



Accountability and Remedy Project *Concept Note and Agenda* South Africa Sub-Regional Consultation

3-4 September 2019
Holiday Inn Sandton, Rivonia Rd, 123, Sandton, 2196
Tanzanite Room

Improving accountability and access to remedy for victims of business-related human rights abuse through non-judicial grievance mechanisms

Introduction

States are the primary actors responsible for protecting those within their territory and/or jurisdiction from business-related human rights abuse and ensuring that those harmed have access to effective remedy. As the UN Guiding Principles on Business and Human Rights (UNGPs) recognize, effective **judicial mechanisms** are at the core of ensuring access to remedy. As such, numerous processes have rightly focused on enhancing the effectiveness of such mechanisms (e.g., the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (i.e., the treaty process),¹ and the first phase of the OHCHR Accountability and Remedy Project (ARP I)²). Nevertheless, **non-judicial mechanisms** can have a role to play in complementing and supplementing judicial mechanisms, in part to provide those harmed by business-related activity with different options for seeking remedy. During this two-day consultation, participants will explore a number of issues relating to **the use of non-judicial mechanisms in cases of business-related human rights abuse**, focusing, in particular, on the work OHCHR has been conducting as part of its Accountability and Remedy Project.

The OHCHR Accountability and Remedy Project

Since 2014, the UN Human Rights Council has made several requests to OHCHR to work to improve access to remedy for victims of business-related human rights abuses through enhancing the effectiveness of both judicial and non-judicial mechanisms.³ The work done in response to these requests has been come to be known as the Accountability and Remedy Project (ARP). Each phase of ARP (see Box 1 below) seeks to deliver credible, workable, and practical recommendations as to steps that can be taken to strengthen the implementation of the UNGPs in the area of access to remedy.

¹ <https://www.ohchr.org/EN/HRBodies/HRC/WGTransCorp/Pages/IGWGOntNC.aspx>.

² A/HRC/32/19 (2016); A/HRC/32/19/Add.1 (2016).

³ OHCHR has received three mandates from the Human Rights Council, with each one corresponding to one of the three categories of grievance mechanism referred to in the UNGPs: A/HRC/RES/26/22 (2014) (State-based judicial mechanisms); A/HRC/RES/32/10 (2016) (State-based non-judicial grievance mechanisms); A/HRC/RES/38/13 (2018) (non-State-based grievance mechanisms).

Box 1: OHCHR Accountability and Remedy Project: Overview and Timeline

People who suffer business-related human rights abuses have a right to an effective remedy. The UN Guiding Principles on Business and Human Rights divide the various mechanisms through which remedy may be sought into three main types: (i) **State-based judicial mechanisms** (i.e., courts and court-like institutions), (ii) **State-based non-judicial mechanisms** (e.g., national human rights institutions, regulators, labour inspectorates), and (iii) **non-State-based grievance mechanisms** (e.g., operational-level grievance mechanisms).

Each phase of the OHCHR Accountability and Remedy Project has been requested by the UN Human Rights Council through consensus resolutions⁴ and has focused on one of these types:

ARP I: Judicial mechanisms (2014 – 2016): The first phase of ARP focused on corporate accountability and access to remedy through **State-based judicial mechanisms**. Judicial mechanisms were selected as the starting point for OHCHR's work because they are the chief means through which victims seek remedy, and the effectiveness of other mechanisms often depends on the effectiveness of judicial mechanisms. OHCHR submitted its final report to the UN Human Rights Council in June 2016.⁵

ARP II: State-based non-judicial mechanisms (2016 – 2018): The second phase of OHCHR's work identified and analyzed lessons learned, best practices, challenges and possibilities to improve the effectiveness of **State-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights, including in a cross-border context**. Examples of relevant State-based non-judicial mechanisms (which provided the focus of ARP II) include national human rights institutions, labour inspectorates, employment or environmental tribunals, consumer protection bodies, public health and safety bodies, and professional standards bodies. OHCHR submitted its final ARP II report to the Council in June 2018.⁶

ARP III: Non-State-based grievance mechanisms (2018 – present): The third, and current, phase of ARP has been focusing on identifying and analyzing challenges, opportunities, best practices and lessons learned with regard to **non-state-based grievance mechanisms that are relevant to the respect by business enterprises for human rights**. In November 2018, OHCHR released a detailed paper outlining the scope of ARP III,⁷ which indicates the three types of mechanisms focused on for the project:

- **Company-based grievance mechanisms:** mechanisms established and administered by companies;
- **Grievance mechanisms developed by industry, multi-stakeholder, or other collaborative initiatives:** mechanisms external to companies that administer a set of commitments that the companies have agreed to adhere to; and
- **Mechanisms associated with development finance institutions:** mechanisms through which those adversely impacted by institution-financed projects can seek remedy (e.g., independent accountability mechanisms).

