



OHCHR Accountability and Remedy Project

Improving accountability and access to remedy in cases of business
involvement in human rights abuses

Phase III: Enhancing the effectiveness of non-State-based grievance mechanisms

Draft Scoping Paper and Programme of Work

5 September 2018

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I. Introduction

People who have suffered adverse human rights impacts as a result of business activity continue to face multiple and serious barriers to remedy. These include legal, financial and practical barriers to accessing judicial and non-judicial mechanisms.

In recognition of this, the Office of the UN High Commissioner for Human Rights (OHCHR), as part of its mandate to advance the protection and promotion of human rights globally, is leading a process aimed at strengthening implementation of the Third Pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) relating to Access to Remedy.

In November 2014, and pursuant to Human Rights Council resolution 26/22, OHCHR launched the Accountability and Remedy Project (ARP). The first phase of this project (ARP I) was carried out between November 2014 and June 2016 and focused on accountability and access to remedy through **judicial mechanisms**. OHCHR submitted an interim progress report to the Council in June 2015¹ and a final report to the 32nd session of the Council in June 2016.² In its final report, OHCHR presented recommended actions that could be taken by States, unilaterally and cooperatively, to improve their implementation of the Third Pillar of the UN Guiding Principles with regard to judicial mechanisms. These recommended actions took the form of a series of **policy objectives** relating to access to remedy and **supporting elements** to illustrate the different ways in which the policy objectives can be achieved in practice. The policy objectives and supporting elements were drafted in a manner that was deliberately flexible in recognition of the many differences between jurisdictions in terms of legal structures, cultures, traditions and resources, all of which have implications for future law reform.

In its resolution 32/10 of June 2016, the Council welcomed the work of OHCHR with respect to judicial mechanisms, noted with appreciation OHCHR's final report on ARP I and made a follow-up request to OHCHR to continue its work in the field of access to remedy for business-related human rights abuses.³ The second phase of this project (ARP II) was carried out between October 2016 and June 2018 and focused on substantive and practical steps that could be taken to improve the effectiveness of **State-based non-judicial mechanisms** in achieving corporate accountability and access to remedy in cases of business-related human rights abuse. OHCHR submitted its final report on this second phase of work on the Accountability and Remedy Project to the Council in June 2018. This report adopted a similar format and approach to that used for ARP I.

¹ A/HRC/29/39 (2015).

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

³ A/HRC/RES/32/10, at ¶ 13 (2016).



In its resolution 38/13, the Council welcomed OHCHR's work on accountability and remedy, noted with appreciation the High Commissioner's report on ARP II, and requested OHCHR to begin work on phase three of its Accountability and Remedy Project (ARP III), specifically "to identify and analyse 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."⁴

OHCHR intends to adopt a similar process for the implementation of ARP III to that followed for ARP I and ARP II. Accordingly, the Project will start by scoping the range of possible issues arising in relation to non-State-based grievance mechanisms with a view to identifying the areas which should be prioritised in the course of the Project. As with ARP I and ARP II, the intention will be to focus on areas that require urgent attention and/or where developments are capable of delivering improvements to accountability and remedy in the short to medium term. In light of time and resource constraints, the Project's methodologies will need to be both robust and efficient, drawing on sources of existing information and expertise, while avoiding duplication and not over-burdening prospective partners and respondents.

With those considerations in mind, this paper sets out OHCHR's preliminary views as to the key issues that will be necessary to explore as part of ARP III, and the methodologies that could be employed in the course of this third phase of the Accountability and Remedy Project, in order to respond to the Council's most recent mandate. The overriding aim of ARP III will be to build upon and further elaborate on the implications of the UNGPs relating to the use of non-State-based grievance mechanisms (including the "effectiveness criteria" for non-judicial grievance mechanisms set out in Guiding Principle 31). Building on its work relating to judicial mechanisms (ARP I) and State-based non-judicial mechanisms (ARP II), OHCHR seeks to develop further resources to help stakeholders identify ways to improve the effectiveness of non-State-based grievance mechanisms to address cases of human rights abuse involving business enterprises. As with both ARP I and ARP II, the aim will be to highlight the **practical steps that can be taken to improve accountability and remedy mechanisms** as well as the relevant policy issues. Therefore, it is anticipated that the methodology for this process will involve **extensive engagement with practitioners working with different types of mechanisms** (e.g., operators of mechanisms and past, present and future users) to ensure that their practical experiences are taken into consideration and appropriately reflected in ARP III outcomes.

The preliminary ideas in this paper are presented for review and discussion at a multi-stakeholder expert and practitioners' review meeting to take place in Geneva on 20-21 September 2018. Following this expert review meeting (and any written

⁴ A/HRC/RES/38/13, at ¶ 9 (2018) (emphasis added).



feedback), a final programme of work for ARP III will be prepared and published by November 2018 via the Accountability and Remedy Project page online.⁵

II. Aims, scope, methodology, and key concepts

1. Aims

The aim of OHCHR's scoping exercise for ARP III is to:

1. gain an initial understanding of the existing use of non-State-based grievance mechanisms as a way of enhancing access to remedy in cases of business-related adverse human rights impacts and the practical and legal challenges that have emerged thus far;
2. develop a typology of the different mechanisms used which can be useful in future research; and
3. identify, in consultation with stakeholders and practitioners,
 - a. the areas that require prioritisation in the course of ARP III, in light of the overarching aims of the project outlined in section I above; and
 - b. the methodology for the implementation of the project that should be employed by OHCHR in response to its mandate under Council resolution 38/13, taking account of time and resource constraints, the current state of research, and the likely availability of external assistance and resources (such as from practitioner organisations, industry bodies and academic institutions).

