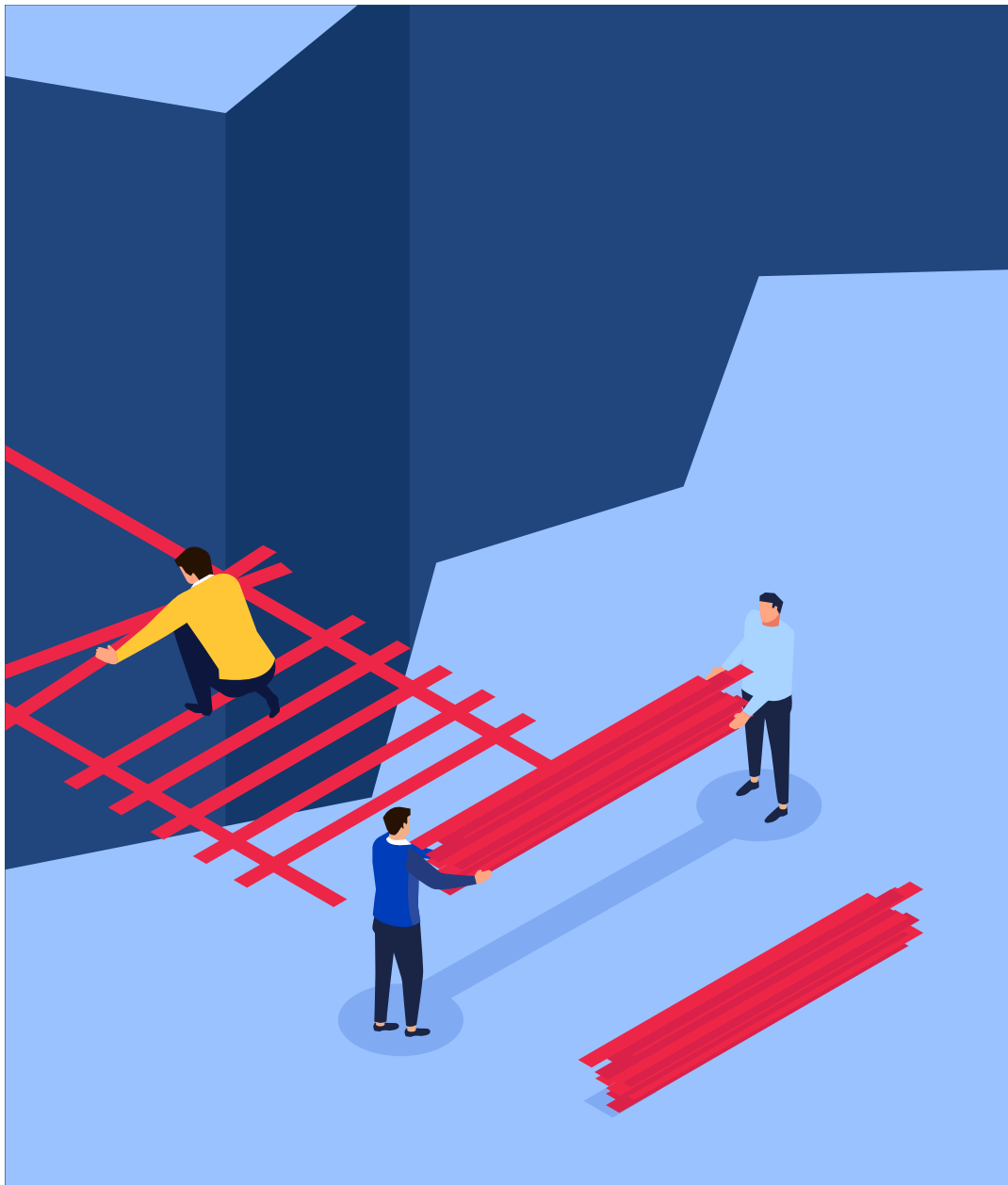


Overcoming Barriers to Access to Justice for Victims of Corporate Human Rights Abuses

2023



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Overcoming Obstacles to Access to Justice

Summary of Recommendations

1. Financial burden

The treaty on business and human rights should require States Parties to adopt measures to reduce the financial burden that might deter or inhibit victims from accessing justice. States should act to ensure their respective legal systems allow costs of litigation and other justice mechanisms to be allocated in ways that facilitate access to justice. States Parties could also reduce the financial burden on victims by providing financial assistance to certain individuals or groups that seek to bring claims against business enterprises for human rights abuses. States Parties should also make sure there is process available to ensure the waiver of court fees in human rights cases to reduce the financial burden on victims.

2. Evidentiary hurdles and the burden of proof

The treaty should contain an obligation for States to adopt measures that allow the reversal or reduction of evidentiary burdens of proof for establishing legal liability, through the application of measures such as presumptions as to the existence of certain facts and the imposition of strict or absolute liability in appropriate cases. Appropriate language should be inserted to clarify article 7.5 of the Third Revised Draft.

