

BRIEFING PAPER: RIGHT TO EFFECTIVE REMEDIES

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Introduction

An international treaty on business and human rights must provide access to effective remedies for corporate violations of human rights. This briefing paper describes the kinds of legal procedures and remedies that might be included in a treaty. Underlying these proposals is the concern that remedies be fair, effective, and accessible in practice, not just on paper.

Effective remedies are dependent on many other aspects of the treaty design. For this briefing paper, we make several key assumptions about the substance of the treaty. We assume that the treaty will address a broad range of human rights violations; apply to both domestic and multinational corporations; require home states as well as host states to hold corporations accountable; prevent corporations from evading responsibility by manipulating corporate structure; apply to all business components, including supply chains; and properly address the particular concerns of indigenous peoples, women, and children.

In addition, a remedy is not effective unless impacted communities have access to key information about their own rights, available remedies, and corporate activities, so that they know what rights a corporation has violated and what (if anything) the corporation has done to remedy those violations, through remedial actions or settlements. So we assume for this paper that communities have access to information about their own rights, available remedies, and corporate activities.

In other words, this paper focuses on *mechanisms* to provide an effective remedy and the content of those *remedies*, not on the many interrelated issues addressed elsewhere in the process.

Right to an Effective Remedy

Multiple international law documents recognize the right to an effective remedy for those impacted by human rights violations. For example, the Universal Declaration of Human Rights, article 8, states: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” The Guiding Principles on Business and Human Rights, in Principle 25, recognize the right to an effective remedy as fundamental to corporate accountability, stating: “States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.”²

The Guiding Principles also recognize that corporations have the responsibility to respect human rights, including the responsibility to provide redress for human rights violations caused by their

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² The right to a remedy is recognized in many other international agreements, including the International Covenant on Civil and Political Rights, art. 2(3); the Convention on the Elimination of Racial Discrimination, art. 6; the Convention on the Rights of the Child, art. 39; the Convention Against Torture, art. 14(1); and in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law, adopted by the General Assembly in 2005.

business operations.³

Inadequacies of the Current System:

Despite the internationally protected right to an effective remedy, those impacted by corporate human rights violations often find it difficult or impossible to obtain a remedy.⁴

One basic problem is that many domestic legal systems do not offer functional mechanisms that enable victims and survivors to obtain any remedy at all. It may be impossible for a private individual or community to file a complaint in court or in any other tribunal with the power to order remedies. The public prosecutor may refuse to act. A multinational corporation may not be subject to the jurisdiction of the local courts, or a court may rule that a claim should be filed in another court system. Inconsistencies between systems can lead to a denial of justice. For example, if the state where the conduct takes place requires that a complaint against a multinational be filed in the corporation's home state, but that state's legal system doesn't offer a remedy, those impacted by the abuses are left with no remedy at all. And company-based grievance procedures or administrative proceedings may require that complainants waive their right to go to court or to an international body, thereby blocking remedies that might have been more effective.

Moreover, even if mechanisms exist in theory, they often do not function in practice. This may be because the government has never fully implemented the law. It may also be because the existing law is not enforced, so that even if a corporation is ordered to appear before a tribunal, or ordered to provide a remedy, there is no effective rule of law to enforce the order. Corporations often have the economic and political power to block enforcement of the law. The threat of violence or other retaliation may prevent survivors of corporate abuses from making use of the remedies that do exist on paper. Judicial delay, corruption (in both courts and outside), and lack of judicial independence may all prevent remedial mechanisms from offering a practical options to those impacted by corporate abuses.

Finally, any mechanisms that are available may, in practice, be too cumbersome or too expensive to use. For example, a court may find that a lawsuit belongs in the courts of another country – often, a country where the impacted community has no ability to actually maintain a legal challenge. The costs of maintaining any action may be more than the impacted community can afford.

Remedies

A treaty addressing business and human rights will need to define what constitutes a remedy. A fine or other sanction against a corporation, we assume, is not sufficient if it is not accompanied by a requirement that the abusive conduct cease, that any damages be repaired, and injured people receive compensation.

The range of remedies might include:

- interim measures: cessation of the violation, injunctions against further actions, guarantees of non-repetition;

³ See Guiding Principles 11, 13, 15, 22.

⁴ For a thorough analysis of the obstacles to remedies for corporate human rights abuses, see Jennifer Zerk, Corporate liability for gross human rights abuses: A report prepared for the Office of the UN High Commissioner for Human Rights.

- adequate reparation: an order to remediate, rehabilitation, monetary compensation, restitution;
- satisfaction, including access to truth about violations, a public apology;
- criminal punishment of both the corporation and corporate officials.

Requirements for effective remedies

A remedy is not effective unless it can be accessed safely. Those who file complaints must be protected from physical harm or other retribution.

The process must also be affordable: those impacted by corporate human rights violations should have access to legal assistance, and financial support for legal fees, travel expenses, and the costs of preparing and presenting complaints in whatever forums they choose to pursue redress, including the costs of collecting evidence and translation services.

The tribunal or agency must be independent, protected from corporate or political manipulation, and be guided by fair hearing standards. The tribunal must have the power to order a full range of remedies and to enforce its judgments. It must operate promptly, both to prevent further harm and to avoid involving the community in seemingly endless proceedings.

In order to protect communities, an effective remedy should allow collective actions, rather than require that individuals bring separate complaints.

