International Organisation of Employers
Organisation Internationale des Employeurs
Organización Internacional de Empleadores

22 September 2014

Making Access to Remedy a Reality for All

Recommendations for Governments and UN institutions

Avenue Louis-Casaï 71 | CH-1216 Geneva | Switzerland | Tel: +41 (0)22 929 00 00 | Fax: +41 (0)22 929 00 01 | www.ioe-emp.org | ioe@ioe-emp.org

I. INTRODUCTION

The International Organisation of Employers (IOE) has been actively engaged in the issue of business and human rights for many years and deeply involved in the debate on improving access to remedy. The IOE was involved in the mandate of the Special Representative of the UN Secretary-General on business and human rights from the outset, and endorsed both the UN "Protect, Respect, Remedy" framework, and the UN Guiding Principles on Business and Human Rights (UNGP) as the basis for the ongoing and progressive implementation of the UN framework. Moreover, the IOE has also worked very closely with the OHCHR, as well as with the UN Working Group on Business and Human Rights and other stakeholders to advance the dissemination and implementation of the framework and the UN Guiding Principles. Through dedicated guides, webinars, conferences, workshops and surveys, as well as individual advice to companies, the IOE has supported business directly in their efforts to bring their related policies in line with the expectations of the UN Guiding Principles. The IOE would like to contribute the following comments to the ongoing debate on access to remedy.

Access to remedy in cases of human rights violations is not only a human right *per se*, but a prerequisite for the full enjoyment of human rights. It is only when people have access to justice and remedy when their human rights are infringed that the rights themselves become meaningful. Article 8 of the Universal Declaration of Human Rights states that "*everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.*"

Access to remedy must therefore not be confused with corporate accountability. Although the goals are related, they are not the same. For instance, measures that hold companies accountable do not necessarily improve victims' access to effective remedy. Criminal proceedings may not always result in the remedying of infringements suffered. This does not mean that criminal proceedings should not be pursued in cases of criminal conduct. However, more clarity is needed around the distinction between corporate accountability versus access to remedy.

The importance of access to remedy is also reflected in the three pillars of the UNGP "protect-respect-remedy" framework. Pillar Three's "foundational principle" is that "*as part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy*." Guiding Principles 26 and 27 further expand on this State duty, explaining that States "should take appropriate steps to ensure the effectiveness of *domestic judicial mechanisms*," including by *"considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy*," and "*should also provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse*." As these statements make clear, access to remedy is first and foremost a responsibility of the State.

The UN Guiding Principles also recognize under Pillar Three that business has a responsibility in facilitating access to remedy. Guiding Principle 28 calls upon States to "*consider ways to facilitate access to effective non-State based grievance mechanisms dealing with business-related human rights harms*" and Guiding Principles 29 and 30 call

upon businesses, through individual and collective action, to "*establish or participate in effective operational-level grievance mechanisms for individuals and communities*," so that possibilities in the event of grievances can be "*addressed early and remediated directly*."

Since the endorsement of the UN Guiding Principles in 2011, the IOE has advocated for the importance of promoting and implementing the three closely interconnected pillars with equal attention and application.

However, wide global differences exist in reality when it comes to access to remedy. Research by the World Justice Project[1] shows that States which have major deficits in protecting the human rights of their citizens also experience the biggest challenges when it comes to providing 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 countries; rather, it is the opposite. Ineffective implementation of human rights, ineffective judicial systems, corruption, deficient administrations and arbitrary political decisions hamper companies in their business activities, impede planning certainty and make investments inherently risky. Thus, besides the obvious ethical reasons, companies have a major business interest in ensuring good governance systems are in place, because it gives them legal certainty, especially when it comes to respecting human rights.

Against this background, the IOE welcomed 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 with continuing work on access to remedy for victims of business-related human rights abuses. The IOE is highly committed to working closely with the OHCHR and other stakeholders to make access to remedy a reality for all. The IOE recognizes the rationale for OHCHR to focus on gross human rights abuses, since these violations need most urgently to be addressed.

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 therefore differ. There is no single 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 and 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. Inadequate financial support and political will on the part of governments and bar associations.