3. Collective or group complaints

The treaty should require States to provide for collective actions in response to business-related human rights abuses and should encourage States to take steps to facilitate the ability of victims to pursue such actions when desired.

4. Access to information and disclosure

The treaty should require State Parties to take reasonable steps to ensure victims have access to information regarding their rights and the status of their claims, with a particular focus on groups that are most likely to face challenges accessing such information. Article 7.2 of the Third draft should be strengthened to allow for discovery or other access of rights-holders to information on business enterprises' activities.

Introduction

At its 8th session, the Open-ended Intergovernmental Working Group (OEIWG) on Transnational Corporations and other Business Enterprises with respect to human rights, created by Human Rights Council Resolution 26/9, adopted the Chair-Rapporteur recommendations, including the conduct of intersessional consultations among States convened and led by friend of the Chair, under the guidance of the Chair-Rapporteur; and the updating of “the draft legally binding instrument taking into consideration the concrete textual proposals and comments submitted by States during the eighth session and the outcomes of the consultations as reported by the friends of the Chair,” by the Chair-Rapporteur, who would then “circulate it in a version in track changes, including by publishing it on the working group’s website, by no later than the end of July 2023”.¹ The OEIWG was created in 2014 by Human Rights Council Resolution 26/9 with the mandate “to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.”²

The value and effectiveness of a draft treaty on business and human rights will in part depend on its provisions to facilitate States’ action to enable access to justice for the victims of business human rights abuses. To do so, the treaty must address ways for removing or mitigating specific obstacles that rightsholders face when attempting to access an effective remedy of a judicial or quasi-judicial administrative nature. These obstacles include, inter alia, financial constraints; lack of equality of arms among the parties and unfair burdens of proof and evidentiary standards for human rights cases; lack of recognition of justiciability of collective actions and, in certain cases, collective rights; and access to rights and justice related information. The discussion below offers a brief overview of some of these obstacles, recommendations for addressing them, and good existing practices that offer ideas for the best path forward.

Existing international human rights law and standards and regional and national practices offer authority and guidance in drafting treaty language aimed at addressing factors and countering conditions that commonly obstruct access to justice. Treaty bodies, in particular the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights,³ have enjoined States party to take action to address obstacles to access to justice and clarified obligations in this respect under their respective treaties. The UN Guiding Principles on Business and Human Rights also contain several recommendations in this regard.⁴ At the regional level, human rights courts and commissions have also addressed many of the identified problems and provided guidance.

¹ UN Human Rights Council, Report on the eighth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, A/HRC/52/41, 2022; para. 25 e) and g)

² UN Human Rights Council, Resolution 26/9, Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights, A/HRC/RES/26/9, 2014

³ Committee on Economic, Social and Cultural Rights, General Comment No. 24, E/C.12/GC/24, 2017; Committee on the Rights of the Child, General Comment 16, , CRC/C/GC/16, 2013

⁴ OHCHR, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, HR/PUB/11/04, 2011, p. 29, available at: https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf (see principle 26)

Overcoming Obstacles to Access to Justice

1. Financial burden

Issue

The cost of litigation or similar justice processes can present an insurmountable barrier to victims of business-related human rights violations, preventing them from accessing justice.⁵ But many States do not provide for free or low-cost legal assistance for civil human rights claims and/or do not provide for fee structures that could increase access to justice for victims. Legal aid, when provided by States, tends to be restricted to criminal defence services or, for instance, cases related to social services, and often unavailable for civil actions against corporate human rights abusers.⁶ In terms of the barriers to access created by fee structures, in many countries, the requirement that a losing party pay their adversary's costs "can have a dissuasive effect [on victims seeking a remedy] when the prospects of success are low."⁷ Retaining legal counsel to pursue a claim can be cost prohibitive for victims, especially when legal aid or pro bono services is unavailable and many States, including a number of European Union Member States prohibit the use of contingency fee arrangements to finance counsel.⁸ Other financial factors that can limit access to justice include "the costs associated with gathering evidence in a foreign State to support a claim, the cost of legal and technical experts, and the sheer fact that these cases can take upwards of a decade to litigate."⁹

Recommendation

The treaty on business and human rights should require States Parties to adopt measures to reduce the financial burden that might deter or inhibit victims from accessing justice. States should act to ensure their respective legal systems allow costs of litigation and other justice mechanisms to be allocated in ways that facilitate access to justice. States Parties could also reduce the financial burden on victims by providing financial assistance to certain individuals or groups that seek to bring claims against business enterprises for human rights abuses. States Parties should also make sure there is process available to ensure the waiver of court fees in human rights cases to reduce the financial burden on victims.