Key Concept I: A “family” of accountability and remedy mechanisms with distinct (but also complementary and mutually-reinforcing) roles and responsibilities

The Third Pillar of the UNGPs refers to three distinct types of accountability and remedy mechanisms: State-based judicial mechanisms, State-based non-judicial mechanisms, and non-State-based grievance mechanisms. As recognized in the commentary to Guiding Principle 26, “effective judicial mechanisms are at the core of ensuring access to remedy.” However, “administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supplementing judicial mechanisms. Even where judicial systems are effective and well-resourced, they cannot carry the burden of addressing all alleged abuses; judicial remedy is not always required; nor is it always the favoured approach for all claimants.”⁶ Furthermore, non-State-based grievance

⁵ As with ARP I and ARP II, information will be made available via a dedicated portal kindly hosted by the Business and Human Rights Resource Centre website, which will be regularly updated. See <https://www.business-humanrights.org/en/ohchr-accountability-and-remedy-project>.

⁶ UNGP 27, Commentary.



mechanisms “may offer particular benefits such as speed of access and remediation, reduced costs and/or transnational reach.”⁷

In practice, mechanisms do not always fit neatly in one category or another. The broad definitions adopted for the purposes of ARP I and ARP II are set out below, as well as the description proposed to be adopted of “non-State-based grievance mechanisms” for the purpose of ARP III (see red-highlighted section below). Past research carried out for the Accountability and Remedy Project has highlighted a number of important interrelationships between these different types of mechanism. It is proposed that these relationships will be further explored as part of ARP III.⁸

STATE-BASED MECHANISMS (ARP I & ARP II)		NON-STATE-BASED MECHANISMS (ARP III)
<p>Judicial mechanisms (ARP I) comprise the court systems of States. Judicial mechanisms apply the laws of the State to enforce public law offences (e.g., criminal matters) and decide private law claims for remedies by affected individuals and communities (e.g., civil actions).</p>	<p>State-based non-judicial mechanisms (ARP II) are <i>public</i> mechanisms (other than courts) by which individuals (or groups of individuals) whose human rights have been adversely impacted by business activities can seek a remedy with respect to those adverse impacts. While the distinction between these types of mechanisms and judicial mechanisms is not always clear-cut, a key difference is that the former will typically be administered by the executive (i.e., ministerial) branch of government (unlike judicial mechanisms, which are administered by the judicial branch).⁹</p>	<p>Non-State-based grievance mechanisms may encompass company-based or multi-stakeholder based grievance mechanisms, as well as regional and international human rights bodies.¹⁰ However, ARP III will be focussing in particular on <i>private</i> mechanisms which are administered and established by non-State entities, such as a business enterprise alone or with other stakeholders (e.g., trade unions), an industry association or a multi-stakeholder group.¹¹</p>

⁷ UNGP 28, Commentary.

⁸ See further sections V.2 and V.3 below.

⁹ Other features which would tend to lead to a mechanism being categorized as “non-judicial” rather than “judicial” include (a) decision-making structures that draw from a mix of legal, technical, lay and specialist expertise; (b) the fact of having been established pursuant to a regulatory regime; and (c) greater use of alternative dispute resolution methods such as conciliation or mediation. ARP II Scoping Paper, at pp. 2-3 (2017), *available at* https://www.business-humanrights.org/sites/default/files/images/ARPII_FINAL%20Scoping%20Paper.pdf. See also A/HRC/38/20, at ¶¶ 4-12 (2018) for a discussion of the features of State-based non-judicial mechanisms.

¹⁰ UNGP 28, Commentary.

¹¹ See further section IV below.



2. Scope

The potential scope of ARP III is immense given the many different categories of non-State-based grievance mechanisms that exist and the high degree of diversity within each category (e.g., in terms of aims, coverage and institutional and decision-making structures). Complicating matters further is the fact that many mechanisms which can handle business and human rights-related grievances are not necessarily framed in human rights terms. Over recent years, the role of these types of mechanisms with respect to the resolution of human rights-related claims, complaints and disputes has been much discussed, including in the context of the process leading up to the endorsement of the UNGPs, and in the analysis of practical implementation of the Guiding Principles themselves.¹² Therefore, the ARP III methodology will need to take account of the large body of research and guidance that has already emerged from the work of different industry bodies, practitioner organisations, civil society organisations and academic institutions with respect to the various different types of non-State-based grievance mechanisms, and the different accountability and remedy challenges that have been encountered with respect to each of them.

Because of the breadth of this topic, identifying and analysing all of the non-State-based grievance mechanisms relevant to business-related human rights abuse would be an enormous task and certainly beyond the resources of ARP III generally, and this scoping exercise in particular. In recognition of this, the exploratory analysis carried out by the Business and Human Rights Catalyst at the University of Manchester, Alliance Manchester Business School for the purpose of this scoping exercise focussed on non-State-based grievance mechanisms that are particularly relevant to certain sub-groups of human rights-related disputes, namely complaints and disputes with respect to:

- labour rights;

¹² See, e.g., Benjamin Thompson, Determining Criteria to Evaluate Outcomes of Businesses' Provision of Remedy: Applying a Human Rights-Based Approach, 2 BUS. & HUM. RTS. J. 55 (2017); fidh, Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (3d ed. 2016); EarthRights International & SOMO, Community-Driven Operational Grievance Mechanisms: Discussion Paper for a New Model (2015); MiningWatch Canada & RAID, Privatized Remedy and Human Rights: Re-thinking Project-Level Grievance Mechanisms (2014); Tebello Thabane, Weak extraterritorial remedies: The Achilles heel of Ruggie's 'Protect, Respect and Remedy' Framework and Guiding Principles, 14 AHRLJ 43 (2014); CSR Europe, Assessing the effectiveness of Company Grievance Mechanisms: CSR Europe's Management of Complaints Assessment (MOC-A) Results (2013). Note that a literature review for the purposes of this scoping exercise has been carried out by the researchers at the University of Manchester. University of Manchester, Alliance Manchester Business School, Non-state based non-judicial grievance mechanisms (NSBGM): An exploratory analysis (2018) [hereinafter "Manchester Study"], available at <https://www.business-humanrights.org/sites/default/files/documents/ARP%20III%20Scoping%20Paper%20Zagelmeyer%20Bianchi%20Shemberg%2013%20July%202018.pdf>.



