Effective Operational-level Grievance Mechanisms



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This report is the result of more than two years of research and consultation by a team from the International Commission of Jurists with the advice, support and guidance from an Expert Panel composed of:

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In addition, Justice Ajit P. Shah (ICJ Commissioner, India, Chairman of the Law Commission of India, Former Chief Justice of High Court of Deli) participated in the early stages of the process.

The report has been approved by each member of the Expert Panel and reflects their collective views. However, it may happen that there are specific statements in the report which do not accord with, or comprehensively reflect, the precise view of every Panelist.

The project, including the contents of this report, also benefited from and was informed by important contributions from an experienced group of practitioners through a Consultative Group. Members of this group provided information, analysis and advice, participating in consultations and reviews of drafts. The Consultative Group was composed of the following persons, some of which participated in their personal capacity:

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The contents of the present report do not necessarily represent the views of those who provided information, comments or participated in the consultations or in the case studies.

ICJ Senior Legal Advisor Carlos Lopez and ICJ legal advisers Briony Potts and Martin Gibbs composed the research and drafting team. ICJ Legal and Policy Director Ian Seiderman provided legal review. Haendila Varela, Laura Knopfel, Ruth Paijatan and Antonella Angelini supported site visits and drafting of case study reports. Mariam Haidara, Miaomiao Li and Rodrigo Paillalef assisted in the editing and preparations for printing.

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Contents

List of Abbreviations	7
Executive Summary	9
Introduction	17
Part I	27
Section 1. Normative framework and context	28
1.1. OGMs and the right to an effective remedy	28
1.2 The policy framework for OGMs	33
1.3 Relationships of OGMs with other institutions and mechanisms	36
1.4 Policy considerations	40
Section 2. Establishment and functioning of OGMs in practice	41
2.1 Early involvement of potential users	44
2.2 Legitimacy and the issue of independence	46
2.3 Accessibility, predictability and transparency towards the community.	50
2.4 Subject matter: community concerns and human rights abuses	52
2.5 Considerations of procedural fairness	57
2.6 Workers grievances in the supply chain and with contractors	62
2.7 Grievance and situations of contribution to harm and complicity	66
2.8 Relationship with judicial remedies and the criminal justice system	66
Section 3. Effective remedy	68
3.1. Community input in the determination of the appropriate remedy	70
3.2 Waiver and exchange of final mutual releases	71
3.3 Ensuring implementation of the agreement / decision	75
Section 4 Monitoring of OGM performance and ongoing supervision	76
4.1 Publication and accessibility of data performance	76
Conclusions from the review of practice	79

Part II	83
Section 1: The way forward	85
Section 2: Recommendations and performance standards for OGMs	95
Proposed Performance standards	98
Bibliography	109

Boxes

Box 1: Guiding Principles on Business and Human Rights	21
Box 2: ILO Recommendation Nº 130 on Examination of Grievances	22
Box 3: Some Issues of Concern Around Implementation of Certain	
Models of OGMs	24
Box 4: Community-Driven Grievance Processes: TVI Resource Development	49
Box 5: Porgera Remediation Framework	54
Box 6: NGOs as advisers to communities	60
Box 7: Learning from Experience on Banking	61
Box 8: Policy Framework	63
Box 9: Examples of Remedies Provided by the North Mara OGM	69

List of **Abbreviations**

ЕТІ	Ethical Trading Initiative
ICJ	International Commission of Jurists
ICoCA	International Code of Conduct Association
IFC	International Finance Corporation
ILO	International Labour Organization
LOCOG	London Olympic and Paralympic Games
MNE	Multinational Enterprises
MSI	Multi Stakeholder Initiatives
NGO	Non Governmental Organization
OECD	Organization for Economic Cooperation and Development
OGM	Operational Grievance Mechanisms
OHCHR	The Office of the UN High Commissioner for Human Rights
PRF	Porgera Remediation Framework
SRSG	Special Representative of the UN Secretary General
UNGP	United Nations Guiding Principles on Business and Human Rights

Executive Summary

The participation of business enterprises in legitimate remediation processes when they cause negative impacts on people, is a standard of responsible business conduct recommended by the Guiding Principles on Business and Human Rights (UNGP), ILO Recommendation 130 and other international instruments. These instruments recommend the creation or participation in grievance mechanisms at the operational level to enable stakeholders' easy access to an option for remediation of their concerns or impacts. Since the adoption of the UNGPs, there has been some progress in terms of companies, especially among the largest ones, creating OGMs and understanding their usefulness. However, evidence of an uptick in the creation of OGMs remains largely anecdotal. Practice around OGMs shows significant divergences in approach and gaps in performance. Many OGMs lack enough transparency and some have been viewed as adding to the problems of affected people. A common complaint has been the limited attention given to the views and interests of people and communities who are intended to benefit from the OGMs. With some notable exceptions, few studies are based on first-hand information about the impact and effectiveness of OGMs.

To address these concerns as well as to assess and improve the effectiveness of OGMs, the ICJ, based on in-depth case studies, research and broad consultation among practitioners and stakeholders, started a two-year process the result of which is the present report. The report provides an assessment of existing practices and policies and recommendations for the improvement of the design and implementation of OGMs, including a set of Proposed Performance Standards to assist companies and other stakeholders in their work.

Normative framework and context

The ICJ concludes that some of the standards on the right to an effective remedy and reparation under international human rights law are applicable to OGMs. Companies' practice and communities' expectations confirm this view. The study takes its policy understanding and analysis of OGMs from a conceptual framework created under the auspices of the UN 2008 Framework "Protect, Respect and Remedy" and the

UNGPs. OGMs should be designed and overseen jointly between companies and the people who may need to use them. As the 2008 framework report stated:

"Where a company is directly involved in administering a mechanism, problems may arise if it acts as both defendant and judge. Therefore, the mechanism should focus on direct or mediated dialogue. It should be designed and overseen jointly with representatives of the groups who may need to access it...."

Guiding Principle 29, which calls on businesses to "establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted", in order to make it possible for grievances to be addressed early and remediated directly.

