

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

States have a duty to regulate businesses to ensure that they respect human rights. This duty also requires States to create avenues of civil and criminal remedy, judicial and non-judicial as appropriate. Such mechanisms must be supported by laws that give victims of corporate human rights violations the ability to bring claims against their abusers. These laws must then have adequate support and be fully enforced.

Access to effective remedy is necessary to ensure both that victims are compensated for harms suffered, but also as a deterrence mechanism, incentivizing companies to comply with the law. States should incorporate human rights into their national laws, policies, and institutions to ensure that these dual purposes are met.

National Action Plans on Business and Human Rights (NAPs), where based in stakeholder engagement, provide a platform to centralize and clarify existing avenues of remedy and make commitments to strengthen them.¹⁰ NAPs offer States an overarching mechanism through which they can implement policies and legislation to address the preventive element of remedy and reform both non-judicial and judicial systems to ensure access to justice.

NAPs are not stationary instruments, but must be revised on an ongoing basis. In implementing NAPs, States must ensure that they are reflective of and offer protection to vulnerable and marginalized groups. This includes measures to prevent attacks against rights defenders and make certain that they

⁶ Olivier De Schutter et al., *Human Rights Due Diligence: The Role of States* (December 2012) at 1, available at <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58671817d2b857fd0d141820/1483151386977/Human-Rights-Due-Diligence-The-Role-of-States.pdf> [HRDD].

⁷ *Ibid* at 43.

⁸ The Third Pillar, *supra* note 3 at 91.

⁹ HRDD, *supra* note 6 at 61-2.

¹⁰ The Danish Institute for Human Rights (DIHR) & The International Corporate Accountability Roundtable (ICAR), *National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks* (June 2014) at 1-3, available at <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/5865d59fe6f2e17f4f0cb629/1483068841826/DIHR-ICAR-National-Action-Plans-NAPs-Report3.pdf>.

are supported, consulted, and free from aggressions, harassment, restrictions, interference, and barriers to justice.¹¹

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?*¹²

As outlined above, both home and host States have a duty to ensure that victims of corporate human rights abuses have access to remedies, whether judicial or non-judicial, although recognizing that judicial mechanisms are at the core of access to remedy. For victims to access civil judicial remedy, States should put in place legislation providing victims with a cause of action for violations of their human rights. Where such legislation is subject to a limitation period, its effects must be clear and it should still provide sufficient time for victims to be identified and retain counsel, as well as for information about the violations to be gathered. Moreover, courts should not apply the doctrines of immunity or non-judiciability where their effects would limit victims' right to remedy. Evidence must be accessible and parties should be granted broad rights of discovery. Legal aid should be made available and costs awards in public interest cases should be limited. To provide effective deterrence and ensure financial viability of these cases, States should allow for collective redress mechanisms and punitive damages.

Where the judicial systems in host States are unable to provide victims with effective remedy, home State courts must be accessible to victims to sue corporations and their subsidiaries connected to the jurisdiction for harms suffered and for any failure to conduct due diligence to prevent these abuses. To do so, home States need to restrict the use of the doctrine of *forum non conveniens*, such that courts will assert jurisdiction where a home State judicial system is the only means by which victims may be able to obtain effective remedy. Similarly, in choosing the law to be applied, whether of the home or host State, courts must ensure that it provides an effective remedy. Prioritizing remedy may also require legislation making it easier to hold parent companies accountable for the human rights abuses of their subsidiaries, contractors, and suppliers, disregarding the concept of limited liability where it prevents victims from accessing effective remedy.¹³ Furthermore, to enable victim and witness testimony, home States may need to create special visas or facilitate appearances by video link.

On the criminal side, States must prioritize prosecutions for corporate human rights abuses by creating an environment that enables law enforcement to pursue corporate actors. This entails the implementation of legislation that provides for corporate liability, as well as ensuring that law enforcement have the requisite skills, knowledge, tools, and networks to hold corporations accountable.