Supporting national and regional practice

Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) provides for the obligation to ensure access to effective remedies for violation of rights contained therein, which the Human Rights Committee has

⁵ See, e.g., Jennifer Zerk, "Corporate liability for gross human rights abuses: Towards a fairer and more effective system of domestic law remedies," OHCHR, 2014, p. 44, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/Business/DomesticLawRemedies/StudyDomesticLawRemedies.pdf>

⁶ Ibid. at p. 79

⁷ European Parliament Directorate-General for External Policies, Access to legal remedies for victims of corporate human rights abuses in third countries, EP/EXPO/B/DROI/FWC/2019-08/Lot4/07, February 2019, p. 16, available at: [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf)

⁸ "Most [European Union] member states prohibit contingency fee arrangements where attorneys' fees are dependent on the sum of damages awarded or settlements." Avi Mediratta, "The European Union's New Collective Redress Initiative: Implications for the Future of Civil Litigation", in NYU Journal of International Law and Politics, Volume 53:10, 6 December 2020, p. 14, available at: <https://www.nyuilp.org/the-european-unions-new-collective-redress-initiative-implications-for-the-future-of-civil-litigation/#refX>

⁹ Gwynne Skinner, Robert McCorquodale, Olivier De Schutter, and Andie Lambe, "The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business", December 2013, p. 7, available at: http://corporatejustice.org/wp-content/uploads/2021/04/the_third_pillar_-_access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf

stressed must be “accessible” and “adapted to take into account the special vulnerability of certain categories of persons, including particularly children.”¹⁰ Article 14 of the ICCPR obligates states to guarantee equal access to justice. The Human Rights Committee has explained that in some cases, this obligation may require that a State provide legal assistance or refrain from maintaining a fee structure that “de facto prevent[s]...access to justice.”¹¹ States parties to the Covenant on Economic, Social and Cultural Rights (ICESCR) also “have the duty to take necessary steps to ... ensure the right to effective remedy and reparation, which requires them to remove substantive, procedural and practical barriers to remedies, including by ... providing legal aid and other funding schemes to claimants.”¹²

The United Nations Office of the High Commissioner for Human Rights (OHCHR) recommends that States provide for “a range of private funding arrangements, such as funding by third party litigation funders, firms of solicitors (e.g. pursuant to contingency fee and/or ‘success fee’ arrangements) and providers of litigation insurance[.]” that “States prioritize the provision of State funding to claimants who are able to show financial hardship,” and that “court fees...[be] reasonable and proportionate, with the likelihood of waivers for claimants showing financial hardship and in cases where there is a public interest in the litigation taking place.”¹³

There are a number of ways in which such objectives can be realized, including:

a) Allocation of costs

In the United Kingdom, lawyers are permitted to establish a contingency fee arrangement with clients, whereby instead of charging the victim a fee, the lawyer is compensated for his or her work with a percentage of any recovery won by the victim.¹⁴ The United States is also well-known for permitting such contingency fee arrangements.¹⁵ Moreover, in collective actions in the U.S., (“class action” suits), lawyers can also pay the costs of litigation on behalf of the claimants (e.g., court fees, cost of expert testimony, etc.) and make “repayment of expenses...contingent on the outcome[.]”¹⁶ Claimants in the United Kingdom can also buy insurance to protect themselves from “the risk of having to pay the legal fees of their opponent under the ‘loser pays’ rule.”¹⁷

b) Financial assistance

A 2016 joint study by the United Nations Office on Drugs and Crime (UNODC) and the United Nations Development Programme (UNDP) revealed that several countries have legal aid schemes that include the provision of financial assistance “for public interest litigation and class action cases[.]” among others Argentina, Australia, Bulgaria, Burkina Faso, Ecuador, Ghana, Israel, Mauritius, and South Africa.¹⁸ In addition to the provision of

10 UN Human Rights Committee, General Comment No. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 15. See also 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, UN General Assembly, Resolution 60/147, 2005, para. 12

11 UN Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc. CCPR/C/GC/32, 23 August 2007, para. 9

12 Committee on Economic, Social and Cultural Rights, General Comment 24, 2017, para. 44

13 OHCHR, Improving accountability and access to remedy for victims of business-related human rights abuse, A/HRC/32/19, 10 May 2016, pp. 18, 19, available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/32/19&Lang=E>

14 Such arrangements are called “damages-based agreements.” UK Statutory Instruments, The Damages-Based Agreements Regulations 2013, 2013 No. 609, available at: <https://www.legislation.gov.uk/ukSI/2013/609/contents/made>

15 American Bar Association, Fees and Expenses, 3 December 2020, available at: https://www.americanbar.org/groups/legal_services/milvets/aba_home_front/information_center/working_with_lawyer/fees_and_expenses/

16 Skinner, McCorquodale, De Schutter, and Lambe, Op. Cit note 9, p. 54

17 Mark B. Taylor, Robert C. Thompson, and Anita Ramasastry, Overcoming Obstacles to Justice: Improving Access to Judicial Remedies for Business Involvement in Grave Human Rights Abuses, Fafo, Norway, p. 21, available at: https://www.faf.no/media/com_netsukii/20165.pdf

