Reflections on the theme of the 2017 Forum on Business and Human Rights

Launch of the 2017 UN Forum blog series

By the UN Working Group on Business and Human Rights

Introduction

The annual Forum on Business and Human Rights is the UN's platform for multi-stakeholder dialogue to assess the progress made by states and business enterprises in moving the three pillars of "Protect, Respect and Remedy" of the Guiding Principles on Business and Human Rights from paper to practice. The 2017 edition of the Forum (27-29 November, 2017, Geneva, Switzerland) will focus on Pillar III of the Guiding Principles: *the need to ensure access to effective remedies for victims of business-related human rights abuse*.

In this note, launching the 2017 Forum blog series, the UN Working Group on Business and Human Rights provides some further reflections on the theme of the 2017 event, complementing the background information set out in the concept note of the Forum.

What is the focus of the 2017 Forum?

Under the theme of *"Realizing Access to Effective Remedy"*, the Forum will examine gaps and shortcomings in existing efforts as well as emerging good practices and innovations to ensure access to effective remedy, with a view to promoting policy coherence and committed action in the service of human rights and rights-holders. Discussions will cover the full range of mechanisms envisaged under the third pillar of the Guiding Principles: state-based judicial mechanisms, state-based non-judicial grievance mechanisms, and non-state-based grievance mechanisms (including those involving companies, industry bodies, multi-stakeholder initiatives and regional and international institutions).

Why focus on access to remedy?

Since the endorsement of the Guiding Principles, access to remedy has been regularly described as the "forgotten pillar". Yet, unless victims of adverse business-related human rights impacts have access to effective remedies, the state duty to protect human rights and the corporate responsibility to respect human rights become meaningless in practice. The need to make progress in translating the third pillar of the Guiding Principles from paper to practice is perhaps *the* most burning issue in the current business and human rights agenda. Immediately after the unanimous endorsement of the Guiding Principles in 2011, significant efforts were made to clarify, implement and/or incentivize corporate respect for human rights. More recently, there has been an increased focus on clarifying

the duty of states to protect against business-related human rights abuse, most notably through national action plans. While both pillars one and two of the Guiding Principles need much more continued work, we consider that it is high time for the UN Forum to pay dedicated attention to the topic of access to remedy.

"Forgotten" is no longer an accurate description of the third pillar, as a great deal of new remedy-focused initiatives and implementation efforts have been launched in the past few years. Good practices and innovations (however nascent) must now be explored to improve the situation further and faster. A number of challenges should be overcome to make progress. First, there is a need for both states and businesses to "walk the talk" on realizing effective remedies, and ensuring that rights-holders as well as human rights defenders do not get victimized in the process of seeking remedies. Second, as various efforts and actors chart their own paths and propose solutions to address existing barriers to remedies, there is a need to avoid "fragmentation" and ensure alignment between diverse mechanisms and efforts. In this regard, there are a large number of efforts focused on remedy and access to justice that are not necessarily labelled as business and human rights, but are still very relevant. Third, there is a need to overcome the "trust deficit" amongst diverse actors which hinders dialogue and collaborative problem-solving among governments, civil society, businesses and victims about how to realize the third pillar of the Guiding Principles. The 2017 Forum seeks to be a positive force in overcoming these and other challenges in realizing effective remedies.

What are key objectives of Forum discussions on access to remedy?

A central aim of the Forum discussions on access to remedy will be to facilitate coherence, mutual trust and committed action in realizing access to remedy. Discussions will seek to break down silos (across or within stakeholder groups or individual institutions) and create foundations for collective action that involves victims, businesses, civil society and states. In doing so, sessions will aim to:

- Deepen understanding about the meaning of access to effective remedies under the Guiding Principles, including how this goal interacts with the state duty to protect and the corporate responsibility to respect human rights.
- Encourage states to strengthen access to effective remedies for business-related human rights abuses, including by removing barriers to judicial and non-judicial remedies and improving cooperation in cross-border cases.
- Create a robust and productive space for mutual learning from exchanges around specific cases, recurring events, state and business practices, and the experiences of victims, other affected stakeholders and civil society.
- Heighten participants' appreciation of current state of play of pillar III implementation (shortfalls, challenges and current practices) and of how diverse mechanisms should and could interact with each other in a coherent manner.
- Highlight innovations (existent and emerging) in realizing effective remedies, identifying conditions that enable effective remedial mechanisms, lessons that can be applied in comparable contexts, and possibilities for scaling and replication.