2. Lack of independence, accountability and transparency in judicial systems.

[1] http://worldjusticeproject.org/rule-of-law-index
[2]http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba_roli_2014_program_book_web_email.authcheckdam.pdf

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 immutable and research by the World Justice Project shows that some countries are making progress in addressing them. Progress however is too slow, not comprehensive enough across the different areas of good governance, and countries' reform efforts have varied in their effectiveness. 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 is required about the activities undertaken to address problems and challenges in judicial systems through technical cooperation and capacity building projects, particularly to identify the shortcomings, lessons learned and gaps in these initiatives. Based on this information, the OHCHR should develop guidance to strengthen systems for capacity building and the exchange of good practice to foster inter-governmental collaboration.

Finally, donor countries should consider listing the sound functioning of national 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 in improving national legal systems. Donor countries should also carefully coordinate with private philanthropic initiatives[3] and those of national and international bar associations to address rule of law and judicial reform[4] so that the countries in the greatest need of assistance are targeted as priorities.

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 with respect to improving access to State-based judicial remedies:

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

[3] See, e.g., http://humanrights.foundationcenter.org/
[4] See, e.g., http://www.americanbar.org/advocacy/rule_of_law/thematic_areas.html; http://www.ibanet.org/PPID/Constituent/Rule_of_Law_Action_Group/Overview.aspx; http://www.ibanet.org/PPID/Constituent/AccesstoJustice_LegalAid/Default.aspx; http://www.ibanet.org/IBAHRI.aspx

- 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 State-based judicial remedies.

Extraterritoriality

In the debate on access to remedy, many NGOs focus especially on expanding the availability of extraterritorial jurisdiction as a panacea to the access to remedy problem without more closely scrutinizing whether this is the most effective or promising means of ensuring access. The shortcomings of extraterritorial jurisdiction are too often overlooked, including the tremendously higher costs involved in pursuing remedies in foreign courts and sustaining such cases over several years; the challenges presented to foreign courts when they must rule according to foreign legal principles; the difficulties in obtaining evidence and testimony abroad; and, most importantly, the problem that extraterritorial jurisdiction is mainly open for allegations against multinationals and not domestic companies, which would continue to leave 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? Research addressing these issues has been undertaken, but more rigour in the empirical and methodological approaches used in analyzing the obstacles to domestic remedies would help in efforts to improve access through domestic institutions, be they judicial or non-judicial. OHCHR should put 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. Further issues are the impact of extraterritorial jurisdiction on the integrity of the host state, which laws would be applicable, what real impact would it have on the ground?

Non-judicial grievance mechanisms

Non-judicial grievance mechanisms can play an important role in providing 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 trained, equipped and working effectively in addressing specific instances brought before it.

Companies also have an important 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, thereby avoiding potential escalation.

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 and Business & Human Rights as well as through conferences, webinars and individual assistance. The IOE and its more than 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 for companies. For instance, there have been cases where companies and grievants have agreed on settlement schemes which were later contested by NGOs and victim groups, undermining not only the settlement, but also the integrity of the remedy mechanism itself.

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, helped in some cases by relevant international bodies, like the OSCE did in the Balkans. 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, the existence of legal aid systems, etc.

- Countries should make non-judicial grievance mechanisms such as the OECD Guidelines National Contact Points or national Human Rights Commissions' mediation and arbitration systems 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 how it can practically contribute to improving access to remedy to victims in a timely and cost-effective fashion. 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 existing obstacles at national level. It is important for OHCHR therefore to engage with companies as well as the representative business organisations, with UN and NGO representatives who are experts in questions related to access to remedy, not only campaigning NGOs, as well as with government representative from industrialised countries, but also from countries that are developing their legal systems.

- Capacity building is a key measure for improving access to remedies. The OHCHR and other relevant organisations 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 for strengthening judicial systems.

3.) What countries should do bi- or multilaterally:

- 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 prevalent 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 access to remedy.

4.) What Employers' and Business Federations can 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 sectoral level.

- Engage constructively and pro-actively at national and international level in the debate on access to remedy as well as the strengthening of national legal systems and governance generally.

*****