OGM also function as part of a set of other remedial mechanisms, both internal and external to a company. OGMs are unlikely to be as effective, and are certainly not appropriate as an exclusive remedy, when dealing with large-scale and/or gross human rights abuses, which because of their magnitude, gravity and complexity more properly remain within the jurisdiction of State authorities. Large scale disasters may also require the creation of *ad hoc* official mechanisms to investigate, establish responsibilities and define reparation programmes. Any existing OGM will therefore need to fit in appropriately with the other mechanisms put in place as circumstances require.

The policy and institutional frameworks created by international financial and development organizations and multi-stakeholder arrangements, are instrumental in the adoption and implementation of OGMs by companies or project operators that receive financial support or are members of those organizations. Many of them already require loan recipients or members to establish OGM in accordance with approved parameters.

Establishment and functioning of OGMs in practice

Although the predominant model of OGM is one led by a company, the ICJ has found several other models of similar effectiveness that are run by local communities or groups and are accepted and used by companies. It is necessary to dispel the assumption that an OGM must be always created and run by a company. Still, most examples of well developed OGM that the ICJ research found are designed and implemented by companies.

From its review of practice of OGMs, the ICJ found that community and stakeholder participation in the pre-design, design and operation of OGMs is frequently below the levels required to create trust in the mechanism. Community and stakeholder participation need to be enhanced, including by privileging collaborative approaches of co-design and co-implementation and the use of community driven OGM when these exist. UNGP 31 (h) states that OGMs should be based on engagement and dialogue and indeed the ICJ considers that enhanced participation will improve the legitimacy of OGMs and make them more effective at solving disputes. There are many examples where more stakeholder participation has made a positive impact.

Although OGMs are not State-based mechanisms, independence and impartiality continue to be important for claimants and other stakeholders who often point to shortcomings in this regard. Enhanced participation of stakeholders can alleviate the perception of partiality of the OGM, and so will adequate organisation and better location of the OGM within the company structure. In certain cases, third parties such as NGOs have been entrusted to administer company's OGM. In other rare cases, grievance mechanisms were set up at the industry level in certain regions.

OGMs are generally designed to deal with a broad range of concerns or complaints, not only those formulated as *"human rights abuses"*, but the evidence suggests that there is a need to differentiate between general concerns and grievances and complaints regarding human rights, some of which are of egregious nature, and that OGM personnel is duly trained to identify and treat each accordingly. But such distinction is rarely made in practice. At the same time, OGM models that have a scope on limited types of serious human rights abuses risk to create unintended obstacles to complainants.

The interface and interaction between OGMs and the judicial system and law enforcement is an issue of critical concern where confusion frequently arises. Some OGMs have dealt with claims with underlying serious human rights violations or abuses potentially amounting to criminal offences, which are normally the subject of official investigation and prosecution by responsible government authorities. These instances have been criticised by several external stakeholders and need to be corrected.

There are significant shortcomings in the way certain OGMs operate which in many instances exacerbate the existing imbalance of power between the parties to the dispute. Very often, large companies are better equipped than claimants in the dialogue and negotiation to resolve a grievance. Without appropriate measures to enhance the capacity and position of the other party to negotiate there is a risk of an unfair and unsatisfactory outcome for the two parties. As covered in UNGP 31 (d), OGMs should be designed to incorporate provisions such as providing reasonable access to information to re-balance the relationship in order to equitably preserve the rights and interests of the people involved.

The quantity and quality of information that companies disclose regarding their OGMs and their performance is currently quite limited. There is a great need to improve disclosure requirements and practices in this regard to enable independent monitoring. Few companies clearly identify grievance channels, details of the review process and information about the types of grievances provided as agreed with the complainant, and even fewer will normally monitor the implementation of the agreements in-house or will appoint a third party to do so.

Many OGMs are still conceived of primarily as mechanisms to adjudicate claims, but there is a growing company practice that regards OGMs as a tool of corporate responsibility that are neither designed nor used to adjudicate on rights or obligations in a legal sense. The use of waivers of rights to sue in court is regrettably still frequent in mechanisms that are designed as legal tools but not on a growing number of alternative models. To overcome existing deficits, companies need to take special care to design OGMs that are complementary and not at cross-purposes with the operation of judicial and other State-based mechanisms when these are available and effective.

Human rights abuses in a company's supply chain and contractors or subcontractors pose distinct questions to the operation and effectiveness of OGMs which have not received enough attention. Operations through large webs of suppliers and contractors is a common feature in certain industry sectors. Existing company practice in this area is very diverse and/or opaque. Some leading companies require their contractors or suppliers to have OGMs and report on its operation, and even provide the option to grievants to access its own OGM if they remain unsatisfied with the OGM at the contractor or supplier level, or these do not exist. In addition, they maintain a system of auditing that would allow the company to obtain detailed information as to the effective operation of a supplier's grievance process.

NGOs and civil society organizations can contribute to OGMs in helping complainants access remedy by helping to file claims, supporting them in mediation or via investigations. The most important factor towards enhancing the effectiveness of OGMs in this context is to assign an important role to the legitimate worker union or its leaders in the process, which will also help to alleviate the inherent imbalanced power relations between individual workers and company. Union leaders are also entitled to enhanced facilities and protections under the law that enable them to act effectively in support to individual workers. But despite their vital role, NGOs, human rights defenders and union leaders are not receiving the protection they deserve against retaliation from all sources.

Due to the limited corporate practice of publicizing details about the remedies granted when a negative impact has been identified, there is sparse information about the resolution of grievances and remedies given. What constitutes an effective remedy or adequate or full reparation in substantial terms is frequently contentious. Several companies publicly report that they take victims' input into consideration when determining remedies, but critics often point to evidence on the contrary. There are recent indications of change in practice with more companies reporting evidence of the way communities and groups are more actively engaged in the determination of remedial measures and their delivery.

Significant additional study of OGMs, their prevalence and their impact in different industry sectors is necessary on a continuous basis to understand their impact and improve their performance, as envisaged in UNGP 31 (g) highlighting the need for OGMs to be a source of continuous learning.

The way forward and general recommendations

The ICJ considers that OGMs need to be understood as a vital element in the broader relationship between the company, its stakeholders and the broader community where it operates. For companies, they should be part of a strategy to build the company's legitimacy and acceptance in the community, cementing its social license to operate and translating into practice its purpose to be a factor for the development of their stakeholders and communities. For grievants and affected individuals, they are a potential source of redress and a way to actively participate in a business enterprise that is vital for social development. OGMs should be part of the company's understanding of its place and role in society and a tool for the company to contribute to the well being and realization of human rights in its own immediate environs. This vision contrasts with the current situation, where these mechanisms are still often better in their design level than in their actual implementation in the field and there is significant opacity in their operations, reporting and monitoring.