- Identify the most significant capacity and capability gaps (whether on the part of states, businesses, CSOs, trade unions, vulnerable groups or human rights defenders) to achieve effective remedial outcomes for rights-holders, and explore practical ways to address those gaps.

- Consider how the issue of access to effective remedies under the Guiding Principles interacts with other spheres, including the 2030 Agenda for Sustainable Development and policy areas such as the international investment regime.

What are some key considerations and assumptions?

Some key considerations underlying our thinking behind the theme of the 2017 Forum are:

- **Access to effective remedy and accountability mechanisms are pre-requisites for realizing human rights and achieving sustainable development.** While many of the biggest challenges for access to justice and accountability are not specific to the business and human rights context, in many cases business-related human rights impacts and the influence of business amplify wider rule-of-law challenges, where victims continue to face multiple and serious barriers to remedies.
- **Engaging directly with victims and their representatives, in particular from the Global South, is critical to ensure that their voices are heard** and that remedies are responsive to the needs of victims.
- **Discussions on solutions need to consider gender aspects and challenges faced by groups and individuals that may be particularly at risk** of abuse, such as, among others, children, human rights defenders, indigenous peoples, LGBTI persons, minorities, migrant workers, persons with disabilities, refugees and women.
- **Business actors also have a role to play in dialogue on access to remedy beyond operational-level grievance mechanisms**.
- **There is no single-mechanism solution for access to effective remedies**. The Guiding Principles set out multiple substantive forms that remedy for victims of human rights-related abuse can take and three different types of mechanisms: i) state-based judicial mechanisms; ii) state-based non-judicial mechanisms; iii) non-state-based non-judicial mechanisms, including operational-level grievance mechanisms. Within each of these, there are diverse and constantly evolving mechanisms and frameworks.
- **The need for increased state leadership and action is critical to improve access to effective remedy**. States have a fundamental and central role in delivering effective remedies, and the existing NAPs on business and human rights have so far given scant attention to this. As explained in the Guiding Principles, effective judicial mechanisms are at the core of ensuring access to an effective remedy. In this regard, OHCHR guidance in the form of a series of policy objectives identify actions that could be taken by states to improve access to remedy for business-related human rights abuses. Moreover, as set out in the Guiding Principles, state-based non-judicial mechanisms provide an essential complementary role as a means of achieving accountability and access to remedy in cases of business-related human rights abuses. A project led by OHCHR based on Human Rights Council resolution 32/10 examines ways to improve effectiveness of such mechanisms.

- **One aspect of more effective state leadership concerns the need to improve cross-border cooperation** between states with respect to law enforcement, which was addressed in a 2017 report by the Working Group.
- **There is a need to further elaborate what constitutes an "effective remedy" in the context of business-related human rights abuses.** Guiding Principle 25 explains that remedies "may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition." Further unpacking practical implications – not least by taking into account the experiences of victims – is an important task for the business and human rights community and is being addressed in the Working Group's forthcoming report to the UN General Assembly.
- **There has been a recent expansion of projects, efforts and proposals focused on enhancing access to remedy**, involving civil society, regional organizations, the UN and other international organizations.[1] However, as the various efforts chart their own paths and propose solutions to address existing barriers to remedy, there may be a risk of fragmentation and lack of coherence in diverse approaches. There is, therefore, a need to ensure more dialogue on the respective roles of and interaction between diverse remedial mechanisms, including those that are not necessarily labeled or understood as "business human rights" mechanisms in a narrow sense.
- **There is a need to explore more practice-based and practice-oriented solutions involving business**, including through sector-specific approaches. Promising examples of remediation solutions can be found in different contexts, and there are opportunities for cross-industry dialogue and peer learning.
- Given the special role of the financial sector in relation to virtually all other sectors, **it is important to explore further how entities in the financial sector should think about remedy**. A key reference in this regard is new guidance from OHCHR on the role of banks in relation to access to remedy.
- **Learning from concrete cases – both cases of promising engagement as well as instances where things have gone wrong – is instructive** for identifying practical solutions and examples, both to learn from mistakes and to replicate good practice or develop new models. In such cases, it is critical to hear from all voices, including from victims and companies. Dialogue about real human rights harms is never easy. However, when done in a constructive and forward-looking manner, multi-stakeholder dialogue and collaboration can be a powerful driver of change, even if perfect outcomes seldom are achieved in the real

