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Making access to remedy a reality for all

Recommendations for Governments and UN institutions

Draft

I. Introduction

The International Organisation of Employers (IOE) has been highly engaged in the issue of business and human rights and deeply involved in the debate on improving access to remedy.

Access to remedy in cases of gross human rights violations is not only a human right *per se*, but a prerequisite for the full enjoyment of human rights. Only when people have access to justice and remedy when they become victims of human rights violations do the rights themselves become meaningful. Article 8 of the Universal Declaration of Human Rights states that “[e]veryone 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.” People need to be sure of their access to “adequate, effective, prompt and appropriate remedies, including reparation”, as the UN 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 demand. Moreover, as the World Justice Project puts it, criminal justice systems must “be capable of investigating, prosecuting, adjudicating, and punishing criminal offenses successfully, reliably, and in a timely manner through a system that is impartial and non-discriminatory, as well as free of corruption and improper government influence all while ensuring that the rights of both the victims and the accused are effectively protected.” **Access to remedy is first and foremost a responsibility of the State.**

The importance of access to remedy is also reflected in the three building pillars of the UN Guiding Principles for Business and Human Rights (UNGPs) “protect-respect-remedy” framework. Since the endorsement of the UN Guiding Principles, the IOE has advocated the importance of promoting and implementing the three closely interconnected pillars with equal vigour.

However, vast global differences exist in reality when it comes to access to remedy. Research by the World Justice Project¹ shows that States with major deficits in protecting the human rights of their citizens, also have the biggest challenges when it comes to access to remedy. Insufficient enforcement of human rights and the lack of effective judicial frameworks do not mean that companies can progress with their business activities unimpeded and without restrictions in these are countries; rather, it is the opposite.

According to the Index of Economic Freedom, it is especially those States with the biggest human rights and access to remedy challenges where entrepreneurial freedom is most restricted. Ineffective judicial systems, corruption, deficient administrations and arbitrary political decisions hamper companies in their business activity, impede planning certainty and make investments an inherent risk. Moreover, insufficient judicial frameworks put pressure on private grievance mechanisms even beyond the issue of human rights, which are not in the position to replace government mechanisms. Thus, besides obvious ethical reasons, companies have a major business interest in ensuring good governance systems are in place, because it gives them legal certainty.

Against this background, the IOE welcomes the focus on access to remedy in the recent resolution tabled by Norway, Russia, Ghana and Argentina and adopted by the UN Human Rights Council on 27 June 2014. The resolution tasks the OHCHR to look deeper into the issue and provide recommendations for strengthening access to remedy to the UN Human Rights Council in June 2016. The IOE is highly committed to working closely with the OHCHR, and other stakeholders to make access to remedy a reality for all and provides considerations and recommendations in this paper.

¹ <http://worldjusticeproject.org/rule-of-law-index>

II. General Considerations

Addressing the barriers to access to remedy

Access to remedy varies from country to country and the obstacles which victims face when seeking remedies are different. There is no monocausal reason for the difficulties victims may experience in this regard. There are, however, major judicial system challenges which influence the possibilities for victims to obtain access to remedies in many countries to varying degrees. These are challenges which the American Bar Association (ABA)² identifies within the ABA Rule of Law Initiative and include, for instance:

1. Lack of effective defence services, along with inadequate financial support and political will on the part of governments and bar associations.
2. Lack of independence, accountability and transparency in judicial systems.
3. Inadequate judicial education and professional training, as well as insufficient emphasis on judicial ethics.
4. Overwhelming caseloads, coupled with inadequate resource allocation and a lack of modern case-management systems, which results in procedural delays that undermine the administration of justice.
5. Corruption, which undermines the fragile public trust in the fairness and efficiency of the judicial system.

These challenges are not carved in stone and research by the World Justice Project shows that some countries are making progress in addressing these issues. Progress however, is too slow, not comprehensive enough throughout the different areas of good governance, and uneven between countries. Stronger commitments by governments are needed to deliver on their duty under international law to provide access to remedy. Performance must also be strongly monitored within the UN supervisory machinery. OHCHR should look into the feasibility of establishing a more stringent system to track the efforts made by States in this regard.