Based on the analysis of current practice, the ICJ proposes a series of elements for assisting companies and their stakeholders in the design and implementation of an OGM.

Participation and Consultation

Effective participation of the affected groups and their representatives, civil society, or communities for whom the mechanism is intended is crucial for the right design of a process that is fit to address the real concerns of users but also for an OGM's overall legitimacy and effectiveness. Early community engagement at the pre-design stage is also important for the establishment of legitimacy before a company heading into the design stage of a OGM. In certain cases, where adequate participation is difficult, the company will have to look for other options, including the option of using existing processes within communities or other companies. A good OGM will also be designed to be consistent with and/ or bearing in mind local culture and allow external actors such as development and human rights NGOs operating in the locality to have a special place in the process.

Defining the scope

It is important that the scope of the OGM is defined as broadly as possible for the mechanism to be able to catch as many situations and concerns that could constitute human rights abuses as possible. When dealing with incidents potentially entailing criminal conduct, in particular if those acts may amount to serious crimes or complicity with those crimes, the primary duty of public authorities to investigate and prosecute should be preserved through adequate company protocols. OGMs in the context of supply chains and the use of contractors or sub-contractors will be effective if the contracting company requires suppliers to adopt their own OGM and ensures its own OGM remains available for grievants who are unable to use an OGM at the contracted company.

Independence and legitimacy

OGMs that are designed and implemented based on dialogue and strong participation by workers and/or communities are best fitted to resist charges of lack of independence or legitimacy. A good practice is to involve an independent third-party body such as an NGO, MSI or collaborative initiative. Formal adjudication should be reserved to judicial or arbitral tribunal to which the parties have lent their consent or to whose jurisdiction they are otherwise subject. The OGM itself should also consider providing some form of appeal and this appeal body should have independence from the decision process that made the original determination. In all cases, to enhance credibility, companies should keep a separate unit in charge of the OGM that does not depend on operational departments and which reports directly to a senior level. The company may also separate within its grievance programme the functions of investigation from the negotiation and dialogue with the complainant.

Minimum procedural fairness principles

Transparency and communication are pivotal for the legitimacy and effectiveness of an OGM. Users must understand how their claim will be treated and what is expected of them, as well as be given an estimate investigation time, be given reasons for any decisions made and the route to appeal those decisions carefully explained. Complainants should also be given the opportunity to have advisers to clearly understand the process and the possible outcomes of the grievance process as well as the alternative redress options. Companies should have a policy of transparency in place regarding internal documents and all other information pertinent to a complaint to provide users and their advisers with access to those documents.

Governance

It is good practice for companies to keep a separate unit in charge of the grievance programme that reports directly to a senior top board director as well as to separate within its grievance programme the functions of investigation from the negotiation and dialogue with the complainant. For those directly operating OGMs, they should be empowered, well-resourced, trained on human rights and motivated. Beyond the internal governance processes and bodies, the whole grievance programme, however it is organized, will benefit from a multi-stakeholder oversight body or its equivalent to ensure an adequate process of feedback and learning from experience. The processes of OGMs should be flexible to enable people with varied degrees of experience, literacy and capability to access to and to use it in different ways.

Grievance in supply chains and contractors

Companies can effectively use contractual obligations to ensure partners effectively provide remediation and subject the actual implementation of this obligation through a system of periodic and independent audits, including provision for consequences for failure to observe commitments. In the situations where one single supplier works for several companies at the same time, the leverage any one lead company can exercise over the supplier is likely to be relative. Options include the creation of a coordinated approach among the buyers or the establishment of an industrylevel grievance process in each locality, requiring enormous coordination efforts and may pose issues of accessibility for grievants. Over extended supply chains consideration must also be given to the need to create a grievance ecosystem, where the parts are designed at multiple levels, with the appropriate linkages and monitoring procedures. When engaging contractors, the company should contractually require the contractor to have its own grievance process or make the company's own OGM available to workers or stakeholders of the contractor.

Reporting, monitoring and evaluation

Reporting of OGM features and outcomes is a crucial part of garnering trust. Clear, regular and detailed communication on complaints received (including complaints turned down and the reasons), timelines and the outcomes delivered is an essential component of a transparent and effective OGM. Where a grievant requires confidentiality for privacy and other considerations this needs to be respected. Reporting and measurement are also essential management tools. When a company has operations in many different locations, a best practice is for the design of OGMs appropriate for the local conditions and for the company to use centralized tools to measure their performance centrally against a set of common criteria.

Link with external third-party mechanisms of dispute resolution

OGM should provide some form of appeal or review process, and this "appeal body" should have independence from the decision process that made the original determination. Engaging with NGOs and MSIs are options for providing appeal mechanisms, as are State based judicial bodies or arbitral tribunals to which the parties have lent their consent or are otherwise subject to. There are cases in practice that some international arbitral tribunals and other facility within dispute resolution organization are being used or being created to deal with complaints in this context.

More generally, the ICJ recommends a strong emphasis on adequate and easy access to information and independent advice by complainants to the OGM. OGMs should be designed and operated in the way that they are not at cross-purposes with the operation of judicial and other mechanisms and do not limit access to them and other avenues for reparation in cases of serious abuses. Finally, states should play an active role in providing incentives or sanctions and ensuring their courts of law are empowered to assess the legality and/or compliance of OGMs' activities with national and international law.