OHCHR will be reporting its findings arising from ARP III to the Council in June 2020.

OHCHR's findings arising from the two completed phases of work (which related to State-based grievance mechanisms) have been distilled into a series of "**policy objectives**," supported by "**elements**" intended to demonstrate the different ways that those objectives can be achieved in

⁴ *Id.*

⁵ A/HRC/32/19 (2016); A/HRC/32/19/Add.1 (2016).

⁶ A/HRC/38/20 (2018); A/HRC/38/20/Add.1 (2018).

⁷ <https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf>.

practice. This deliberately flexible format was chosen to be readily adaptable to different legal systems and contexts, while also being practical, forward-looking and reflective of international standards on access to remedy. It was designed with several potential applications in mind, including to inform the work of practitioners, policymakers, and international bodies with mandates relevant to business and human rights, including human rights treaty bodies and the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights.

Sub-Regional Consultation: Scope and Aims

The aim of this consultation is to explore the various ways in which State and non-State actors can contribute, both individually and collaboratively, to the development and maintenance of effective alternatives to judicial mechanisms to resolve grievances arising from business-related human rights harms taking place in **Southern Africa**, and ultimately to provide those affected with an effective remedy.

Participants will have an opportunity to provide feedback on practical insights and issues arising from the recommendations published at the conclusion of ARP II (2018), as well as the key focus areas identified for ARP III.⁸ The discussions on ARP III will feed directly into OHCHR's ongoing work, to be presented to the Human Rights Council in June 2020.

The consultation will focus, in particular, on getting a sub-regional perspective on:

- The **key elements** of “effective” non-judicial grievance mechanisms (both State-based and non-State-based);
- **Raising awareness** among affected individuals and communities about their rights and how to access the different mechanisms that may be available;
- Special considerations to take into account in **challenging operational contexts**;
- Achieving **effective and rights-compatible representation** of communities and their members;
- The **role of national human rights institutions (NHRIs)** in improving and strengthening non-judicial mechanisms (both State-based and non-State-based);
- Ways to develop more realistic and readily identifiable **pathways to effective remedies**, (including through a combination of judicial and non-judicial approaches);
- **Effective consultation** with affected individuals and communities in order to deliver full and effective reparations for harm; and
- The **role of the State** (including its rule-making and law enforcement bodies) in providing a **supportive “regulatory ecosystem”** for non-judicial mechanisms.

Non-State-based grievance mechanisms (ARP III)

The first 1-1.5 days of the consultation will focus on OHCHR's current work into the effectiveness of **non-State-based grievance mechanisms**. Depending on the circumstances involved, non-State-based grievance mechanisms may offer certain advantages over State-based mechanisms. For instance, the adjudicative or dialogue-based processes used by **industry associations and multi-stakeholder initiatives** can offer potential benefits in terms of **speed of access and remediation, reduced cost and/or transnational reach**. Additionally, **company-based grievance mechanisms** operated by (or on behalf of) business enterprises can support **the identification of adverse human rights impacts** and the **early and direct remediation of harms** by the business enterprise concerned, thereby **preventing harms from compounding and grievances from escalating**.

⁸ See *id.* at pp. 17-30.

In reality, however, the potential of non-State-based grievance mechanisms is rarely realized for those harmed by business-related human rights abuses, who **continue to struggle to achieve effective remedies for the harms they have suffered**. The remedies that may be achievable through non-State-based mechanisms are **uncertain, patchy and, in many cases, inadequate**. Rectifying these problems will require **renewed and concerted efforts** from those administering non-State-based grievance mechanisms, in **close consultation with potentially affected individuals and communities** and other stakeholders.

The domestic regulatory environment for such mechanisms is important too. Although State institutions are generally not closely involved in the establishment, design and day-to-day running of non-State-based grievance mechanisms, the **laws, policies, actions and non-actions of State institutions can have profound implications for the effectiveness of non-State-based grievance mechanisms in practice**. Supporting the establishment of effective non-State-based grievance mechanisms, and facilitating access to them, is potentially a key way in which States can **improve access to remedy** for business-related human rights abuse as part of a “**smart mix**” of legal and policy interventions.

