

10. Remedy mechanisms

10.1 Right to effective remedy and reparation

Remediating abuses by business actors often poses important challenges to States, especially when transnational business entities are involved and when the so-called corporate veil allow business actors to escape liability. Specific difficulties may arise in cases in which there is a large group of (alleged) affected individuals or communities. More generally, “transnational” litigation is even more time and resource consuming than litigation in a purely domestic setting.

The future legally binding instrument shall therefore require States to take necessary steps to address these challenges and difficulties, prevent denial of justice and ensure the right of victims of abuses and violations to effective remedy¹ and reparation. Remedies shall thus be available and effective. For a remedy to be effective, those seeking it must have prompt access to an independent authority, which has the power to determine whether a violation has taken place and to order cessation of the violation and reparation to redress harm. Under the right to an effective remedy, victims must be ensured of the cessation of the violation and of “full and effective reparation... which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”². This implies, notably, that States should adapt and reform their domestic procedural laws and the administration of justice in order to address normative, procedural and practical obstacles. In particular, procedures allowing for group or class actions, and for public interest litigation should be put in place; legal aid schemes should be foreseen in litigation of business abuses; provisions should be made to enable to gather and use of evidence and testimonies across borders.

The submitting organisations recall that through ratification or accession to the IHRL treaties, all States branches of government are bound to the obligations. The judiciary has thus an essential role in ensuring the right to effective remedy in cases of abuses or violations in the context of business activities. It is therefore of utmost importance that justice actors, and in particular judges and lawyers, have the necessary knowledge about human rights standards, the obligations of their State, and enforce laws that prevent, protect against and /or remedy abuses of human rights by TNCs and other business entities. Justice actors have to be guaranteed independence and have to be accountable, especially as corruption may be a particular issue in the context of litigation involving business actors. In addition, judges have a specific role to play and a deep influence on the protection of rights and on the guarantee of the right to

¹ On access to remedy see: UDHR art. 8; the ICCPR (Article 2 (3)); Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Articles 13 and 14); the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6); the Convention on the Rights of the Child (Article 39); the American Convention on Human Rights (Articles 25 and 63 (1)); the African Charter on Human and Peoples’ Rights (Article 7(1)(a)); the Arab Charter on Human Rights (Articles 12 and 23); the European Convention on Human Rights (Articles 5 (5), 13 and 41); the Charter of Fundamental Rights of the EU (Article 47) and the Vienna Declaration and Program of Action (Article 27). Although the International Covenant on Economic, Social and Cultural Rights makes no express provision regarding remedy, the Committee has reaffirmed that an obligation to provide remedies is inherent in the Covenant, for example, in General Comment 9 on The Domestic Application of the Covenant, adopted in Dec. 1998, U.N. Doc. E/C.12/1998/24 (1998).

² The United Nations 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, establishes at its Principle 3 that “the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to: (a) Take appropriate legislative and administrative and other appropriate measures to prevent violations; (b) Investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law; (c) Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation; and (d) Provide effective remedies to victims, including reparation...”

an effective remedy, for instance, through the use of judicial doctrines such as the one of forum non conveniens under which cases, especially those with an extraterritorial dimension, may be dismissed by a court who considers that another one is better placed to hear the case. Another area in which judges have a particularly powerful interpretive and protective role concerns the cases in which States argue public or general interest to justify actions to the benefit of business activities to the detriment of the enjoyment of human rights of individuals and groups affected by these activities.

10.2 Types of remedies

Mechanisms aimed at ensuring accountability for abuses by corporate actors may take various forms. However, effective remedies must include judicial remedies as described above. Judicial remedies must be made available to all affected individuals and communities without discrimination to their financial or other situation. Non-judicial mechanisms can sometimes fail to bring effective redress and satisfaction to the alleged affected individuals and communities.

10.2.1 Judicial remedies

Judicial remedies themselves can be provided in different areas of law. Since the violations of human rights essentially involve a claim from an individual or group of individual against the State, constitutional and administrative remedies are of particular relevance. However, some domestic legal systems foresee the horizontal effect of constitutional human rights protections and thus victims may directly introduce a petition against a business actor. Additionally, especially in the context of business activities, civil and criminal remedies may play an important role in the redress of abuses of human rights.

- **Civil.** In the majority of domestic legal systems, civil remedies represent the most natural avenue for victims of abuses by business actors to claim their rights and obtain reparation, including compensation and damage awards. Depending on the system concerned, they can be pursued in parallel or in addition to criminal remedies. Civil law remedies may also be available in the context of consumer protection and may represent an important avenue for redress for abuses of rights committed by business actors. The submitting organisations call on States to also make civil remedies available extraterritorially, when victims of abuses live abroad.
- **Criminal.** Criminal law remedies may not be the first or principal avenue for victims of abuses by business actors to seek redress. However, they may be relevant on two accounts: a) when an abuse of a human right may amount to a crime or offense under national or international law; and, b) when the penal sanction of the perpetrator of the abuse contributes to ensure satisfaction of the victims as an element of the right to reparation as defined in international law and/or have a deterrent and preventive effect and thus contribute to the guarantee of non-repetition of abuses and violations.
- **Administrative.** Administrative law and remedies, while they are typically dedicated to the regulation of the conduct of governmental bodies at central and local levels, can play an important role in preventing and redressing abuses by business actors in a variety of ways. Under certain domestic legal systems, business actors may be considered as State agents and be directly suable before an administrative court. In addition, administrative remedies may be pursued to challenge administrative decisions regarding licences of exploration and exploitation of natural resources; the regulation of building licences for housing or industrial infrastructures; the regulation and the administration of education, health facilities or of services including water or electricity.

10.2.2 Non-judicial remedies

Non-judicial remedies must not replace judicial mechanisms. However they may contribute to remedy and redress abuses of human rights, and contribute to accountability,³ if they do not prevent adequate reparation.⁴

10.3 International accountability mechanisms

³ United Nations Guiding Principles on Business and Human Rights, Guiding Principle 27: Non- judicial mechanisms can be national or international, State-based or non-State- based.

⁴ *ibid*, Principle 31.

Finally, we reiterate that at the international level, a treaty body should be created with the mandate to monitor the implementation and interpret the provisions of the Treaty. Moreover a study centre on TNCs and other business enterprises should be created, that assists the treaty body in its monitoring efforts and provides information of public interest of TNC activities which adversely impact human rights.