- consumer rights;
- environmental standards; and
- social and community rights.¹³

For the purposes of the different work streams to be followed for ARP III described in section V below, it is proposed to maintain the focus on mechanisms that specialize in the specific types of complaints listed above, although **OHCHR would welcome feedback and further discussion with respect to this proposed sample group, in light of the Council's mandate under resolution 38/13.**

Key Concept II: Procedural and substantive aspects of access to remedy

Access to remedy has both procedural and substantive aspects.¹⁴ The procedural aspects refer to the steps that must be gone through before a remedy can be obtained, and the substantive aspects refer to the different types of remedies that may eventually be awarded (e.g., apologies, restitution, rehabilitation, financial compensation, administrative remedies and preventative orders). Although the types of substantive remedies that may be offered by a regime are key to whether the outcome of a process is appropriate, adequate and effective, such remedies are only of academic interest if affected individuals are unable, for procedural, financial or practical reasons, to access a grievance mechanism in the first place.¹⁵ Therefore, it is anticipated that the methodology eventually adopted for ARP III will need to take account of procedural features of non-State-based grievance mechanisms as well as the kinds of remedies they are able to offer.¹⁶

3. Methodology

In preparing this paper, OHCHR benefited from research carried out by the Business and Human Rights Catalyst at University of Manchester, Alliance Manchester Business School.¹⁷ Their research paper (the “Manchester Study”) took the form of an exploratory analysis of issues and challenges that have emerged so far with respect to the use of non-State-based grievance mechanisms in business and human rights cases and comprised:

¹³ Manchester Study, *supra* note 12, at p. 7. See section II.3 below on methodology, which discusses the Manchester Study in more depth.

¹⁴ UNGP 25, Commentary.

¹⁵ For a graphic representation of the impact of certain practical, financial and procedural issues on access to remedy in the context of State-based judicial mechanisms, see A/HRC/32/19, at pp. 7-8 (2016).

¹⁶ See sections V.1 and V.5 below.

¹⁷ OHCHR is extremely grateful for the extensive and well-researched work of those involved in the study, in particular Dr. Stefan Zagelmeyer, Dr. Lara Bianchi and Andrea Shemberg.



- a literature review (covering dozens of publications by academics, NGOs, users of non-State-based grievance mechanisms, international financial institutions, multi-stakeholder initiatives and trade unions) to ascertain the current status of research in this area and to identify where there may be gaps in the research carried out to date;
- a mapping exercise to ascertain the key features of different types of non-State-based grievance mechanisms based on information currently available (which was used to highlight broad trends, available sources of information, areas where further research may be needed and potential research challenges); and
- a series of interviews with key stakeholders knowledgeable about how non-State-based grievance mechanisms work in practice.

A copy of the Manchester Study can be accessed on the ARP online portal.¹⁸ This exploratory analysis, and subsequent OHCHR desk research and discussions prompted by it, have informed the ideas and proposals for future research set out in this discussion paper.

III. Role and importance of non-State-based grievance mechanisms

While effective judicial mechanisms are at the core of ensuring access to remedy,¹⁹ other kinds of grievance mechanisms (including administrative, legislative and other non-judicial mechanisms such as company-based grievance mechanisms, and those operated by industry, multi-stakeholder or other collaborative initiatives) play an essential role in complementing and supplementing judicial mechanisms.²⁰

Depending on the circumstances involved, non-State-based grievance mechanisms may offer advantages over State-based mechanisms (including judicial mechanisms) for those seeking accountability and remedy for business-related human rights abuses. For instance, non-State-based grievance mechanisms:

- may be quicker, cheaper and easier to access,²¹ and may resolve grievances in situations where a dispute does not amount to a legal cause of action;
- may offer a greater range of potential remedies, and greater potential and flexibility to tailor remedies to the needs of rights-holders;²²

¹⁸ Manchester Study, *supra* note 12, available at <https://www.business-humanrights.org/sites/default/files/documents/ARP%20III%20Scoping%20Paper%20Zagelmeyer%20Bianchi%20Shemberg%2013%20July%202018.pdf>.

¹⁹ UNGP 26 and Commentary.

²⁰ UNGP 27 and Commentary.

²¹ In relation to operational-level grievance mechanisms, see OHCHR, *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, at p. 64 (2012) [hereinafter OHCHR Interpretive Guide], available at https://www.ohchr.org/Documents/Publications/HR.PUB.12.2_En.pdf.

²² Manchester Study, *supra* note 12, at p. 5.



- may aid the early resolution of complaints and disputes and thus help to avoid the escalation of human rights-related conflicts;²³
- may have greater scope and capacity to act on their own initiative (e.g., they may not have to wait until an issue amounts to an alleged human rights abuse or a breach of other standards before they can act to address it);²⁴
- may be able to offer remedy in circumstances where an effective remedy is not available through State-based channels, for instance in areas with weak governance;²⁵ and
- may have a greater ability to contribute to future prevention (e.g., in the case of company-based grievance mechanisms, by identifying adverse human rights impact in a timely manner and tracking the effectiveness of responses to impacts raised through the mechanism, thus reinforcing aspects of human rights due diligence).²⁶

However, there are challenging issues surrounding when and how non-State-based grievance mechanisms should be used. They may not be sufficiently independent, transparent and predictable for rights-holders to have confidence in them as a potential route to an effective remedy. Moreover, there will be circumstances (for example, cases of complicity in international crimes, or situations involving serious abuses of human rights), in which judicial remedy is the only effective remedy. Additionally, challenges arise where more than one business enterprise has caused or contributed to abuses,²⁷ or where a State-based proceeding is already underway,²⁸ or where crimes have been alleged.²⁹ Where there are different potential pathways to a remedy, it is important that parallel procedures do not operate in such a way as to create additional barriers to remedy for those seeking to use them,³⁰ and that rights-holders can make informed decisions about how they wish to proceed based on an understanding of the alternatives.³¹

²³ *Id.* at p. 6.

²⁴ See OHCHR Interpretive Guide, *supra* note 21, at p. 68.

²⁵ See Manchester Study, *supra* note 12, at p. 5.