State-based non-judicial mechanisms (ARP II)

The remainder of the consultation will focus specifically on enhancing the effectiveness of **State-based non-judicial mechanism** (in particular NHRIs). State-based non-judicial mechanisms may take many different forms and can be found at all levels of government: local, regional and national. While some have mandates relating to all human rights, many are specialized bodies that focus on specific human rights-related themes, such as labour rights, non-discrimination, consumer rights, the right to privacy, environmental rights, or the rights to water or to health.

Between 2016 – 2018, OHCHR identified and analyzed lessons learned, best practices, challenges and possibilities to improve the effectiveness of State-based non-judicial mechanisms. In conducting this work, there was a particular focus on the role of NHRIs in acting as grievance mechanisms, but also in facilitating access to other non-judicial mechanisms. Thus, the ARP II work was largely informed by the experiences of, and targeted to, NHRIs.

In June 2018, OHCHR submitted its final ARP II report to the Human Rights Council, in which it sets out a series of recommended actions as to the various ways in which the effectiveness of these mechanisms, both individually and collectively, might be improved. In this session, participants will be invited to reflect on the various ways in which these recommended actions can be harnessed by different stakeholder groups to improve access to remedy using these mechanisms in the Southern Africa region. Particular attention will be paid to the role of NHRIs, both as a potential source of remedy in themselves, and as a key point of liaison between rights-holders, other State-agencies, and non-State actors (including companies).



Agenda

Day 1 (3 September 2019)	
8:00 – 9:00	Registration and Coffee/Tea
9:00 – 9:30	Welcome and Introductions
9:30 – 10:30	Overview of the UN Human Rights system's work on access to remedy <ul style="list-style-type: none"> • OHCHR Business and Human Rights Section (and the Accountability and Remedy Project) • UN Working Group on Business and Human Rights • Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights • OHCHR field presences • Q&A
10:30 – 10:45	<i>Coffee / Tea Break</i>
10:45 – 12:30	Session 1: Focus on effectiveness <ul style="list-style-type: none"> • Key elements of effectiveness (UNGP 31) • Insights from ARP III work so far • What are the key challenges to effectiveness of non-State-based mechanisms in the Southern Africa context, and how can these be addressed? • Protecting people from intimidation or reprisals as a result of having accessed private grievance mechanisms: What practical steps can be taken? • Special considerations in: <ul style="list-style-type: none"> ○ Particular sectors (e.g. extractive sectors) ○ Particular operating contexts (e.g. areas of weak governance) ○ Relation to particular adverse human rights impacts (e.g. arising from pollution, lack of access to water) <p><i>Discussion Questions</i></p> <ul style="list-style-type: none"> • <i>What do you see as the main challenges to the effectiveness of private grievance mechanisms in the Southern Africa context?</i> • <i>Do the nature and scale of these problems alter depending on the</i> <ul style="list-style-type: none"> ○ <i>Sector involved;</i> ○ <i>Nature of the adverse human rights impacts;</i> ○ <i>People or communities affected; and/or</i> ○ <i>Operating context (e.g., areas of weak governance)?</i> <p><i>If so, how?</i></p> <ul style="list-style-type: none"> • <i>What are some examples of, or concrete suggestions for, overcoming these challenges?</i>
12:30 – 13:30	<i>Break for Lunch</i>
13:30 – 14:45	Session 2: Representation of communities <ul style="list-style-type: none"> • Effective and rights-respecting representation in different cultural and operating contexts

	<ul style="list-style-type: none"> • Group actions: Common challenges <ul style="list-style-type: none"> ○ Strategies for engaging effectively with large groups ○ Dealing with disagreements between complainants ○ Safeguarding from retaliation and intimidation <p><i>Discussion Questions</i></p> <ul style="list-style-type: none"> • <i>What steps are needed to ensure that a person claiming to represent a person or group does indeed have the consent of that person (or those people) to act on their behalf?</i> • <i>What steps are needed to ensure that decisions about (i) procedures for resolving a grievance, and (ii) outcomes of grievance processes are arrived at in an inclusive and rights-respecting way?</i> • <i>What particular challenges arise in cases involving large groups of complainants, and how are these addressed?</i>
14:45 – 15:00	<i>Coffee / Tea Break</i>
15:00 – 16:15	<p>Session 3: Supporting Actors: How different organizations and institutions can help improve access to effective remedy using non-State-based grievance mechanisms</p> <ul style="list-style-type: none"> • The role of non-State actors (e.g., civil society, legal profession, academics, standard-setting bodies, multi-stakeholder initiatives) <ul style="list-style-type: none"> ○ Practical support to users ○ Advocacy ○ Guidance as to the local context ○ Information sharing and liaison ○ Research, and piloting and testing new initiatives ○ Building supportive networks <p><i>Discussion Questions</i></p> <ul style="list-style-type: none"> • <i>How would you assess the performance of the non-State-based grievance mechanisms you have encountered in your work?</i> • <i>Where is there a need for development?</i> • <i>How can your type of organization / institution contribute to more effective use of existing, and the development of more effective, non-State-based grievance mechanisms for resolving human rights grievances in the Southern Africa region?</i> • <i>What changes are needed to make your type of organization / institution more effective in this space?</i>
16:15 – 16:30	Wrap up and close