Moreover, further information about the activities which have been undertaken to address problems and challenges in judicial systems through technical cooperation and capacity building projects is required; as well as an identification of the shortcomings, lessons learned and gaps in these initiatives. Based on this information, the OHCHR should develop guidance to strengthen systems of capacity building and exchange of good practice to foster inter-governmental collaboration.

Finally, donor countries should consider listing the functioning of the legal systems as a key criterion for providing financial aid to developing countries. A human rights approach to foreign aid could be a major ingredient to improving national legal systems.

Governments do not have to re-invent the wheel when improving access to remedy. The *UN 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* identify some important elements which governments should consider:

- Disseminate, through public and private mechanisms, information about all available remedies for gross violations.

²http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba_rol_i_2014_program_book_web_email.authcheckdam.pdf

- Take measures to minimise inconvenience to victims and their representatives, protect against unlawful interference with their privacy as appropriate and ensure their safety from intimidation and retaliation.
- Provide proper assistance to victims seeking access to justice.
- Make available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to remedy for gross violations of international human rights.
- Provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law. In cases where a person, a legal person, or other entity is found liable for reparation to a victim, such a party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim.
- Endeavour to establish national programmes for reparation and other assistance to victims in the event that the parties liable for the harm suffered are unable or unwilling to meet their obligations.
- Provide effective mechanisms for the enforcement of reparation judgements under domestic laws.
- Provide victims of human rights violations with full and effective reparation which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.
- Develop means of informing the general public and in particular, victims of gross violations of international human rights law and serious violations of international humanitarian law, of the rights and remedies addressed by these Basic Principles and Guidelines and of all available legal, medical, psychological, social, administrative and all other services to which victims may have a right of access.

Governments should use these recommendations in their efforts to strengthen access to remedy.

Extraterritoriality

In the debate on access to remedy, many NGOs focus especially on the issue of extraterritorial jurisdiction. The shortcomings of extraterritorial jurisdiction include issues which are often neglected in this debate. For instance: the challenge of “forum shopping” and the legal uncertainty for victims and companies it brings with it; the issue of tremendously higher costs; the challenge of ruling according to foreign law; and most importantly, the problem that extraterritorial jurisdiction is mainly open for allegations against multinationals and not purely domestic companies, which leaves victims of domestic companies without access to remedy.

Moreover, research by OHCHR has so far mainly focused on challenges of access to remedy through extraterritorial jurisdiction instead of looking into the question of why these cases were filed in foreign courts to begin with. What barriers did victims face at local level where the incidents happened? What would have been necessary to allow them to file the case at home? Are there cases filed against domestic companies in the country? OHCHR should place more effort into researching these questions to allow the international community to move ahead in the debate based on facts and figures.

Based on this in-depth research and information, the OHCHR should continue discussions on the issue of extraterritorial jurisdiction for gross human rights violations to gain a better understanding of the needs and consequences of extraterritorial jurisdiction.

Non-judicial grievance mechanisms

Non-judicial grievance mechanisms can play an important role in providing non-bureaucratic access to remedy – especially in cases of transnational business activities. The OECD Guidelines for multinational enterprises provide the possibility for a mediation procedure through National Contact Points, which allows issues between affected persons and/or communities and a company to be settled in a cost and time efficient way. OECD countries should make sure that their NCP is working effectively.

Companies themselves have a key role to play when it comes to access to remedy. UNGP art. 29 states that *“to make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted”*. Judicial and non-judicial mechanisms are thereby not competing but complementing each other.

Having an effective company-driven grievance mechanism is therefore in the company’s own interest because it helps identify and settle problematic issues as close as possible to their source, avoiding potential escalation of problems.