Possible remedial procedures

There are many legal procedures that could be included in a treaty as a means to obtain remedies for corporate human rights violations, although each has advantages and disadvantages.

Business-sponsored procedures

Some corporations have internal company grievance procedures that allow employees or community members to file complaints about corporate activities. One advantage is that this is likely to be the least expensive, least time-consuming option. But the obvious disadvantage is that it is only effective if the corporation is honest and fair and protects complainants from reprisals. Some existing grievance procedures require participants to agree in advance that they won't file a lawsuit or any other legal claim. The treaty will have to make clear that no company procedure can prevent affected people from pursuing other remedies. More generally, the treaty should make clear that human rights cannot be waived, especially by those in vulnerable conditions.

State procedures

Most remedial procedures are provided by the state. For a multinational corporation, these could be in the state in which the abuses took place (the host state) and/or in the corporation's home state. Host state remedies are likely to be easier and less expensive to access, but the multinational corporation may not be subject to the jurisdiction of the local government, or may have the economic and political power to block a fair hearing.

A. State non-judicial remedies

Many states have multiple public bodies that can consider complaints of human rights violations by corporations. Examples include: a national human rights institution; an

ombudsperson; a National Contact Point⁵; one or more administrative complaint bodies—for example, labor tribunals or health, safety and environmental agencies; legislative committees; state sponsored mediation or arbitration boards.

B. State judicial Remedies

- Judicial remedies may include criminal prosecution of corporations and corporate employees (although some states currently do not permit criminal prosecution of corporate entities). Usually, criminal charges must be initiated by a government prosecutor, but some states permit private individuals to initiate criminal prosecutions under some circumstances.
- Most legal systems allow private individuals to file civil lawsuits against corporations to seek orders that they halt an activity, take action to protect people or the environment, or pay damages to compensate those harmed by their activities. However, it may be difficult or impossible to sue a multinational corporation in the place where the abuses take place, and/or to sue a corporation in its home state for conduct occurring in a foreign country.
- Some states have separate courts to hear employment complaints such as unfair dismissals, unsafe working conditions and discrimination, or have other specialized court systems authorized to hear particular categories of complaints against corporations, including environmental tribunals. These may be easier to access than other remedies, and better able to respond to particular problems, but in some circumstances they may interfere with the ability to access more comprehensive remedies.

International remedies

A new treaty could create a range of new international remedies.

- One option is an international criminal court with jurisdiction over both corporate officials and corporations. This could be a new criminal court, or an extension of the current International Criminal Court, which currently does not have the power to prosecute corporations.
- The treaty could also create a new international court to hear civil claims against corporate officials and corporation.
- A treaty could also establish a committee to receive complaints against corporations. Most of the current human rights treaties include such complaint procedures for use against states that have agreed to submit to the complaint procedure.⁶

Multi-stakeholder initiatives

States, civil society organizations, and corporations have created dozens of programs that establish standards applicable to business in general or to particular industries, which sometimes include systems to monitor compliance with the standards or to penalize violations. The initiatives range from the broad United Nations Global Compact, a very general set of corporate human rights standards, to industry-specific initiatives such as the Kimberley Process, which certifies “conflict-free” diamonds. Some rely on business itself to monitor its own behavior, while others have more effective compliance mechanisms and greater government or civil

⁵ National Contact Points are government agencies established to implement the Guidelines for Multinational Enterprises drafted by the Organization for Economic Co-operation and Development (OECD).

⁶ For example, the Committee on Enforced Disappearances is authorized to review complaints of violations of the International Convention for the Protection of All Persons from Enforced Disappearances, but only against states that have agreed to accept that mechanism.

society participation.

Advantages and disadvantages

Each of the possible procedures listed above has strengths and weaknesses. A procedure sponsored by the corporation that has committed the human rights abuses is, obviously, likely to be protective of the corporation, and people who bring complaints may be subject to reprisals. It may also require complainants to waive access to other remedies. On the other hand, if there is any possibility of obtaining a remedy from the corporation, that is likely to be the fastest and least costly option.

Governments often lack the political will to ensure that mechanisms that look good on paper actually work in practice. The government in the state where the corporation operates and/or where the corporation is at home may be easily swayed by the corporation, particularly if it is a major employer or contributes to political campaigns.

Administrative or other non-judicial procedures may be faster and less expensive than judicial remedies. But some agencies have the power only to recommend relief, rather than issuing binding orders.

International mechanisms such as an international criminal or civil court might be more independent and less subject to the influence of corporations. But they are also far away from the impacted communities (which makes it expensive to appear before them and to bring witnesses and other evidence), generally slow to reach decisions, and may have the resources to hear only a few complaints.

Questions for civil society:

- (1) What experience have you had with existing remedies and procedures? Has anything worked? If so, why do you think it was effective? If not, what problems have you faced?
- (2) What types of remedies do you think a treaty should offer?
- (3) Would any of the above mechanisms respond to the problems you have had in obtaining remedies? Are there additional difficulties that we have not addressed?
- (4) Which of the possible mechanisms we discuss seem most important? Should we prioritize the list? In your experience, are any so ineffective, unlikely, or politically impossible that they should be left off our list?
- (5) Some of these mechanisms already exist on paper, but don't actually function in practice. What could a treaty include to make it more likely that any mechanisms it mandates are actually effective in practice?
- (6) Do you have a preference for a remedy that is more immediate and stops the harmful activity rather than one that might be more comprehensive but would take much longer?
- (7) Do you have additional suggestions?