Introduction

Introduction

- Wherever business enterprises operate, their activities will bring them into contact with local communities. Sometimes these contacts are mutually beneficial, but on occasion problems arise, some of them serious. A company may have activities in remote areas where natural resources are located and where human rights or environmental laws or enforcement is weak. In other cases, a company may find that its supply chain includes countries with weak labour laws and regulations, a poor record on protecting human rights or a weak administration of justice.
- 2. There have been many well documented situations where serious harm has occurred as a result of companies' activities and where remedies afforded by the host state, through its judicial and regulatory systems have been entirely inadequate or effectively unavailable. It is now over ten years since the United Nations Human Rights Council adopted the Framework "Protect, Respect, Remedy", which led to the UN Guiding Principles on Business and Human Rights (UNGP). After a decade of experience, it is timely to examine how successfully these principles have been implemented and try to identify trends and avenues of improvement.
- 3. An OGM is a mechanism which carries a process for addressing complaints and concerns that can be used by individuals, workers and communities that have been or fear that they will be negatively affected by business activities. OGMs may be specific to a certain site, such as a mine or they can operate across a product supply chain, which will often cross international borders. There are several models of grievance mechanisms for business-related abuse, including ones led by communities or industry associations. In undertaking this study, the ICJ has focused more on company-generated operational-level grievance mechanisms (OGMs) bearing in mind that all models need to have company involvement to be operative, though other models are also considered for comparative purposes.
- 4. This report is the result of a more than two-year process that included research and consultation among a broad range of practitioners and stakeholders, including civil society groups and businesses from different sectors of the economy. This report has benefitted from the co-operation of several companies and the information provided by Adidas Group and their regional staff in Indonesia, Acacia plc and its North Mara Mine, Cerrejon Coal Mine Colombia and Telefonica Colombia, all of whom co-operated with the ICJ to independently study their grievance procedures to draw up the case studies included in the companion report. By participating in this study, these companies demonstrated their interest in improving the design and performance of their OGMs. A number of individuals and organizations were also willing to provide information and comments on the successive drafts of this report and its annexed performance standards.

- 5. OGMs as private initiatives operate in a context where State institutions, including the courts and other government- based methods of dispute resolution should normally operate. However it is clear that in areas where government authorities, particularly in the justice sector, are weak, unable or unwilling to act, or in the case of grievances that are numerous but too small to justify the cost of court proceedings, or where a company wishes to move quickly to resolve problems before they escalate or end up in court, an OGM may offer an alternative of redress to affected persons and, at times may be the most realistic opportunity to obtain an effective remedy. However, unless an OGM is both designed and implemented well, it may fail to deliver meaningful remedies and may even jeopardize and undermine the right of individuals to an effective remedy. In respect of human rights obligations, OGMs are complementary to, but do not displace the right to judicial and administrative remedies that must be afforded by the State.
- 6. OGMs gained special prominence in international policy discussions as well as in the broader human rights and business discourse through the 2008 "Protect, Respect and Remedy" Report, where the Special Representative of the United Nations Secretary General on the issue of Transnational Corporations and other Business enterprises set out a framework for business and human rights for presentation to the Human Rights Council.' In this report, OGMs are described by their functions: they permit the company "to identify and address grievances early, before they escalate," as part of the corporate responsibility to respect human rights.² They are also described as "those that operate at the interface between a business enterprise and its affected stakeholders."³
- 7. The UNGP intended to "operationalize" the "Protect, Respect and Remedy" Framework including the policy and conceptual underpinnings of OGMs. 4
- 8. The UNGP provisions on grievance mechanisms were not the first of their kind. Other institutions such as the International Labour Organization (ILO) and the World Bank's International Finance Corporation (IFC) developed and provided guidance in this area well before the UNGP.⁵ However, the UNGP point the

3 Ibid., para. 8.

P Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5, 2008, paras. 93-95. Although the Norms on the Responsibilities of Transnational Corporations and other Business enterprises with Regards to Human Rights (UN Doc E/CN.4/ Sub.2/2003/Rev.2 (2003)) adopted by the Sub-commission included a provision to the effect that transnational corporations and other business enterprises "shall provide prompt, effective and adequate reparation" to those adversely affected by failures to comply with the Norms, the document did not use the concept of Operational or company level grievance mechanisms.

² Report of the SRSG on the issue of human rights and transnational corporations and other business enterprises, Piloting Principles for Effective Company-Stakeholder Grievance Mechanisms: A Report of Lessons Learned, CSR Initiative, Harvard Kennedy School, Cambridge, A/HRC/17/31/Add.1, 2011, para. 93.

⁴ Human Rights Council, Guiding Principles on Business and Human Rights (UNGP), 2011.

⁵ See International Finance Corporation, Addressing Grievances from Project Affected Communities, World Bank Group, 2009. See also OECD, OECD Guidelines for Multinational Enterprises, 2011.

way to a broader international implementation of the concept, with particular application to the broad range of human rights that businesses are bound to respect.

- **9.** The UN Working Group on Business and Human Rights in 2017 emphasized that the 2008 UN framework was meant "to ensure that rights holders are at the heart of remedies."⁶ The Working Group also highlighted that there are multiple "roads to remedy" and multiple kinds of remedies.⁷ OGMs fit within this remedial ecosystem. The Office of the High Commissioner for Human Rights has also started a project that focuses on private grievance mechanisms, including those that function at the operational level.⁸ At the time of printing of the present report, the Special Rapporteur on Trafficking of persons also published her report on grievance mechanisms in the trafficking of workers in particular.⁹
- 10. Since the adoption of the UNGP, there has been some progress in terms of companies, especially among the largest ones, creating OGMs and understanding their usefulness. However, evidence of an uptick in the creation of OGMs remains largely anecdotal. Practice around OGMs shows significant divergences in approach and gaps in performance. Many OGMs lack sufficient transparency and some have been viewed as adding to the problems of affected people. A common complaint has been the limited attention given to the views and interests of people and communities who are intended to benefit from the OGMs. With some notable exceptions,¹⁰ few studies are based on first-hand information about the impact and effectiveness of OGMs and this ICJ initiative is intended to go some way toward remedying this gap in the research.

⁶ Report of the UN Working Group on Transnational Corporations and Other Business Enterprises, Human Rights and Transnational corporations and other business enterprises Report, A/72/162, 18 July 2017, paras. 1, 3, 5-7, 81, 86, and Part III.

⁷ See Ibid., paras. 1, 6-8, 81, 84-87.

⁸ OHCHR, Accountability and Remedy Project III: Enhancing effectiveness of non-state-based grievance mechanisms in cases of business-related human rights abuse, n.d. Available at: https://www.business-humanrights.org/en/ohchr-accountability-andremedy-project/accountability-and-remedy-Project-iii-enhancing-effectiveness-of-non-state-based-grievance-mechanismsin-cases-of-business-related-human-rights-abuse

⁹ UN General Assembly, Report of the Special Rapporteur on trafficking in persons, especially women and children, A/74/189,18 July 2019.