18 Jennifer Zerk, 2014, Op. Cit. note 5, pp. 92, 131, 160, 173, 186, 218, 288, 392, and 453

direct financial aid, indirect public assistance for human rights claims against companies could be provided through the operations of a National Human Rights Institution,¹⁹ or similar State or public body with competency to provide assistance. For example, in Kenya, people can submit human rights complaints against private companies to the Kenya National Commission on Human Rights, which may then provide legal advice, open an investigation, intervene in litigation with an amicus brief, or file a case against the company on behalf of the victim or the public interest more broadly.²⁰

c) Waiver of court fees

In Brazil, under the 1985 Public Civil Action Law, there are no fees for class action lawsuits, including class actions filed by the Public Prosecution Service on behalf of victims of human rights violations, even if the case is unsuccessful.²¹

19 OHCHR, Improving accountability and access to remedy for victims of business-related human rights abuse: explanatory notes for guidance, A/HRC/32/19/Add.1, 12 May 2016, para. 3, available at: <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/HRC/32/19/Add.1&Lang=E>; see also European Union Agency for Fundamental Rights, Improving access to remedy in the area of business and human rights at the EU level, 10 April 2017, p. 12, available at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2017-opinion-01-2017-business-human-rights_en.pdf (“National Human Rights Institutions...can play an important role as non-judicial bodies having the power to offer remedies if they are competent to accept cases. If they do not have that competence, they could be useful in an advisory capacity.”)

20 Kenya National Commission on Human Rights, Legal Services, <https://www.knchr.org/Our-Work/Legal-Services> (Accessed 1 June 2023). After receiving a litany of complaints related to the mining industry, the Commission opened a public inquiry into the mining sector in Taita Taveta County. Kenya National Commission on Human Rights, Investigations into Human Rights Violations, <https://www.knchr.org/Articles/ArtMID/2432/ArticleID/1047/Investigations-into-Human-Rights-Violations> (Accessed 1 June 2023); The Constitution of Kenya, 2010, Article 22(2)

21 Thales Cavalcanti Coelho, “Access to Remedies and Reparations: From Brazilian Practice to International Binding Standards”, in *Business and Human Rights Journal*, 2023, p. 3 (citing Public Civil Action Law 1985, article 18); see also Tito Amaral de Andrade, Gláucia Mara Coelho, and Gisela Mation, “Class/collective actions in Brazil: overview”, in *Thomson Reuters Practical Law*, 1 April 2018, [https://uk.practacallaw.thomsonreuters.com/9-617-6649?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practacallaw.thomsonreuters.com/9-617-6649?transitionType=Default&contextData=(sc.Default)&firstPage=true)

2. Evidentiary hurdles and the burden of proof

Issue

Claimants in business-related human rights cases often face significant obstacles in accessing evidence necessary to satisfy the required standard of proof due to a series of factors. Some of these are highlighted in the UN Guiding Principles on Business and Human Rights commentary, including the lack of available expertise where expert testimony may be needed, the inequality of means available to company and complainants, and the inability to access key information that is in the possession of the company.²² There is also a great expense involved in carrying out even a basic investigation, which can involve, for example, interviewing employees and company officials. The combination of these factors results in a structural inequality of arms and unfair proceedings. For example, in *Oguru et al v. Shell Oil Company*, the claimants who sued Shell Oil Company and its Nigerian subsidiary in a court in the Netherlands for environmental harm caused by oil spills in several Nigerian villages had to face Shell's outsized financial resources. They struggled to find necessary technical experts because much of the candidate pool "worked with Shell professionally and were therefore unable or unwilling to testify," and had trouble "accessing internal information...regarding the operations of the business" which the court held Shell was not obligated to provide under Dutch law.²³

Recommendation

The treaty should contain an obligation for States to adopt measures that allow the reversal or reduction of evidentiary burdens of proof for establishing legal liability, through the application of measures such as presumptions as to the existence of certain facts and the imposition of strict or absolute liability in appropriate cases. Appropriate language should be inserted to clarify article 7.5 of the Third Revised Draft.

Supporting national and regional practice

The Inter-American Commission on Human Rights takes a flexible approach to evidentiary standards for cases involving human rights violations by companies due to the burdens that victims may face, including "obstacles linked to the investigation and collection of evidence for presenting claims, to having counsel, to knowing their rights and available mechanisms,"²⁴ as well as "notorious imbalances" caused by the disparate economic status of victims and companies.²⁵ According to the Commission, "in cases in which these obstacles are verified," States should adjust their evidentiary rules, guided by international human rights evidentiary principles. These include "recognizing gradations that will depend on the nature of the dispute and the seriousness of the facts; the application of circumstantial evidence and presumptions from which conclusions consistent with the facts may be inferred; shifting the burden of proof when decisive information cannot be obtained without the involved business entity's cooperation or when there are evasive or ambiguous answers to the accusations made against them."²⁶