¹¹ International Service for Human Rights (ISHR) & International Corporate Accountability Roundtable (ICAR), *Human Rights Defenders in National Action Plans (NAPs) on Business and Human Rights: A Thematic Supplement to 'National Action Plans on Business and Human Rights: A Toolkit for the Development, Implementation, and Review of State Commitments to Business and Human Rights Frameworks'* (June 2016), available at <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/58f8dbffe6f2e1522bb9fa9a/1492704259220/HRDs+English+FINAL.pdf>.

¹² Our response to this question and the following is generally taken from The Third Pillar, *supra* note 3 and Amnesty International & The International Corporate Accountability Roundtable (ICAR), *The Corporate Crimes Principles: Advancing Investigations and Prosecutions in Human Rights Cases* (October 2016), available at <http://www.commercecrimelhumanrights.org/wp-content/uploads/2016/10/CCHR-0929-Final.pdf> [The Corporate Crimes Principles].

¹³ Gwynne Skinner, *Parent Company Accountability: Ensuring Justice for Human Rights Violations* (November 2015) at 24, available at <https://static1.squarespace.com/static/583f3fca725e25fcd45aa446/t/591c8ebdbf629a23e7e35da0/1495043779017/PCAP+Report+2015.pdf>.

Corporations themselves, along with their officers and directors, should be subject to liability for crimes committed and for any failure to act with due diligence to prevent such crimes. This liability should extend to a corporation's entire group and global operations, recognizing the principle of command responsibility. Prosecutors should be prepared to collaborate across jurisdictions and may need to take extra steps to ensure that victims, informants, whistleblowers, witnesses, and experts are protected.¹⁴ Both the charges and sentences should match the gravity of the crimes and the process should provide for victim compensation, whether financial or otherwise. Finally, where prosecutors decide not to act, their decisions must be subject to judicial review in a process that is both accountable and transparent.

Just as judicial systems are key to remedy, they can also be used as a tool for suppression. States should introduce legislation that prevents the use of Strategic Lawsuits Against Public Participation (SLAPPs).

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

Businesses' responsibilities with respect to effective remedy include actively engaging in efforts to identify, prevent, mitigate, and account for the harms that they and their subsidiaries, suppliers, and contractors may be involved in. They should also cooperate fully with any criminal, regulatory, and/or civil investigations. This cooperation may entail clarifying corporate structures, including foreign assets, disclosing evidence, and/or providing plaintiffs with access to broad discovery. Companies must also acknowledge the power dynamics at play in their operations. This means that they should avoid any actions which might influence in any way the avenues of available remedy. This obligation must be construed broadly as a general limitation on corporate lobbying with respect to remedy.

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

Please see our response to question 5.

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

Civil society plays an important role facilitating access to effective remedy for victims of human rights abuses. It acts as a bridge between victims, who may be located in host States, and remedy, which may only be available in home States or internationally. For this reason, it is necessary for these organizations to be granted third party standing in judicial proceedings concerning corporate human rights abuses and other public interest litigation.

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

¹⁴ Anita Ramasastry & Robert C. Thompson, *Commerce, Crime, and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries* (September 2006) at 28, available at http://www.fao.no/media/com_netsukii/536.pdf.

Please see our response to question 1. Reparations may satisfy the substantive aspect of a remedy, but care must be taken to ensure that they also reflect the procedural side. Their distribution must account for the linguistic, cultural, and geographic background of the victims being compensated. In certain cases, the allocation of financial resources may cause conflict within a community and could even lead to re-victimization. Victims must therefore be at the heart of assessing and implementing reparations.

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.

The *Corporate Crimes Principles* contain many such examples. For instance, the International Criminal Court's involvement in a "first responders" project demonstrates how law enforcement can strategically position itself to collaborate more closely with NGOs, journalists, forensic scientists, and health professionals on the ground to ensure quick and effective access to potential evidence. Evidence is key to ensuring that victims of corporate human rights abuses can access effective judicial remedy.¹⁵

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.

While ICAR was unable to incorporate all its feedback into this response due to world limit restrictions, it would be pleased to offer additional comments or clarifications as required. For more information, please contact Heather Cohen, Legal and Policy Associate, at heather@icar.ngo.

¹⁵ The Corporate Crimes Principles, *supra* note 12 at 33.