¹⁰ See Jungk, Margaret, Chichester, Ouida, and Fletcher, Chris, In Search of Justice: Pathways to Remedy at the Porgera Gold Mine, BSR, September 2018. Available at: https://www.bsr.org/reports/BSR_In_Search_of_Justice_Porgera_Gold_Mine.pdf; Aftab, Yousuf, The Right to Remedy: Pillar III on the Ground, An Independent Assessment of the Porgera Remedy Framework, Enodo Rights, 2016. Available at: https://barrick.q4cdn.com/788666289/files/porgera/Enodo-Rights-Porgera-Remedy-Framework-Independent-Assessment.pdf;

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BOX 1

UN GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS

29. 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.

30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-state based, should be:

a. Legitimate

enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

b. Accessible

being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

c. Predictable

providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcomes available and means of monitoring implementation;

d. Equitable

seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

e. Transparent

keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet and public interest at stake;

f. Right-compatible

ensuring that outcomes and remedies accord with internationally recognized human rights;

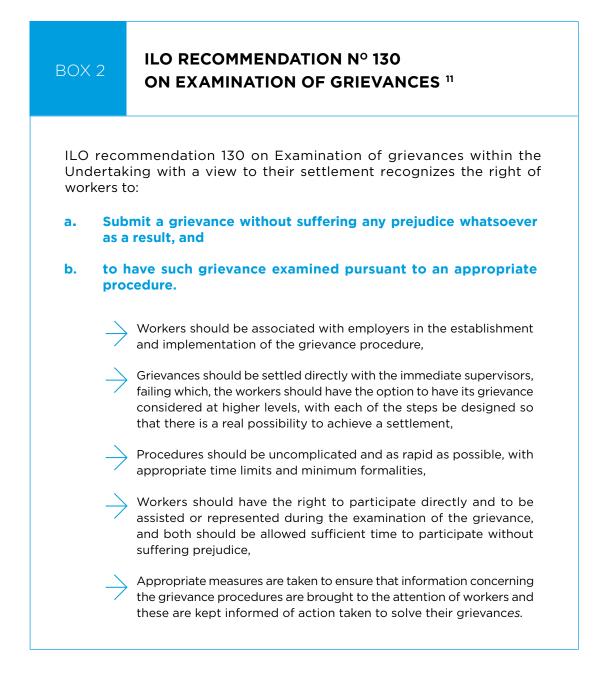
g. A source of continuous learning

drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

h. Based on engagement and dialogue

consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.



11. While article 3 of ILO recommendation 130 defines the scope of grievances to those relating to aspects of the relationship between employer and worker that appear to be contrary to existing regulations, the UNGP defines a more openended scope for grievances. The commentary appended to Guiding Principle 29 of the UNGP emphasizes that OGMs "need not require that a complaint or grievance amount to an alleged human rights abuse before it can be raised, but

¹¹ International Labor Organization, R130 - Examination of Grievances Recommendation, No. 130. 1967.

specifically aim to identify any legitimate concerns of those who may be adversely impacted. If those concerns are not identified and addressed, they may over time escalate into more major disputes and human rights abuses." This approach is confirmed in a Guide published by the Office of the UN High Commissioner for Human Rights (OHCHR), which describes OGMs as: "a formalized means through which individuals or groups can raise concerns about the impact an enterprise has on them – including, but not exclusively, on their human rights – and can seek remedy."¹² The Guide restates that grievances include not only real or perceived abuses of human rights but any other concern for "impacts" relating to the enterprise's operation.

- 12. The UNGP approach is a flexible one, and the ICJ found it reflected in the broad range of different OGMs it encountered. As will be described in this report, the practice observed by the ICJ is that most companies use such a flexible approach in scope, while some companies use OGMs more particularly to address human rights abuses, sometimes very serious ones. Whether broad or narrow in scope, the ICJ initiative focusses on how OGMs treat human rights concerns and abuses, taking into account the particular nature of those rights and the normative and accountability framework created for their protection.
- 13. OGMs should provide an effective and accessible mechanism to remediate certain adverse impacts on human rights resulting from companies' operations. However, several prominent examples in recent years have shown that the design and/or implementation of certain OGMs has been problematic.



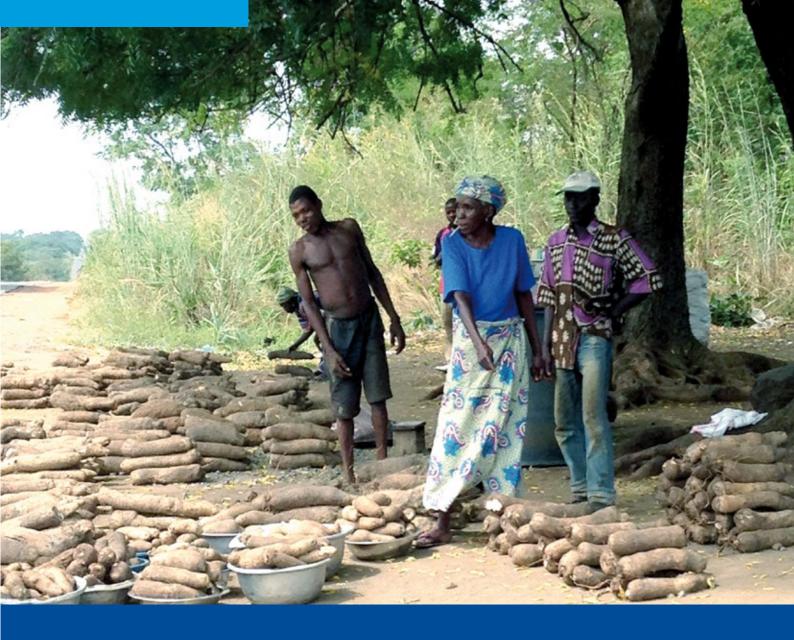
12 OHCHR, The Corporate Responsibility to Respect Human Rights: An Interpretative Guide, 2012, p. 68.