²⁶ *Id.*

²⁷ OHCHR Interpretive Guide, *supra* note 21, at p. 64.

²⁸ *Id.* (“For instance, if a court process or some other State-based proceeding is under way, it may be necessary or appropriate for the enterprise to defer to that process rather than pursuing direct remediation.”).

²⁹ *Id.*; see also UNGP 22 Commentary (“Some situations, in particular where crimes are alleged, typically will require cooperation with judicial mechanisms.”).

³⁰ In relation to parallel proceedings between judicial mechanisms and State-based non-judicial mechanisms, see OHCHR’s final report on ARP II, A/HRC/38/20, Annex, at ¶ 3.8 (2018) (“In cases where both State-based non-judicial mechanisms and judicial mechanisms may have a role in the delivery of an effective remedy, their procedural rules and practices operate in a manner that serves to reduce barriers to remedy for rights holders and does not contribute to the creation of new barriers to remedy.”).

³¹ The OHCHR’s final report on ARP II recommends that “State-based non-judicial mechanisms and judicial mechanisms have adopted and implemented equitable, predictable, rights-compatible and transparent procedures to be followed in the event that more than one mechanism (whether judicial or non-judicial) has been called upon to investigate, adjudicate upon and/or mediate a set of allegations arising from a single event and/or similar sets of circumstances and involving the same business enterprises.” *Id.* at ¶ 3.6.



IV. Types of non-State-based grievance mechanisms

As the Manchester Study observes, there is presently huge diversity in the types of non-State-based grievance mechanisms that are potentially relevant to the resolution of disputes and complaints arising from business-related human rights harms. The range of potential human rights impacts that a business enterprise can have, and the range and numbers of non-State-based grievance mechanisms that have been established to deal with them, mean that it will not be possible to examine all kinds of mechanisms in detail. To make the task manageable, it will likely be necessary to organize the work by reference to a few emblematic types that are particularly relevant to business and human rights grievances and that are particularly influential in this space.

As a precursor to the work to follow, this section sets out a provisional typology of non-State-based grievance mechanisms based on the findings of the Manchester Study, to be used as a way of framing and organizing future research. In the boxes below, each broad type is described by reference to key features and aims, along with further details to help build up a picture as to where and how these different types of mechanisms may be found and used, such as information relating to the types of remedial outcomes that are potentially obtainable, variations that may be observed as to structure and approach, and illustrative examples. **OHCHR would welcome feedback and further discussion with respect to this proposed typology in light of the Council's mandate under resolution 38/13.**

Company-Based Grievance Mechanisms

Key Features: Company-based grievance mechanisms are mechanisms established and administered by companies (ideally designed through consultation with the stakeholder groups for whose use they are intended³²). They can be administered by enterprises (alone or in collaboration with others, including relevant stakeholders) or provided through recourse to a mutually-acceptable external expert or body. This category includes, but is not limited to, operational-level grievance mechanisms (i.e., mechanisms at the level where business enterprises interface with the individuals or groups they may impact).

Grievances can usually be filed anonymously and through a range of different channels, including drop boxes, email, hotlines, and through webpages. Little information is

Furthermore, the OHCHR's report recommends that "[r]ights holders retain the ability to alter a remedial course of action in response to evolving circumstances, including by transferring a complaint and/or dispute from a State-based mechanism to a judicial mechanism in the event that it becomes clear that judicial recourse is an essential part of having access to remedy and/or alternative methods of achieving effective remedy are unavailable." *Id.* at ¶ 3.7.

³² See UNGP 31(h).



available about how decisions are taken, although the UNGPs note that: “Since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”³³ Although some of these mechanisms allow appeals against adverse decisions, it is unclear how common this is.

Remedial Outcomes: It is difficult to make any general comments about the types of remedial outcomes that may be available through these kinds of mechanisms. The details of mediated settlements tend not to be publicised, and there may be disadvantages (from the perspective of both the company and potential users) in being too prescriptive about the types of remedies that might be obtainable. However, one company in the Manchester Study revealed that when a grievance relates to the harm caused by a supplier, the company could impose sanctions on the supplier, review orders, and send warning letters leading to the termination of contracts.³⁴

Variations: These mechanisms can be at the operational level where workers and communities interface with a company, as well as at the corporate level, more removed from those impacted by business activities. While workers are usually covered by the mechanisms, there is variation as to the extent to which affected communities and others are permitted to file grievances. Additionally, the types of grievances that each mechanism covers can differ, with some accepting all kinds of complaints, and others only focusing on human resources and labour issues, environmental complaints or community issues.

Grievance Mechanisms Developed By Industry, Multi-Stakeholder, or Other Collaborative Initiatives

Key Features: These types of mechanisms are external to companies themselves and administer a set of commitments that companies have agreed to adhere to. The commitments could be in the forms of codes of conduct, a set of principles, certification schemes, or by way of an agreement between a business enterprise and an organisation with a mandate to protect the rights of specific groups of stakeholders.³⁵ Multi-actor mechanisms can operate at the level of individual members, or at the level of the collaborative initiative, or both, and may cover multiple corporations and jurisdictions. They may be designed to function as a mechanism of last resort when local mechanisms have failed to settle grievances. Most often, these mechanisms deal with labour-related

³³ UNGP 31(h) Commentary.

³⁴ Manchester Study, *supra* note 12, at p. 25.

³⁵ *E.g.*, international framework agreements “concluded between a multinational business enterprise and organisations representing employees and workers, for example global trade unions, international works councils and/or their counterparts at national level.” *See id.* at pp. 30-35.



disputes, although some address other types of adverse human rights impacts, such as community impacts, or those relating to public health and safety.

Remedial Outcomes: Little information is available on the exact types of remedial outcomes possible using these mechanisms, both in relation to potential remedies for victims as well as penalties for wrongdoers. For certification bodies, the initiative can refuse to certify or revoke the certification of a company's products or activities. For membership-based initiatives, some mechanisms can decide to revoke the company's membership.