[1] Efforts and developments include the NGO campaign and ongoing UN process to elaborate a treaty on business on human rights; the OHCHR's Accountability and Remedy Project and 2016 report and recommendations to the Human Rights Council; the 2016 Council of Europe access to remedy resolution; developments at the Inter-American Court citing the Guiding Principles as evidence of state duties; the exponential growth in use of OECD National Contact Points to advance human rights claims; development of tools to address corporate crimes; proposals for an international tribunal; numerous private initiatives to establish operational-level or industry mechanisms; the 2016 Human Rights Council resolution mandating OHCHR to undertake a project on the effectiveness of state-based non-judicial mechanisms that are relevant for the respect by business enterprises for human rights ; the 2017 opinion by the EU Fundamental Rights Agency; the 2017 consultations and reports of the Working Group; and more. (See also the live list of information about ongoing projects and initiatives submitted to the 2017 Forum).

world. Identifying and encouraging such dialogue is key for the Forum, while bearing in mind the public and time-limited nature of the Forum sessions.

- **There is a need to explore innovations both with regard to community-based approaches and the role and potential of specific actors**, such as human rights defenders, trade unions, lawyers, the financial sector, multi-stakeholder initiatives, and national human rights institutions.
- **A key issue is to examine how to design operational-level grievance mechanisms that are consistent with the Guiding Principles'** effectiveness criteria. There is a need for unpacking what these effective criteria mean in practice and how they interact with many complex challenges of setting up such mechanisms on the ground. One such aspect includes exploring ways to set up strategic and independent counsels for communities (including innovative funding models) and empower communities so that grievance mechanisms do not become an "off-ramp" for access to other avenues for remedy.
- **How multi-stakeholder initiatives address remedy in practice** remains an under-explored issue. However, there are emerging experiences with both company-level and multi-stakeholder mechanisms and remedy provision from which other multi-stakeholder initiatives should learn lessons.
- **Connections between the digital sphere and business and human rights are not new, but the issue is increasingly involving a range of industries as new platforms and technologies are on the rise.** This development brings with it new dilemmas and challenges as well as new opportunities, and a pertinent question is how information-gathering technologies and tools can be used most effectively to deliver remedy at an early stage, for example in the context of complex supply chains.
- **The access to remedy pillar cannot be considered in isolation**. The introduction to the Guiding Principles notes: "Each pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures…". Under the state duty to protect, states are not only required to prevent abuse but also to "…investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication". Among other things, remedy needs to be considered in the context of the "state-business nexus" (for example when state-owned enterprises and public financial institutions are involved). States need to be willing and able to ensure their own departments, ministries, and officials participate in legitimate remedial processes; as well as using their leverage to get responsible parties to deliver remedy. The need to ensure policy coherence also applies to the area of investment policy, where it is necessary to consider the access to remedy pillar in relation to bilateral or international investment agreements.
- **When it comes to the corporate responsibility to respect, the reality is that a majority of businesses are still in an early stage of getting human rights due diligence right.** With regard to realizing effective remedies, they have a number of responsibilities. The clearest role for the private sector is to provide for or cooperate with legitimate remedial processes where they cause or contribute to an adverse human rights impact, and establish effective operational-level grievance mechanisms. The Guiding Principles also expect companies to support the rule of law: "Business enterprises should not undermine states' abilities to meet their own human rights obligations, including by actions that might weaken the integrity of judicial processes".

- In sum, **it is important to explore how implementation (or lack of it) of the state duty to protect and the corporate responsibility to respect human rights inter-relate and may reinforce or undermine access to effective remedy**.

Will the 2017 Forum only be about access to remedy?