There is no “one-size-fits-all” approach when it comes to company grievance mechanisms. Companies use different approaches – ombudsman, telephone hotlines, stakeholder meetings, etc. – to provide employees and communities with the possibility to voice their grievances. What is important for UNGP art. 31 is that non-judicial grievance mechanisms, both State-based and non-State-based, are legitimate, accessible, predictable, equitable, transparent, rights-compatible and a source of continuous learning. Employers’ federations have an important role to play in supporting their company members through advice and guidance and in facilitating the exchange of experiences.

As a global employers’ network, the IOE does so through its Policy Working Group on CSR & Human Rights as well as through conferences, webinars and individual assistance. The IOE and its 150 member federations around the globe are committed to continue and increase efforts in this regard.

Non-judicial grievance and remedy mechanisms must also bring legal certainty to companies. For instance, there have been cases where companies have agreed on settlement schemes, which were later contested by NGOs and victim groups.

III. Recommendations for Action

Strengthening access to remedies requires determined action on different levels by various actors.

1.) What governments should do at national level:

- ✓ As UNGP art. 3 states, countries have to *“enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps”*. Comprehensive human rights regulation applicable to all actors in society, including business, is the

precondition to allow victims of human rights violations to seek remedies for their grievances.

- ✓ Countries have to assess their civil and criminal judicial systems, identify gaps and improve their systems by addressing these gaps. They should do so by involving society, setting clear timelines and reporting about the targets achieved as well as persisting challenges in a transparent manner. They should take the above listed recommendations of the *UN 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* into account when reforming their judicial systems.
- ✓ Countries should look at barriers potential human rights victims in their countries may face when attempting to obtain remedies, for instance with regard to the costs of suing, language barriers, geographical access, etc.
- ✓ Countries should make non-judicial grievance mechanisms such as the OECD Guidelines National Contact Points, work and ensure society is informed about these mechanisms.

National Action Plans on the implementation of the UN Guiding Principles are useful tools to embed these efforts in a comprehensive strategy to implement the UN Guiding Principles.

2.) What the OHCHR should do:

- ✓ The international supervision of efforts for improving access to remedies by UN member countries should be strengthened. The OHCHR should elaborate on ways in which established mechanisms such as the periodic review mechanism, could be used to this end.
- ✓ Continue the discussion on extraterritorial jurisdiction to develop a better understanding of its needs and consequences. These discussions should be based on deeper research about the concrete reasons for filing a lawsuit outside the respective country as well as measures to address them.
- ✓ Capacity building is a key measure for improving access to remedies. The OHCHR should engage in supporting countries to reform their judicial systems and to embed these reforms in comprehensive strategies to implement the UN Guiding Principles.
- ✓ The OHCHR should, moreover, analyse capacity building efforts undertaken so far and develop guidance to improve technical cooperation with regard to strengthening judicial systems.
- ✓ Despite their importance in facilitating foreign direct investment (FDI), bilateral investment treaties (BITs) have come under increasing criticism for limiting the possibilities for governments to improve human rights standards. OHCHR should undertake a study to clarify which challenges BITs might bring with regard to increasing human rights standards in FDI target countries and how these challenges could be addressed.

3.) What countries should do bi- or multi-laterally:

- ✓ Countries should undertake more efforts to support each other through technical cooperation and the exchange of experience. The system of twinning partnerships

has been very successful in the past; for instance in the case of EU enlargement, and should be considered further in this regard. Moreover, South-South cooperation has become more and more prominent and should also be increasingly used to improve access to remedy.

- ✓ Countries should be prepared to engage in a peer review process of their National Action Plans to implement the UN Guiding Principles with a special focus on actions to strengthen the access to remedy.

4.) What Employer and Business Federations should do:

- ✓ Raise awareness and provide guidance about the UN Guiding Principles and especially its provisions on non-judicial grievance mechanisms for companies.
- ✓ Facilitate the exchange of experience between companies and foster action at sectorial level.
- ✓ Engage constructively and pro-actively at national and international level in the debate on access to remedy.