Variations: There are several different types of mechanisms that fall into this category, including industry and sectoral mechanisms, international certification bodies, and multi-stakeholder mechanisms. Some are membership-based initiatives while others audit companies and certify that certain practices are being observed. There is considerable variation with respect to powers and process; mechanisms can focus on communication channels and training programmes, structured investigation, mediation/conciliation, negotiation or adjudication. Some mechanisms were designed with input from the companies adhering to them while others (like certification bodies) present a pre-determined mechanism for companies to sign up to. There is also diversity with respect to who is allowed to file grievances, ranging from workers of a company to any person or organization that wants to raise an issue.

Illustrative Examples:³⁶

- **Industry and sectoral mechanisms:** e.g., Clear Voice Hotline, Fair Food Programme, Fair Wear Foundation, HP Centre for Action Labor Issues, International Council of Toy Industries, Roundtable on Sustainable Palm Oil, Voluntary Principles on Security and Human Rights, and the Worker Rights Consortium;
- **International certification bodies:** e.g., Fairtrade, Forest Stewardship Council, Rainforest Alliance, and Social Accountability International;
- **Multi-stakeholder mechanisms:** e.g., Ethical Trading Initiative, Fair Labor Association, Accord on Fire and Building Safety in Bangladesh, and the Issara Institute;
- **Mechanisms to enforce International Framework Agreements:** e.g., mechanisms to implement the Global Framework Agreement between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall.

³⁶ See *id.* at p. 36.



Grievance Mechanisms Developed By International Financial Institutions

Key Features: The aim of these types of grievance mechanisms is to provide a means by which a person (or group of people) whose human rights have been adversely affected by an institution-financed project can raise a complaint with the financial institution itself.³⁷ The precise grounds for the complaint will vary from case to case but may include (depending on the mechanism's terms of reference) a complaint that the financial assistance had breached the institution's own human rights standards, and/or that the response of the company in receipt of finance was inadequate (e.g., in failing to set up a suitable company-based mechanisms of its own). The mechanism will usually check the eligibility of the claim, collect and analyse relevant information and then decide on a non-binding recommendation which is usually passed on to higher-level decision makers, for example the management board, where, ultimately, the case is decided.³⁸

Remedial Outcomes: The various remedial outcomes possible depend on each financial institution's mechanism. Some engage in mediation but do not have authority to stop or otherwise sanction projects. Other mechanisms have the authority to block continued disbursements of funding.

Variations: Different mechanisms have different eligibility requirements and allow different kinds of complainants. Some require at least two individuals to file a grievance, whereas others accept grievances from individuals, groups or organizations affected by projects.³⁹

Illustrative Examples:

- Inspection Panel of the World Bank
- Compliance Advisor Ombudsman of the International Finance Corporation and Multilateral Investment Guarantee Agency
- European Investment Bank Complaints Mechanism (EIB-CM)

V. Key issues for further study

Using the UN Guiding Principles on Business and Human Rights as a starting point, and taking account of the findings from ARP I and ARP II, the outcomes of the Manchester Study and follow-up discussions, OHCHR proposes that the ARP III work should focus on five main areas (or “work streams”).

³⁷ This should be differentiated from the work international financial institutions do in relation to company-based grievance mechanisms, for instance with respect to requiring companies receiving financing to set up operational-level grievance mechanisms or work dedicating to improving the effectiveness of these mechanisms.

³⁸ *Id.* at p. 28.

³⁹ *Id.*



OHCHR's initial proposals as to the content of these different work streams are set out below, along with suggestions as to the methods that could be employed to investigate the issues highlighted. These proposals are presented for review and discussion at the multi-stakeholder expert and practitioners' review meeting.

1. Work stream 1: Practical steps that mechanisms can take to meet the “effectiveness criteria” of UNGP 31

Non-judicial mechanisms can play an essential role in complementing and supplementing judicial mechanisms so that, where business-related human rights abuses have occurred, an effective remedy is available.⁴⁰ In reality, however, people often struggle to access an effective remedy through this means. Guiding Principle 31 sets out a series of criteria for non-judicial grievance mechanisms which are designed to help those responsible for designing and administering non-judicial grievance mechanisms identify ways to make these mechanisms work more effectively for those seeking remedy for adverse human rights impacts that are business related (the “effectiveness criteria”).⁴¹ The Manchester Study included some preliminary analysis as to how different types of non-State-based grievance mechanisms respond to different aspects of the UNGP effectiveness criteria, while noting that there are a number of areas where information is presently lacking (particularly relating to issues such as how the impacts of mechanisms are evaluated and how the outcomes of grievance processes contribute to human rights due diligence and continuous learning).

ARP III provides an opportunity to consider how different kinds of non-State-based grievance mechanisms can meet these criteria *in practice* with a view to encouraging further innovation and cross-fertilisation of “good practice” ideas. This work stream would provide the evidential basis for guidance, similar to that which appears in the ARP II report,⁴² about the practical steps that can be taken to implement UNGP 31 in different contexts and scenarios, while recognising that, because of the diversity of these types of mechanisms (not to mention the range of legal, structural, cultural and economic factors to take account of), there are no “one size fits all” solutions. Some of the key issues that could be explored with respect to different elements of the effectiveness criteria are set out in the table below.

⁴⁰ UNGP 28.

⁴¹ For a description of the effectiveness criteria, see UNGP 31 and its Commentary, as well as Corporate Social Responsibility Initiative, *Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned* (2011).

⁴² See A/HRC/38/20, Annex, Part II (2018).