While the majority of Forum sessions will address the theme of realizing access to remedy, parts of the programme will cover other key issues and trends, in line with the Forum's mandate of providing a platform for discussing trends and challenges in implementation of the Guiding Principles. The 2017 Forum aims to facilitate broad stock-taking of developments in the area business and human rights, by also addressing issues such as:

- Where is state action on business and human rights heading (with a particular focus on the lens of access to remedy)?
- What is the state of play of with regard to human rights due diligence in practice, including across supply chains and among smaller and medium sized enterprises?
- What is needed to ensure that respect for human rights becomes the bedrock for the private sector contributions to the SDGs (including in relation to access to justice)?
- How can we ensure that human rights defenders working on corporate accountability issues are protected and supported and how can business play a positive role in this regard?

Moreover, an overall question for the Forum is how the business and human rights movement can better position itself and help building new coalitions for tackling some of today's greatest human rights challenges and providing a vision for the role of the private sector in delivering sustainable development based on respect for human rights.

Finally, the Forum also aims to be a place for "newcomers" to the business and human rights agenda and will include both introductory sessions and sessions to highlight practices and perspectives from "emerging markets".

Constructive multi-stakeholder dialogue: Launching the Forum blog series

To build common understanding of gaps and challenges as well as solutions around access to effective remedies, we aim to facilitate Forum dialogue that is conducted in a constructive and respectful way. This does not mean avoiding contentious topics, reducing divergent views or censoring inputs, but rather taking extra care to create a space for meaningful multi-stakeholder engagement, which is something that the Forum seeks to achieve. The Working Group recognizes that while achieving this objective is not easy, in particular when addressing real situations of business-related human rights impacts unfolding in complex environments, making sincere efforts is all the more necessary.

We have found that important ingredients for a meaningful and constructive dialogue are the needs to:

- hear different sides of the story,
- base dialogue on facts and lessons learned from practical experiences,
- address power imbalances,
- engage in good faith,

- explore innovations and new initiatives, and
- identify pertinent questions that can provide a better understanding of challenges and point toward developing solutions.

The Working Group seeks to facilitate dialogue at the Forum in this spirit. To extend this dialogue beyond the three days of the Forum and to help inform discussions at the event, the Working Group is launching a Forum blog series. It is meant to be an online **platform for pre-Forum dialogue around the themes and topics of the 2017 Forum to share information about ongoing work in an accessible way**. The blog will be hosted on the website of the Business and Human Rights Journal (BHRJ).[2] All stakeholders and interested parties are encouraged to contribute. For expressions of interest in contributing, please write to: David Birchall (BHRJ Journal fellow), bhrj[at]cambridge.org and cc: the UN Forum Secretariat, forumbhr[at]ohchr.org, indicating "Forum Blog" in the subject line.

The Working Group encourages all stakeholder groups to contribute, and hopes to see contributions from commentators in civil society, labour, business, government, international organizations, community groups, academia, lawyers and others. The diversity in contributions in terms of views, gender and regions is strongly encouraged. We hope the blog series will spur critical and creative thinking on the 2017 Forum theme, and look forward to the dialogue!

Background information

The Forum was established by the UN Human Rights Council in 2011 "to discuss trends and challenges in the implementation of the UN Guiding Principles on Business and Human Rights and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments or in relation to specific rights or groups, as well as identifying good practices" (resolution 17/4, paragraph 12).

The Forum is guided and chaired by the UN Working Group on Business and Human Rights and organized by its Secretariat at the Office of the UN High Commissioner for Human Rights (OHCHR). For questions about the Forum, contact: forumbhr@ohchr.org. Twitter: @WGBizHRs

[2] The blog platform is not an official UN Forum platform, and the UN Forum organizers take no responsibility for viewpoints expressed in the blog contributions. Publication of blog contributions does not entail endorsement of the authors or the viewpoints expressed. Contributions will be reviewed as they are received on a rolling basis. It may not be possible to publish all blog submissions if the number of submissions exceeds the capacity to review and process all submissions prior to the Forum. All contributors are expected to be guided by the objective of constructive dialogue, in line with the elements set out in this note by the Working Group. In particular, the Working Group encourages contributions that are solution oriented and focus on ways forward to ensure business respect for human rights. The blog will be cross-posted at the Business & Human Rights Resource Centre: https://business-humanrights.org/