22 Guiding Principles on Business and Human Rights, 2011, p. 29 (explaining that many barriers to accessing a judicial remedy "are the result of, or compounded by, the frequent imbalances between the parties to business-related human rights claims, such as in their financial resources, access to information and expertise."); see also, e.g., European Parliament Directorate-General for External Policies, Op. Cit. note 7, pp. 64, 109; see also Inter-American Commission on Human Rights, Report on Business and Human Rights: Inter-American Standards, OAS/Ser.L/V/II IACHR/REDESCA/INF.1/19, November 1, 2019, paras. 134, 140, available at: http://www.oas.org/en/iachr/reports/pdfs/Business_Human_Rights_Inte_American_Standards.pdf; see also OHCHR, Op. Cit. note 19, para. 15 ("In cases where business enterprises have caused or contributed to adverse human rights impacts, but where there is no detailed information about the relevant corporate structures, contractual relationships, internal management processes and reporting procedures, it can be difficult to identify the company (or companies) that should be legally accountable and on what basis.").

23 Skinner, McCorquodale, Schutter, and Lambe, Op. Cit. note 9, pp. 107-108

24 Inter-American Commission on Human Rights, Report on Business and Human Rights Op. Cit. note 22, para. 139

25 Ibid.

26 Ibid, para. 140

The UK Bribery Act 2010 created a “strict liability” offense for companies for failing to prevent bribery; but it gives companies a defense to avoid punishment if they can show that they had in place “adequate procedures” designed to prevent such conduct. In this case although the company avoids punishment, the person that committed bribery can still be found liable under other provisions of the Act.²⁷

The European Union also recognizes the need to shift the burden of proof in certain contexts and has done so “in EU non-discrimination legislation, such as the Racial Equality Directive (Article 8) and the Gender Equality Directive (Article 18). Once a claimant has established an initial case on the facts, a presumption of discrimination arises, and the responding party must prove that discrimination did not occur.”²⁸

The Council of Europe addresses the issue in a general fashion: “Member States should consider revising their civil procedures where the applicable rules impede access to information in the possession of the defendant or a third party if such information is relevant to substantiating victims’ claims of business-related human rights abuses, with due regard for confidentiality considerations.”²⁹

The Escazú agreement on Access to information, participation and justice in environmental matters, article 8.3 requires in this respect: “Measures to facilitate the production of evidence of environmental damage, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof”.³⁰

In Colombia, this question is regulated in an exceptional way in Article 167 of the General Procedural Code: “(...) according to the particularities of the case, the judge may, ex officio or at the request of a party, distribute the burden of proof when ordering the production of evidence, during its production or at any time during the process before taking a decision, requesting the production of proof of a certain fact to the party that is in a better position to provide the evidence or clarify the controversial facts by virtue of its proximity to the evidence, for having the object of evidence in its possession, for special technical circumstances, for having intervened directly in the events that gave rise to the dispute, or due to a state of defencelessness or disability in which the counterpart is, among other similar circumstances.”

In Brazil, a “reversal of the burden of proof....has been accepted in some environmental cases in which obtaining evidence of the damage is challenging for the plaintiff but simple for the defendant.”³¹

Under Thailand’s Mineral Act of 2017, “a person to whom permission has been granted... must be liable to pay compensation or damages for losses or grievances caused by the operation of his business to persons, animals, plants, property or the environment. In the case where the loss occurs in the area for which permission has been granted, it shall prima facie be presumed that such loss is caused by the act of the person to whom such permission has been granted.”³²

27 UK Bribery Act 2010, section 7; see also OHCHR, Improving accountability and access to remedy for victims of business-related human rights abuse: The relevance of human rights due diligence to determinations of corporate liability, A/HRC/38/20/Add.2, 2018; paras. 25 and ff.

28 European Union Agency for Fundamental Rights, Op. Cit. note 19, p. 39 (internal citation omitted)

29 Committee of Ministers of the Council of Europe, Recommendation CM/Rec (2016)3 of the Committee of Ministers to Member States on Human Rights and Business, 2016, para. 43, available at: <https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html>

30 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (ECLAC), available at: <https://www.cepal.org/en/subsidiary-bodies/regional-agreement-access-information-public-participation-and-justice/text-regional-agreement>

31 Thales Cavalcanti Coelho, Op. Cit. note 21, p. 3

32 Thailand Minerals Act, B.E. 2560 (2017), Tentative translation by Associate Professor Dr. Pinai Nanakorn under contract for the Office of the Council of State of Thailand’s Law for ASEAN project, Section 139, available at: <https://policy.asiapacificenergy.org/sites/default/files/Minerals%20Act%2C%20B.E.%202560%20%282017%29.pdf>