BOX 3	SOME ISSUES OF CONCERN AROUND IMPLEMENTATION OF CERTAIN MODELS OF OGMS INCLUDE:
\rightarrow	The inadequacy of compensation and other reparation provided through companies' frameworks and the methods followed to assess the damage.
\rightarrow	Insufficient transparency about the existence, operation and outcomes of OGMs.
\rightarrow	Shortfalls in procedural transparency and fairness in the dealings between companies and individuals or local communities.
\rightarrow	Production, access and control of information relating to the claims by the company, as well as exclusive control over the process of gathering that information or evidence.
\rightarrow	Focus on strict legal rights while it should be on improved relations with the community.
\rightarrow	Obstacles to access to OGMs for certain affected individuals and groups.
\rightarrow	Lack of tracking and publication of data on OGM performance.

- 14. The ICJ's OGM study was also prompted by concerns that the functioning of certain OGMs may undermine the effectiveness and accessibility of State-based remedies, both judicial and administrative, which States have a continuing obligation to provide irrespective of the availabilities of OGMs. OGMs have inherent limits when dealing with serious human rights abuses; for example they provide reparations for conduct potentially constituting a criminal offence, and may be problematic if as a result of the "resolution" of the complaint via the OGM relevant authorities fail to pursue criminal sanctions. Other concerns include established trade unions seeking to protect organized industrial relations grievance and claims processes under collective bargaining arrangements, which they may fear could be supplanted by OGMs. The existing situation seemed at odds with what the UNGP meant to achieve in relation to grievance processes.
- 15. The ICJ therefore decided to carry out research and analysis of the normative framework and practice of these mechanisms and provide further detailed guidance to assist legal advisors, businesses, affected individuals and groups and civil society, to improve the design and operation of OGMs.
- 16. This report and the attached proposed standards of performance are addressed to companies and all stakeholders in the design and operation of a grievance programme. Although existing international guidance is directly addressed primarily to companies, it is ultimately the victims of abuses by companies or in the context of company operations, that the OGMS must be designed to serve. It goes without saying that civil society groups, human rights defenders, legal professionals, labour unions, local communities and State authorities have an essential role to play, sometimes in a leading position, and strong interest in their correct functioning.
- 17. This report addresses a number of issues that arise in relation to the functioning of OGMs, including the relationship between corporate-led OGMs and State institutions such as the judiciary, prosecutorial services, and the police; the main challenges faced by companies in different sectors, including, for example the extractive industry and companies with supply chains which may sometimes be lengthy and complex; difficulties in establishing an OGM with appropriate degrees of independence and legitimacy, including in the eyes of claimants and local communities; the consideration of the potential of OGM models that are based more on community participation and leadership, or co-designed mechanisms that bring companies and stakeholders together as the OGM is formed and designed; the scope of the OGM; and the need for direct negotiations and dialogue to arrive at more collaborative solutions.

Description of the project

- 18. As described more in detail in the companion volume on methodology, the project used a combination of research, consultation and in-depth study of specific examples of OGMs in selected companies. The research included publicly available sources of information, reports compiled by third parties and information provided directly to the ICJ by companies. ICJ teams also carried out deeper examinations of selected company practices by visiting the sites where they operate and use OGMs, interviewing individual members of local communities, workers and union leaders, company officials and State authorities.
- 19. The ICJ initiative on OGMs was led by an expert panel composed of six leading jurists from around the world, five of whom were ICJ Commissioners. The expert panel advised and guided the ICJ in its research, consultation and drafting process, met several times during the process and participated in site visits. A consultative group was also created, comprised of practitioners from academia, NGOs, national human rights institutions and legal counsel who met as a group and were consulted on content and drafting.
- 20. This report examines the practical realities of seeking to uphold human rights in a globalized world. Although there are indications of new and encouraging readiness by responsible companies to resolve grievances with their own administrative mechanisms, publicly available information with sufficient detail to allow analysis of performance is limited. While information collected by the ICJ and other institutions will help remedy this deficiency, it is not enough. Data shows that only a small percentage of companies have so far adopted some form of OGM. The pages that follow describe some of the difficulties that stand in the way of broader acceptance and end with some conclusions and recommendations on the way forward.



Part I

Section 1
Normative Framework and Context

Section 2 Establishment and Functioning of OGMs in Practice

> Section 3 Effective Remedy

Section 4 Monitoring of OGM Performance

Conclusions from the Review of Practice



Section 1

Normative framework and context

1.1 OGMs and the right to an effective remedy

21. In the field of business and human rights, the UNGP lay down a system of remedial avenues divided into judicial and non-judicial mechanisms. Non-judicial mechanisms can be State governed or State--sponsored, such as those provided by OECD National Contact Points, or derive from employment contracts or collective labour agreements under public law or arrangements under private law. Alternatively, they can be privately and unilaterally constituted and as such these OGMs have features and are subject to a set of norms which differ in important respects from State-based remedial processes. To understand the differences, this report takes as a point of departure the understanding of the right to an effective remedy under international law and standards.¹³

In particular article 8 of the Universal Declaration of Human Rights, article 2 of the International Covenant on Civil and Political Rights, article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and article 39 of the Convention on the Rights of the Child, and articles 68 and 75 of the Rome Statute of the International Criminal Court. See UN General Assembly, 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, Resolution 60/147, 16 December 2005. Available at: https://www.un.org/ruleoflaw/blog/document/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-human.

- 22. The right to an effective remedy and reparation is a universally recognized right under general international law guaranteed under all principal human rights treaties. The basic contours of the right were set out in an instrument adopted by all States in a consensus UN General Assembly resolution of 2005, which under the general obligation of States to respect, ensure respect and implement human rights law and humanitarian law, includes the duty to "investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law". It also sets out the duty to:
 - "c Provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice ---irrespective of who may ultimately be the bearer of responsibility for the violation; and
 - d Provide effective remedies to victims, including reparation,[...]."¹⁴
- 23. As noted, all human rights treaties provide for an effective remedy in their main text or in related jurisprudence. For instance, Article 2.3 of the International Covenant on Civil and Political Rights provides that Each State Party to the Covenant undertakes:
 - (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
 - (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
 - (c) To ensure that the competent authorities shall enforce such remedies when granted.

¹⁴ UN General Assembly, ibid., para. 3.