Day 2 (4 September 2019)	
8:30 – 9:00	Morning Coffee/Tea
9:00 – 9:30	Welcome and Overview of ARP II <ul style="list-style-type: none"> • Methodology • Consultation processes • Key findings and recommended actions: format, applications and uses
9:30 – 10:45	Session 4: NHRIs: Front-line actors in the drive to improve access to remedy for business-related human rights abuses (ARP II) <ul style="list-style-type: none"> • Comparing and contrasting mandates <ul style="list-style-type: none"> ○ Complaints processes ○ Investigations • Exploring the role of NHRIs in supporting and strengthening State-based remedial mechanisms (judicial and non-judicial) <ul style="list-style-type: none"> ○ Recommendations to State agencies (e.g. regarding better regulation) ○ Information sharing, referrals, and other cooperation ○ Monitoring implementation of remedies ○ Expert testimony ○ Advocacy ○ Specialist knowledge and expertise (e.g. with respect to safeguarding, improving accessibility, etc.) ○ Advisory role • Limiting factors on NHRIs' roles, performance, and impact • Suggestions for improvement and reform • Sub-regional cooperation • Items for inclusion in National Action Plans <p><i>Discussion Questions</i></p> <ul style="list-style-type: none"> • <i>In which ways can NHRIs act as remedy providers?</i> • <i>What are some of the benefits / limits of accessing remedy through NHRIs?</i>
10:45 – 11:00	<i>Coffee / Tea Break</i>
11:00 – 12:30	Session 5: The role of NHRIs in relation to non-State-based grievance mechanisms (ARP III) <ul style="list-style-type: none"> • Exploring the role of NHRIs in supporting and strengthening non-State-based grievance mechanisms <ul style="list-style-type: none"> ○ Advice and guidance (e.g. on design of mechanisms, suitable remedies in individual cases, etc.) ○ Exchange of local knowledge and specialist expertise ○ Training and capacity building ○ Help lines and referrals ○ Advocacy ○ Monitoring the implementation of remedies • Are there limits on the kinds of issues that private grievance mechanisms should be addressing? • What more can or should be done? • Sub-regional cooperation <p><i>Discussion Questions</i></p> <ul style="list-style-type: none"> • <i>In which ways can NHRIs facilitate access to effective remedy through non-State-based grievance mechanisms?</i>

	<ul style="list-style-type: none"> • <i>What is / should be the role of NHRIs in relation to supporting the development or use of private grievance mechanisms?</i> • <i>How can civil society work with NHRIs to improve remedy-seekers' ability to obtain effective remedies through private grievance mechanisms?</i>
12:30 – 13:30	<i>Break for Lunch</i>
13:30 – 15:15	<p>Session 6: The vital role of the State in ensuring realistic remedy pathways for affected people and communities</p> <ul style="list-style-type: none"> • The concept of a “remedy pathway” • Legal and structural limitations of individual mechanisms (and hence the importance of providing flexibility and choice) • The role of States in ensuring that remedy pathways are realistic, accessible, and readily identifiable • “Policy coherence:” What is it and how does it relate to access to remedy? • How different domestic regimes can affect the performance of non-judicial remedial mechanisms in practice • Managing referrals to and from different types of grievance mechanisms: The importance of a “rights compatible” approach • Focus on domestic legal regimes relevant to safeguarding: Protection of people and communities from intimidation and reprisals • Special considerations in challenging operational contexts • Recognition of non-State-based grievance mechanisms in domestic and international regulatory regimes <p><i>Discussion Questions</i></p> <ul style="list-style-type: none"> • <i>In what ways can the law sometimes operate to limit choices of remedy-seekers about how to resolve their grievances?</i> • <i>Do you know of any cases where remedy-seekers have simultaneously sought to access both judicial and non-judicial mechanisms in relation to a business-related human rights grievance? What challenges did this give rise to? And how were these resolved?</i> • <i>Are there any situations in which it would be appropriate to ask remedy-seekers to waive their rights to seek further legal remedies? If so, what legal precautions would need to be observed?</i>
15:15 – 15:30	Wrap up and close