<p>UNGP 31 “effectiveness criteria”</p>	<p>Key issues to explore in ARP III</p>
<p>UNGP 31(a): “Legitimate”</p>	<ul style="list-style-type: none"> • How do different kinds of mechanisms build trust among rights-holders and other stakeholder groups? • What involvement do different stakeholder groups have in the design and administration of different kinds of mechanisms? What scope might be there to enhance this involvement in the future? • What are the key advantages, disadvantages and challenges associated with the use of independent third-party investigators, adjudicators or mediators within the different types of mechanism? • What techniques are used to ensure that the mechanism and those acting on its behalf adhere to high standards of ethics and conduct? • How is the mechanism held accountable (e.g., internally within the organisation and, where relevant, externally) for the way it responds to complaints and disputes (e.g., complaints procedures, referral for review by management or third party, peer review)? • Do some operating contexts (e.g., conflict-affected areas) pose greater legitimacy challenges than others? If so, how are these addressed in practice?
<p>UNGP 31(b): “Accessible”</p>	<ul style="list-style-type: none"> • What steps are taken to ensure that mechanisms are publicised to rights-holders and other stakeholders? • What kinds of technologies are used? What are the advantages and disadvantages associated with their use?⁴³ • What steps are taken to ensure that (where relevant) rights-holders and other stakeholders in different jurisdictions have access to the relevant mechanism? • What steps are taken to limit the effects of barriers to access, including barriers related to language, literacy, costs, physical location (e.g., to meet the needs of persons

⁴³ See Manchester Study, *supra* note 12, at p. 24.



	<p>with disabilities or people living in remote areas) and fears of reprisal?</p> <ul style="list-style-type: none"> • What additional steps are taken to address the particular needs of people who may be at a heightened risk of vulnerability or marginalization, such as women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities?
UNGP 31(c): “Predictable”	<ul style="list-style-type: none"> • What steps are taken to publicise procedures and estimated time frames? • Are time frames for each stage respected? • Is there clarity with respect to outcomes available and means of monitoring implementation?
UNGP 31(d): “Equitable”	<ul style="list-style-type: none"> • What steps are taken to ensure that rights-holders have a reasonable opportunity to comment on allegations, counterclaims and proposed outcomes? • What steps are taken to ensure that rights-holders have access to advice and expertise from a trusted source?
UNGP 31(e): “Transparent”	<ul style="list-style-type: none"> • To what extent are aggrieved parties informed about how their complaint is being handled? • What steps are taken to publicise data and information relating to the work and performance of grievance mechanisms? • What kinds of data and information are typically published (and why)? • What level of transparency is necessary and/or desirable for non-State-based grievance mechanisms? How might arguments for (and against) greater transparency differ depending on the type of mechanism involved? • How are the interests of transparency balanced with the need for confidentiality?
UNGP 31(f): “Rights-compatible”	<ul style="list-style-type: none"> • How are international law standards with respect to outcomes and remedies for human rights-related harms relevant to different kinds of non-State-based grievance mechanisms?



	<ul style="list-style-type: none"> • How are these standards met in practice? Are they readily translatable to non-State-based grievance mechanisms? If not, what additional guidance would be useful for different kinds of non-State-based grievance mechanisms (e.g., company-based grievance mechanisms and multi-stakeholder mechanisms)? • What conditions are needed to make sure that remedies are implemented effectively (taking account of the particular needs of people who may be at a heightened risk of vulnerability or marginalization, such as women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities)?
<p>UNGP 31(g): “A source of continuous learning”</p>	<ul style="list-style-type: none"> • How does the mechanism contribute to human rights due diligence? • What steps are taken to ensure that lessons for improving the mechanism and preventing future grievances and harms are learned and acted upon? • What kinds of indicators can be used to track the performance of non-State-based grievance mechanisms?
<p>Operational-level mechanisms should also be:</p> <p>UNGP 31(h): “Based on engagement and dialogue”</p>	<ul style="list-style-type: none"> • What kinds of stakeholder engagement processes are used in the design and review of grievance mechanisms? • What steps are taken to ensure proper engagement of, and consultation with, people who may be at a heightened risk of vulnerability or marginalization, such as women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities? • How do stakeholder engagement processes influence the design of mechanisms in practice? • To what extent do operational-level grievance mechanisms rely on dialogue and/or independent third-party mechanisms to resolve grievances?



Key research tasks for work stream 1 (for discussion)

- Put together online surveys, targeted to different types of stakeholders, to gather information from a wide range of jurisdictions and in respect of a wide range of non-State-based grievance mechanisms (similar to ARP II).
- Hold a workshop with representatives of different kinds of mechanisms [2-3 from each type].
- Hold [2] workshops, either during or immediately after the 2018 Forum, on the following themes:
 - How company-based grievance mechanisms contribute to human rights due diligence by companies (an area about which there appears to have been a lack of research but which has been chosen as a priority area for the Annual Forum); and
 - Non-State-based grievance mechanisms in challenging contexts (e.g., conflict-affected areas or other instances of weak governance), with a particular focus on “legitimacy” and accountability (UNGP 31(a)) and “rights-compatibility” (UNGP 31(f)).
- Interview representatives of international financial institution grievance mechanisms relevant to business and human rights to gather views about “effectiveness.”
- Carry out a case study (or series of case studies) to build understanding of practical ways in which different stakeholder groups and/or organisations representing the interests of different stakeholder groups can contribute to the design and administration of different kinds of mechanisms, focussing in particular on practice surrounding the development of international framework agreements.
- Hold a webinar to gather examples of good practice from businesses and multi-stakeholder initiatives about ways to meet the “effectiveness criteria” in practice (ideally in partnership with another organization which has significant convening power).

2. *Work stream 2: How States can facilitate access to effective non-State-based grievance mechanisms*

The UNGPs make it clear that effective judicial mechanisms “are at the core of ensuring access to remedy,” noting that “non-judicial mechanisms play an essential role in *complementing and supplementing* judicial mechanisms.”⁴⁴ That said, Guiding Principle 28 and its commentary provide that “States should consider ways to facilitate access to effective non-State-based grievance mechanisms.” Furthermore, States “can play a helpful

⁴⁴ UNGP 26, Commentary; UNGP 27, Commentary (emphasis added).



role in raising awareness of . . . such options, alongside the mechanisms provided by States themselves.”