- 24. The UN Human Rights Committee has elaborated further on the scope of this obligation, stressing that the obligation to provide an effective remedy entails an obligation to provide reparation.¹⁵ The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.
- 25. Whereas a remedy does not necessarily need to be of a judicial nature, it should be timely, accessible and effective, in the sense that it is enforceable and capable of providing real relief or reparation. Reparations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.¹⁶
- 26. Although obligations under human rights treaties are for States to provide effective remedies for violations attributable to their agents, international human rights law also requires States to protect people not only against human rights violations attributable to them, but also against the conduct of private actors such as businesses that may impair the enjoyment of human rights. This well-established norm forms the backbone of the first pillar of the UNGP. Effective remedies, therefore, must be made available to redress the activities of both States and businesses, and should take the form of State-based remedies and, as a supplement, private processes such as OGMs.
- **27.** Effective remedies may be of an administrative or judicial character. However, judicial remedies are always required when serious human rights violations are concerned, in particular those amounting to gross human rights violations, including crimes under international law. In a series of decisions, the UN Human Rights Committee has held that "purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights."⁷⁷ Because of their severity in relation to the importance of the protected rights and their impact on public policy, gross human rights violations require more stringent procedures that accord with due process and fair trial standards. International law also require the establishment of criminal accountability for those responsible.

¹⁵ Human Rights Committee, General Comment 31 on the Nature of the General Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004, para. 16.

¹⁶ See UN General Assembly, above note 13, Principle 18; General Comment 31; Committee Against Torture, General Comment 3, Implementation of article 14 by States parties, CAT/C/GC/3, 2012; See also Report UN Working Group on Transnational Corporations and Other Business Enterprises, above note 6, paras. 11, 14, 39-54.

¹⁷ See Human Rights Committee, Views of 27 October 1995, Bautista de Arellana v. Colombia, Communication No. 563/1993, para. 8.2. See also Human Rights Committee, Jose Vicente y Amado Villafañe et al v. Colombia, Communication No. 612/199, U.N. Doc. CCPR/C/56/D/612/1995, para. 8.2.; and UN General Assembly, above note 13.



- 28. Under international law, the authority responsible for adjudicating complaints should be competent to verify the alleged violations and must be functionally independent of executive or corporate line of authority. It must have the authority to investigate complaints with the participation of the complainant, and to issue timely, binding and enforceable decisions.¹⁰
- **29.** On careful analysis, the ICJ has concluded that some of these standards on effective remedy and reparation are applicable to OGMs. The United Nations Working Group on Business and Human Rights the United Nations Human Rights Council special procedure mandated to promote the implementation of the UNGP –affirms that principles on remedies and reparation outlined above should be also applicable to companies.¹⁹ Company practice and the expectations of the communities using OGMs likewise suggest that at least certain aspects of common remedial standards are indeed applicable to OGMs in order for the mechanisms to have relevance.
- **30.** The structural imbalances in any relationship between companies and affected individuals must be taken into account in determining whether a company-led OGM can deliver credible remedies. In relation to adjudication, already in 2008, the

¹⁸ See European Court of Human Rights, Judgment of 10 January 2012, Ananyev and Others v. Russia, Application Nos. 42525/07 and 60800/08, paras. 215-216; See also European Court of Human Rights, Judgment of 08 January 2013, Torreggiani and Others v. Italy, Application No. 43517/09, para. 51 and European Court of Human Rights, Judgment of 22 October 2009, Norbert Sikorski v. Poland, Application No. 17599/05, para. 111.

¹⁹ Report UN Working Group on transnational corporations and other business enterprises, above note 6.

UN Framework "Protect, Respect, Remedy" warned against the situation where a company would be both judge and defendant. Recognizing that such a conflict is inherent in most OGMs the ICJ notes that this lack of independence is frequently cited as a weakness of company-led OGMs. In the case studies undertaken by the ICJ, complainants most often regarded lack of independence as undermining the legitimacy of the OGMs and therefore the legitimacy of the remedies they deliver. When strong and independent State mechanisms are not present it will be especially important that stakeholders see the OGM as legitimately capable to provide fair and prompt remediation, and that the outcomes are independent from the wishes of the company's lawyers and senior managers.

- **31.** The UN Working Group on Business and Human Rights has highlighted the centrality of rights holders to any effective OGM: "[R]ights holders should be central to the entire remedy process, including to the question of effectiveness."²⁰ Centring rights holders includes some requirements, for example, being responsive to rights holders' experiences and expectations; linking accessibility, affordability, adequacy, and timeliness analysis to the needs of rights holders; avoiding "fear of victimization"; providing a "range of remedies", access to information, and addressing power imbalances.²¹ An effective remedy includes procedural and substantive dimensions and any remediation provided by business "should be effective in terms of both process and outcome".²²
- **32.** In relation to grievances specifically by company workers, the set of international standards protecting freedom of association and the right to collective bargaining, set out in the ILO Conventions 87 and 98, and the guidance on grievances in Recommendation 130 and the Declaration on Multinational Enterprises²³ are of paramount importance. These standards apply when employees' grievances follow either a channel separate from grievance processes for people external to the company or when they follow the same channel. Freely established and functioning labour unions act as channels for the expression of collective or individual grievances, enabling dialogue and negotiation with the company. For unionized labour this will typically be the appropriate and most effective channel for dealing with workers' grievances, though especial attention should be put to ensure the unions are legitimate and free.

²⁰ Ibid., paras. 19, 81.

²¹ Ibid., paras. 20-25, 32-54, 79-81, 84-87.

²² Ibid., paras. 14-15, 79.