3. Collective or group complaints

Issue

Victims of human rights abuses may face barriers to bringing a claim individually. For example, filing a claim may be cost prohibitive or may pose a personal security risk to an individual victim, it may be prohibitively costly, as discussed above, or the victim may be a child or other person without legal standing. Additionally, human rights abuses by businesses, especially large companies, may impact multiple people or entire communities and it is often costly and procedurally inefficient to file a series of individual complaints for the same fact. For this reason, it is important that the possibility of a collective or class action be available to ensure these rights. Here, it is important to distinguish between actions taken together by multiple and event large numbers of individuals, who must be each named and identified as an individual party to a complaint, and a proper collective or class action, where certain individuals or entities act on behalf of a group of similarly situated individuals, some of whom may not even be identified until after the litigation has long concluded. Many jurisdictions do not recognize the possibility of collective actions,³³ making it difficult for groups of persons and communities harmed by a human rights abuse or a group of similarly situated individuals to collectively seek access to justice. For example, “German law does not provide for collective redress mechanisms ... ‘Instead, the lawyers have to treat each claim as a separate lawsuit and file each motion individually.’ The significant administrative effort that this requires might in turn discourage law firms from filing claims on behalf of all those affected by the abuse.”³⁴ Even in States where collective actions are possible, claimants face significant barriers to pursuing claims.³⁵ For example, getting a case “certified” as a class action suit in the United States requires satisfying sometimes difficult to meet criteria³⁶ and the admission of a collective action in the United Kingdom is subject to the court’s discretion.³⁷

Some international human rights instruments recognize collective rights,³⁸ including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights (the right to self-determination), although under both these treaties, the right to self-determination is non-justiciable through their individual communication procedures;³⁹ the United Nations Declaration on the Rights of Indigenous Peoples and the Indigenous and People’s Tribal Convention (indigenous rights including land rights);⁴⁰ and the African Charter on Human and Peoples’ Rights (property rights).⁴¹ In theory, violation of those collective rights could give rise to collective complaints. But except in some cases, national and international procedures do not yet allow those forms of complaints.

33 See, e.g., European Parliament Directorate-General for External Policies, Op. Cit. note 7, p. 16 (“[M]ost European States have not adopted class action mechanisms...”)

34 Ibid. at p. 64 (quoting P. Wesche and Miriam Saage-Maaß, “Holding Companies Liable for Human Rights Abuses Related to Foreign Subsidiaries and Suppliers before German Civil Courts: Lessons from Jabir and Others v Kik”, in *Human Rights Law Review*, Volume 16:4, 1 June 2016, p. 382)

35 Skinner, McCorquodale, Schutter, and Lambe, Op. Cit. note 9, p. 10

36 American Bar Association, *Class Actions 101: How to Obtain (or Defeat) Class Certification*, <https://www.americanbar.org/groups/litigation/committees/class-actions/practice/2019/class-actions-101-how-to-obtain-certification/> (Accessed 1 June 2023)

37 Skinner, McCorquodale, Schutter, Andie Lambe, Op. Cit. note 9, pp. 10, 56

38 International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: Practitioners Guide No. 2*, Revised Edition, 2018, pp.43-44, available at: <https://www.icj.org/wp-content/uploads/2018/11/Universal-Right-to-a-Remedy-Publications-Reports-Practitioners-Guides-2018-ENG.pdf>; see also OHCHR, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation*, HR/PUB/06/8, 2005, p. 4, available at: <https://www.ohchr.org/sites/default/files/Documents/Publications/FAQen.pdf> (“Collective rights are reflected strongly in some regional human rights regimes.”)

39 International Covenant on Civil and Political Rights, Article 1; International Covenant on Economic, Social, and Cultural Rights, Article 1; International Commission of Jurists, *Ibid.*, p. 44

40 Indigenous and Tribal Peoples Convention (ILO Convention No. 169), 1989, Articles 13-19

41 International Commission of Jurists, *The Right to a Remedy and Reparation for Gross Human Rights Violations: Op. Cit. note 39*, p. 44 (citing article 21(2) of the African Charter on Human and Peoples’ Rights)

Recommendation

The treaty should require States to provide for collective actions in response to business-related human rights abuses and should encourage States to take steps to facilitate the ability of victims to pursue such actions when desired.

Supporting national and regional practice

The commentary on the UN Guiding Principles on Business and Human Rights highlights that “[t]here are inadequate options for aggregating claims or enabling representative proceedings... and this prevents effective remedy for individual claimants[.]”⁴² In this regard, the OHCHR recommended that “[r]ules of civil procedure provide for the possibility of collective redress mechanisms in cases arising from business-related human rights abuses...”⁴³

Inter-American human rights mechanisms and jurisprudence recognize collective rights. For example, a collectivity can obtain injunctive remedies in the form of “precautionary measures” granted by the Inter-American Commission on Human Rights pursuant to Article 25 of the Commission’s Rules of Procedure.⁴⁴ Per Article 25 § 3 of the Rules, “[p]recautionary measures may protect persons or groups of persons, as long as the beneficiary or beneficiaries may be determined or determinable through their geographic location or membership in or association with a group, people, community or organization.” Similarly, the Inter-American Court of Human Rights recognizes that communities can face collective harm, allows collective legal action, and has ordered collectively oriented remedies.⁴⁵ For example, the Court has held that “the [American] Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property...”⁴⁶