Research carried out in the course of ARP II highlighted several ways in which different kinds of non-State-based grievance mechanisms can be recognised in and integrated into regulatory regimes in practice.⁴⁵ For instance, some regimes (e.g., consumer and labour regimes) make prior reference to a company-based grievance mechanism a condition of access to State-based non-judicial mechanisms. However, care is needed to ensure that such pre-conditions do not create barriers to remedy. ARP III provides an opportunity to build on this prior research and explore further the linkages that exist between State-based and non-State-based mechanisms, with a view to building understanding and consensus with respect to:

- how non-State-based grievance mechanisms can contribute to effective regulation (e.g., by providing a means of early resolution of disputes, thus reducing the need for regulatory interventions and sanctions; or by highlighting areas where closer regulatory supervision may be necessary; or by providing a potential route to remedy where State-based remedies are not available, for instance in areas of weak governance);
- the legal, regulatory and risk-management drivers that influence the establishment of non-State-based grievance mechanisms in practice;
- the various ways in which States can promote the use of non-State-based grievance mechanisms dealing with business-related human rights harms (e.g., in guidance to business enterprises, or in the design of regulatory regimes);
- the implications of legal regimes which require rights-holders to first approach non-State-based grievance mechanisms for access to remedy prior to accessing State-based mechanisms;
- specific legal issues and challenges arising where non-State-based grievance mechanisms are presented as an alternative to State-based mechanisms, such as the implications of requests for waivers of rights to access State-based mechanisms (including judicial mechanisms) either (a) as a pre-condition of using non-State-based grievance mechanisms, or (b) as a condition of accepting a settlement proposed by a non-State-based grievance mechanism; and
- the contexts and circumstances in which there is (or may be a need for) regulatory oversight of the processes and performance of non-State-based grievance

⁴⁵ OHCHR, *State-based non-judicial mechanisms for accountability and remedy for business-related human rights abuses: Supporting actors or lead players?*, at pp. 18-19 (2017), available at https://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/ARPII_%20DiscussionpaperonPhase2forUNForum_FINAL.pdf.



mechanisms, and the policy justifications for this in different contexts and circumstances.

Key research tasks for work stream 2 (for discussion)

- Choose [10] focus jurisdictions for a short study about how governments are promoting the establishment and use of non-State-based grievance mechanisms (e.g., in regulatory regimes or by way of guidance or regulatory incentives).
- Review data collected in the course of ARP I and ARP II; identify (and analyse) [5] examples of where regulatory regimes refer to non-State-based grievance mechanisms and prepare a case study on each.
- Interview representatives of [10] companies from a range of jurisdictions and industrial sectors to better understand the legal, regulatory and other drivers for establishing company-based grievance mechanisms, as well as the *disincentives* for doing so.
- Case study of a multi-stakeholder sectoral initiative (e.g., ICoCA) to understand how regulatory regimes and multi-stakeholder grievance mechanisms can interrelate.
- Consultation with stakeholder groups (e.g., civil society organisations and business organisations) for perspectives on (a) the potential pitfalls of requirements that rights-holders first approach non-State-based grievance mechanisms before accessing State-based mechanisms, and (b) the extent to which and the circumstances in which regulatory oversight is appropriate.
- Workshop to gather perspectives from a wide range of States, businesses, civil society organisations and other stakeholders.

3. Work stream 3: How non-State-based grievance mechanisms can work together to improve the prospects for effective remedy

The flexibility enjoyed by companies and other organisations with respect to the design and implementation of grievance mechanisms creates the chance of both overlaps and gaps in the possibilities available to rights-holders to seek remedy for business-related human rights harm. While choice for rights-holders is to be encouraged, some degree of coordination is likely to be needed in many cases in order to maximise the chances of an effective remedy. In order to improve coordination, there are various different linkages and relationships which require further exploration and examination. These are described briefly below.



(i) *Relationships between different grievance mechanisms within a company.* Companies sometimes have multiple grievance mechanisms, each dealing with separate, but sometimes overlapping, issues.⁴⁶ For instance, a company may have one grievance mechanism to handle complaints from workers related to employment issues and a different grievance mechanism to handle broader human rights issues, including from affected communities outside of the company itself. When a grievance could conceivably fall under multiple mechanisms, issues of coordination and institutional coherence arise.

(ii) *Relationships between company-based grievance mechanisms and those of other companies linked to the company through its operations, products and services.* The interaction between grievance mechanisms of different entities which are in a business relationship can raise both practical and legal issues for users of these mechanisms. For instance, a person whose human rights have been adversely affected by business activities taking place in the context of a global supply chain may be able to make use of grievance mechanisms of various companies (e.g., a manufacturer as well as the ultimate buyer, such as a brand owner in a clothing supply chain).⁴⁷ In another context, a person whose rights have been adversely affected by a project supported by an international financial institution may have grounds for raising a complaint both with a relevant company-based mechanism (e.g., an operational-level grievance mechanism) and with the international financial institution itself. In such cases, questions arise as to whether and how the relevant mechanisms should coordinate with respect to the dissemination of information about the relevant standards and processes, the investigation of claims, and how associated costs and resulting remedial responsibilities should be allocated between them.⁴⁸

(iii) *Relationships between company-based grievance mechanisms in circumstances where multiple companies make use of a single facility and it is difficult to allocate responsibility for business-related human rights to any one company.* A specific set of challenges arise with respect to site-level mechanisms where the site acts as a supplier to a number of different buyers or brands. In some cases, the relevant companies may choose to collaborate with respect to a single grievance mechanism (rather than duplicating grievance processes between themselves).⁴⁹ However, this raises a separate set of potential legal and practical challenges with respect to matters such as the allocation of responsibilities for publicizing and funding the mechanism, for investigating claims, and for devising suitable tests to help determine “causation” or harm in specific cases and hence the techniques used to allocate remedial responsibilities between the companies involved.

(iv) *Relationships between company-based grievance mechanisms and other grievance mechanisms “external” to the company.* This could cover instances where a company is a member of a multi-stakeholder mechanism, and both entities have a grievance mechanism that could potentially handle a single complaint. This group of relationships also

⁴⁶ See Manchester Study, *supra* note 12, at pp. 9, 23.

⁴⁷ See *id.* at p. 20.