The Brazilian legal system also offers collective access to justice and the Public Prosecution Service has filed class action lawsuits on behalf of “groups of rights holders[.]”⁴⁷

Collective actions are increasingly common in South Africa,⁴⁸ and a class action lawsuit is currently pending against a British mining company for injuries caused by pollution from its mining activities South Africa.⁴⁹

⁴² Guiding Principles on Business and Human Rights, HR/PUB/11/04, 2011, p. 29

⁴³ OHCHR, Op. Cit. note 13, p. 18

⁴⁴ Organization of American States, Rules of Procedure of the Inter-American Commission on Human Rights, 1 August 2013, Article 25, available at: <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/basics/rulesiachr.asp> (emphasis added)

⁴⁵ Judgment of March 29, 2006, Inter-American Court of Human Rights, Case of Sawhoyamaxa Indigenous Community v. Paraguay, para. 228, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf

⁴⁶ Judgment of August 31, 2001, Inter-American Court of Human Rights, Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 148. Finding this right violated in the Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, the Court ordered Nicaragua to pay compensation to the community and to “carry out the delimitation, demarcation, and titling of the [member’s] corresponding lands...” Id. at paras. 155, 164, 167. Similarly, in Sawhoyamaxa Indigenous Community v. Paraguay, the Court held that Paraguay violated the Sawhoyamaxa people’s collective right to life and property, and ordered Paraguay to, inter alia, take specific steps to improve the health of the community and to facilitate acquisition of identification documents, describing these reparations as “especially relevant in the instant case, given the collective nature of the damage caused.” Judgment of March 29, 2006, Inter-American Court of Human Rights, Case of Sawhoyamaxa Indigenous Community v. Paraguay, paras. 228-33.

⁴⁷ Thales Cavalcanti Coelho, Op. Cit note 21, pp. 2-3 (citations omitted)

⁴⁸ Theo Broodryk, An empirical analysis of class actions in South Africa, in Law, Democracy & Development, Volume 24, 2020, p. 55, available at: <https://law.uwc.ac.za/images/stories/ldd/BROODRYK-C.pdf>

⁴⁹ OHCHR, Press Release: UN experts intervene in toxic legacy class action against lead pollution, 19 January 2023, available at: <https://www.ohchr.org/en/press-releases/2023/01/un-experts-intervene-toxic-legacy-class-action-against-lead-pollution>

4. Access to information and disclosure

Issue

All persons should have accessible and accurate information of their rights under human rights law and their right to access justice if such rights are violated. Victims' lack of access to information about their rights has been identified as a barrier to accessing justice in many contexts, including in the European Union⁵⁰ and Latin America.⁵¹ Moreover, rightsholders often lack access to relevant, sufficient, quality information in connection to corporate activity, which hinders their meaningful participation in the prevention of and response to human rights impacts.⁵²

Recommendation

The treaty should require State Parties to take reasonable steps to ensure victims have access to information regarding their rights and the status of their claims, with a particular focus on groups that are most likely face challenges accessing such information. Article 7.2 should be strengthened to allow for discovery or other access of rights-holders to information on business enterprises' activities.

Supporting national and regional practice

The commentary on the UN Guiding Principles on Business and Human Rights explains that “[e]nsuring access to remedy for business-related human rights abuses requires...that States facilitate public awareness and understanding of these mechanisms, how they can be accessed, and any support (financial or expert) for doing so.”⁵³ The OHCHR recommends that information about litigation financing be “well-publicized...and understandable[,]” that States ensure “transparency...with respect to court delays[,]” and that claimants are informed of their rights and the procedures for appealing an enforcement agency’s denial of a request to take action.⁵⁴

In the European Union, people can access information about their rights and legal resources through the “the European e-Justice Portal[,]” which was created by the European Commission “to increase awareness of rights under EU law...Currently, the information and resources provided in the Portal are available in all EU official languages, ranging from information on legal aid, judicial training, European small claims and videoconferencing to links to legal databases, online insolvency and land registers. It also includes user-friendly forms for various judicial proceedings...”⁵⁵ The portal includes information on business and human rights, with country-specific information on relevant rights and redress options for over a dozen countries.⁵⁶

Principle 1 of the ARTICLE 19 Principles on Freedom of Information Legislation (endorsed by the UN Special Rapporteur on Freedom of Opinion and Expression) asserts that “private bodies themselves should also be in-

⁵⁰ See e.g., European Union Agency for Fundamental Rights, Op. Cit. note 19, p. 51

⁵¹ Inter-American Commission on Human Rights, Report on Business and Human Rights Op. Cit note 22, para. 139 (“[I]n the context of operations by extractive industries and development projects, the IACHR has also identified a series of judicial and administrative obstacles, for example...knowing their rights and available mechanisms[.]”)