⁴⁸ *Id.*

⁴⁹ See *id.* at p. 22.



encompasses cases where different non-State-based grievance mechanisms cooperate or share good practices for “continuous learning” purposes. For instance, some international financial institutions communicate with each other and exchange information through organizations such as the Independent Accountability Mechanisms Network.⁵⁰

Key research tasks for work stream 3 (for discussion)

- Work with partner organizations to identify [5] examples of good practice with respect to the use of non-State-based grievance mechanisms in supply chains, and prepare case studies on each.
- Explore opportunities for participation in conferences relating to “responsible supply chains” to highlight and promote discussion on role of non-State-based grievance mechanisms in raising standards.
- Interview representatives of the Independent Accountability Mechanisms Network.
- Conduct a case study to build an understanding of the ways that multi-stakeholder mechanisms can raise standards with respect to [company-based] models (identify similar examples relating to labour, consumer and environmental rights – e.g., ICoCA, FLA, FSC, Bangladesh Accord).

4. Work stream 4: Safeguarding rights-holders, their families and representatives and human rights defenders from retaliation, harassment and intimidation

Protecting users of non-State-based grievance mechanisms and their representatives from threats of reprisals or intimidation is of paramount importance for such mechanisms to be effective. Many grievance mechanisms allow complaints to be issued anonymously and seek to ensure confidentiality in the process. However, while important, this may not be sufficient in itself to ensure that victims are not further victimized. More research is needed to identify the range of practical steps that could potentially be taken to protect people from the risk of retaliation, harassment, intimidation and threats as a result of having resorted to such mechanisms, paying attention to the particular needs of people who may be at a heightened risk of vulnerability or marginalization, such as women, children, migrant workers, persons with disabilities, victims of modern slavery or bonded labour practices, or members of indigenous communities.

⁵⁰ <http://independentaccountabilitymechanism.net/>.



Key research tasks for work stream 4 (for discussion)

- Hold a workshop on these issues [either during or immediately after the 2018 UN Forum on Business and Human Rights] with representatives of civil society organisations, trade unions, legal advisers and human rights defenders.
- Call for views via an “open process” survey.

5. *Work stream 5: Meaningful stakeholder involvement in the design, implementation and follow-up monitoring of remedial outcomes*

Non-State-based grievance mechanisms relevant to business respect for human rights must be capable of ensuring “rights-compatible” outcomes and remedies to affected persons.⁵¹ In many cases there will be limitations with respect to the kinds of remedial outcomes that such grievance mechanisms can deliver in practice, perhaps because of a limited mandate, a lack of enforceability of outcomes or a lack of leverage with respect to other parties. Even so, such mechanisms should not lose sight of the importance of meaningful stakeholder engagement and dialogue, not only with respect to the design of remedial outcomes, but with respect to their implementation and any follow-up activities (e.g., impact monitoring or performance tracking)⁵² to ensure that they have the desired effect. The need for stakeholder engagement and dialogue in the design of operational-level grievance mechanisms is addressed in UNGP 31(h). However, further research is needed with respect to the ways that meaningful stakeholder engagement can and should inform the **substantive aspects of remedy (as well as procedural aspects)**⁵³ **for a wider range of mechanisms**, and the various structural, cultural, economic and other issues to be aware of in order to ensure that remedial outcomes are “rights-compatible,” meet the needs of those affected and constitute an effective remedy for the human rights-related harms that have occurred.

⁵¹ UNGP 31(f) and Commentary.

⁵² The Manchester Study notes a general lack of available data with respect to the extent to which this kind of follow-up work is carried out at the moment by company-based mechanisms, suggesting a need for further research. See Manchester Study, *supra* note 12, at p. 25.

⁵³ See Key Concept II Box above for an explanation of the differences between substantive and procedural aspects of remedy.



Key research tasks for work stream 5 (for discussion)

- Hold a workshop, either during or immediately after the 2018 Forum, on best practices in relation to meaningful stakeholder engagement (note that meaningful stakeholder engagement by businesses on human rights issues and mechanisms is a priority theme for the 2018 Forum).
- Identify, with the help of partner organizations, [5] potential examples of good practice with respect to stakeholder engagement on the design and implementation of remedial outcomes and prepare a case study on each.

VI. Conclusion: Key items for discussion at expert meeting

As noted above, the ideas and proposals set out in this paper are preliminary and are presented for the purposes of discussion and review at the multi-stakeholder expert and practitioners' meeting, scheduled to take place in Geneva 20-21 September 2018. Following this discussion, and in light of the feedback received, OHCHR will prepare a final version of its proposed workplan for ARP III, which will be published by November via the OHCHR's Accountability and Remedy Project webpage.

Key Points for Discussion

OHCHR seeks feedback from stakeholders and practitioners on the following points in particular:

- Do you agree with the proposed typology of mechanisms set out at section IV of this paper? For instance, is this typology a workable and useful way of organising the work? What challenges do you see in applying this categorisation of mechanisms? Are there any further categories you would add, or any categories you would delete? If so, why?
- Do you agree with the proposal above (at section II.2) to focus in particular on mechanisms relevant to complaints and disputes with respect to labour rights, consumer rights, environmental standards, and social and community rights?
- With respect to the existing body of literature referenced at footnote 12, are there any further or forthcoming research reports or practice tools that should be brought to OHCHR's attention for the purposes of ARP III?



- In light of the Council's request to OHCHR in its resolution 38/13, do you agree with the five work streams proposed in section V above? If not, why not? Is there anything important that has been missed? If so, what? Are there any sub-themes that should have more prominence in the research? If so, which (and why)?
- Do the descriptions of each of the work streams above identify the key issues under each theme? If not, is there anything you would suggest changing or adding? For instance, for work stream 1, are the questions asked in relation to each of the "effectiveness criteria" the right ones? If not, what would you change or add?
- Do you have any comments to make on the key research tasks identified so far for each of the five work streams (see boxes in each part of section V above)? Do these seem realistic given the time and resources constraints that exist? What alternative or additional methods would you recommend to investigate the issues identified?
- Which practitioner organisations and industry bodies are likely to be of particular importance to ARP III from the perspective of partnering and/or mobilising stakeholders and/or stakeholder consultation?