⁵² ESCR-net & FIDH, Ten Key Proposals for the Treaty, October 2016, pp. 44-52, available at: <https://www.fidh.org/IMG/pdf/tenkeyproposalstreaty.pdf>

⁵³ Guiding Principles on Business and Human Rights, 2011, p. 27; see also Jennifer Zerk, Op. Cit. note 5, p. 58

⁵⁴ OHCHR, Op. Cit. note 13, pp. 14, 19

⁵⁵ European Union Agency for Fundamental Rights, Op. Cit. note 19, p. 68

⁵⁶ European Union, Business and human rights, 2020, https://e-justice.europa.eu/580/EN/business_and_human_rights (Accessed 1 June 2023)

cluded [in legislation] if they hold information whose disclosure is likely to diminish the risk of harm to key public interests, such as the environment and health or affect individuals' human rights."⁵⁷

Article 9 of the African Charter provides that "[e]very individual shall have the right to receive information."⁵⁸ The Declaration of Principles on Freedom of Expression and Access to Information in Africa, adopted by the African Commission on Human and Peoples' Rights in 2019, offer guidance for the implementation of this article.⁵⁹ In addition to calling for laws that guarantee "the right to access information held by public bodies[,]" Principle 26 of the Declaration states the "[e]very person has the right to access information of private bodies that may assist in the exercise or protection of any right expeditiously and inexpensively."⁶⁰ The African Commission's Model Law on Access to Information also reflects this principle, guaranteeing "an enforceable right to access information from...a private body, where the information may assist in the exercise or protection of any right."⁶¹

In South Africa, the Promotion of Access to Information Act requires private bodies to disclose information which is 'required for the exercise or protection of any right'.⁶²

In environmental law, two regional conventions provide for clauses promoting access to and dissemination of environmental information to the public: the Aarhus Convention⁶³ and the Escazú Agreement.⁶⁴ Article 6(12) of the latter contains a requirement that Parties "take the necessary measures through legal or administrative frameworks... to promote access to information in the possession of private entities."⁶⁵

The recently adopted Norwegian Transparency Act obliges companies to respond to information requests from members of the public about the risks relating to human rights and decent working conditions in their operations, and their related due diligence activities.⁶⁶

The EU Collective Redress Directive also introduces a regime on access to information by providing that, where reasonably available evidence has been presented by the claimant, the court may order the disclosure of information in the hands of the defendant (Article 18).⁶⁷

57 Article 19, The Public's Right to Know: Principles on Freedom of Information Legislation, 2016, Principle 1, available at: https://www.article19.org/data/files/RTI_Principles_Updated_EN.pdf

58 African Charter on Human and Peoples' Rights, Article 9, available at: https://au.int/sites/default/files/treaties/36390-treaty-0011_-_african_charter_on_human_and_peoples_rights_e.pdf

59 African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa 2019, 17 April 2020, Introduction, available at: <https://achpr.au.int/en/node/902#:~:text=The%20Declaration%20establishes%20or%20affirms,to%20express%20and%20disseminate%20information>

60 African Commission on Human and Peoples' Rights, *Ibid.*, p.19, principle 26; see also Amnesty International, *Injustice incorporated: Corporate abuses and the human right to remedy*, 2014, p. 159, available at: <https://www.amnesty.org/en/documents/pol30/001/2014/en/> (discussing a similar principle articulated in an earlier version of the Declaration, "the Declaration of Principles on Freedom of Expression in Africa").

61 African Commission on Human and Peoples' Rights, "Model Law on Access to Information for Africa", p. 22, section 12(1)(b), available at: https://archives.au.int/bitstream/handle/123456789/2062/Model%20Law%20Access%20to%20Information_E.PDF?sequence=1&isAllowed=y

62 Promotion of Access to Information Act 2 of 2000, section 50(1)(a): "Right of access to records of private bodies; A requester must be given access to any record of a private body if that record is required for the exercise or protection of any rights", available at: <https://www.gov.za/documents/promotion-access-information-act>

63 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), available at: <https://unece.org/DAM/env/pp/documents/cep43e.pdf>

64 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), available at: <https://www.cepal.org/en/subsidiary-bodies/regional-agreement-access-information-public-participation-and-justice/text-regional-agreement>

65 *Ibid.* at Article 6(12)

66 Act relating to enterprises' transparency and work on fundamental human rights and decent working conditions

67 Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC

Conclusion

The next sessions of the OEIGWG in charge of elaborating a treaty on business and human rights should start negotiating an updated draft to be prepared by the Chair-Rapporteur. The recommendations provided in this paper provide the blueprint for robust provisions tackling endemic problems that impede access to justice for victims of business human rights abuse. These recommendations are based on existing international (and regional) standards and widespread national practice. State delegations that are participating in the regional consultations might find the recommendations and supporting practice informative and inspiring for their own. It is imperative that new drafts of the proposed treaty contain clear and strong obligations in this respect to fulfil one of its key objectives and contributions.