²³ See ILO, C087 - Freedom of Association and Protection of the Right to Organise Convention, No. 87,1948. Available at: https:// www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:::NO:12100:P12100_ILO_CODE:C087:NO; See also ILO, C098 - Right to Organise and Collective Bargaining Convention, No. 98,1949. Available at: https://www.ilo.org/dyn/normlex/en/f?p=NORM LEXPUB:12100:::NO:12100:P12100_ILO_CODE:C098:NO; and ILO, Tripartite declaration of principles concerning multinational enterprises and social policy (ILO MNE Declaration), 5th Edition, GB.329/POL/7, 2017. Available at: https://www.ilo.org/empent/ Publications/WCMS_094386/lang--en/index.htm

1.2 The policy framework for OGMs

33. The ICJ's OGM study takes its policy understanding and analysis of OGMs from a conceptual framework created under the auspices of the UN 2008 Framework and the UNGP. The UNGP, which are mix of restatement of hard legal obligations and policy guidance, have been adopted by the UN Human Rights Council and contain a solid, though insufficient, framework for business and human rights. In this context, the 2017 Working Group report on remedies in the business and human rights is also important. In particular, OGMs should be designed and overseen jointly between companies and the people who may need to use them. As the 2008 framework report stated:

"Where a company is directly involved in administering a mechanism, problems may arise if it acts as both defendant and judge. Therefore, the mechanism should focus on direct or mediated dialogue. It should be designed and overseen jointly with representatives of the groups who may need to access it. Care should be taken to redress imbalances in information and expertise between parties, enabling effective dialogue and sustainable solutions. These mechanisms should not negatively impact opportunities for complainants to seek recourse through State-based mechanisms, including the courts." ²⁴

- **34.** The ICJ study on OGM builds on the original understanding and objective of these mechanisms as a collaborative model to effectively solve human rights-related disputes in a legitimate and effective manner.
- 35. Between 2009 and 2011 the principles set out in the UN Framework were

^{24 2008} UN Framework Report, para. 95. The Framework and its Guiding Principles are based on three pillars: 1) the duty of States under international law to protect all human rights against third party abuse, including corporate abuse; 2) the responsibility of business enterprises as specialised economic organs of society to respect all human rights; 3) the need to ensure access to effective remedy for those whose rights have been negatively impacted. OGMs are mechanisms that touch or belong to two pillars: the corporate responsibility to respect human rights and access to remedy. See also 2017 UN Working Group on transnational corporations and other business enterprises, above note 6, para 71 "it is critical..(.that OGMs.)..never be used directly or indirectly, to preclude access to other judicial or non-judicial remedial mechanisms, lest they be unable to gain he trust of affected communities or provide effective remedies, thus undermining the very purpose of having such mechanisms".

subject to a piloting project with a view to refining them.²⁵ The results informed the elaboration of the Guiding Principles on Business and Human Rights that were presented to and adopted by the UN Human Rights Council in June 2011. The Guiding Principles recommend OGMs as a good standard of conduct for responsible companies. In the Guiding Principles, "a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness for aggrieved communities."²⁶

- 36. OGMs are directly addressed in Guiding Principle ²⁹, which calls on businesses to "establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted", in order to make it possible for grievances to be addressed early and remediated directly. The commentary to UNGP identifies two key functions of OGMs in relation to the "responsibility of business enterprises to respect human rights":
 - First, these mechanisms help the company to identify adverse human rights impacts "as part of an enterprise ongoing due diligence" on the basis of concerns raised by those directly impacted by the enterprise's operations. By analysing trends and patterns in complaints, business enterprises can also identify systemic problems and adapt their practices accordingly.
 - Secondly, the mechanisms allow enterprises to address and remediate the identified grievances, "preventing harms from compounding and grievances from escalating."
- 37. The commentary also notes that the OGMs are not only aimed at addressing complaints or grievances relating to "alleged human rights abuse" but also about identifying "any legitimate concerns of those who may be adversely impacted."²⁷
- **38.** Guiding Principle 30 calls for industry, multi-stakeholder and other collaborative initiatives to ensure that "effective grievance mechanisms are available". The Commentary indicates that the mechanisms could be at the level of individual members or an appropriate collectivity, or both. As such, a grievance mechanism

²⁵ The project was conducted by a team of advisors to John Ruggie at Harvard Kennedy School's Corporate Social Responsibility Initiative. With the support of the International Organisation of Employers and the agreement of the respective business corporations -who had volunteered to be part of the project, the project tested "the practical applicability of a set of principles for effective non-judicial grievance mechanisms" by four companies: Carbones del Cerrejón (Colombia), Esquel Group (Hong Kong), Sakhalin Energy Investment Corporation (Russia), and Tesco Stores Ltd (United Kingdom). The project also comprised an adjunct project: Hewlett-Packard and two suppliers in China. In practice, the extensive time spent to enable stakeholders to be involved in the design or revision of each grievance mechanism meant that there was little remaining time for the actual implementation during the project duration.

²⁶ Human Rights Council, above note 4, Commentary to GP 25.

²⁷ Ibid., Commentary to GP 29.



at the operational level may be led by a company, but also by members of a given community or organized group, with the acceptance of the company.

- **39.** The Commentary to this Principle notes that only the eighth criterion, that the mechanism is "based on engagement and dialogue", "is specific to operational-level mechanisms that business enterprises help administer." This highlights again a key design element and a characteristic of the effective implementation of successful OGMs.
- **40.** The research and consultations undertaken by the ICJ generally confirmed the view that UNGP Principles 29, 30 and 31 are sound, and an essential part of the task undertaken in this study is to address some of the practical difficulties that arise and that must be resolved for their objectives to be achieved. The ICJ work also aims at providing more detailed guidance to help stakeholders in their work.

1.3 Relationships of OGMs with other institutions and mechanisms

41. Internally at the company level, OGMs often work as part of a complex ecosystem of internal policies and mechanisms to address concerns and grievances of stakeholders.²⁸ They sit with other processes intended to "provide channels for identifying and/or addressing the concerns of certain groups of individuals such as employees or customers or breaches of standards (e.g. a Code of Ethics) in one way or another."²⁹ Many large businesses and business groups have policies and mechanisms to deal with corruption, consumer complaints and whistle-blower protection. However, because of their focus on human rights and potential human rights abuses and their position as a key component of a community-relations strategy, company-led OGMs have acquired different characteristics and a unique place. OGMs intended for people external to the company may also be available to employees, but in most cases, employees have separate grievance and collective bargaining processes, often involving trade unions in an intermediary role.

OGMs and judicial remedies

- **42.** An OGM is likely to interact with the judicial system or the State-based remedial system which deals with violations of human rights, including when these abuses involve private third parties in the territory of the alleged harm. In practice, judicial institutions are not always present or able to offer a remedy that is accessible and effective. For instance, in the North Mara case study the ICJ found only two district courts in the area, understaffed and under-resourced, to which aggrieved people had rarely submitted any complaints and were unlikely to have the means to do so. In circumstances where effective judicial avenues are lacking, the process offered by the company may end up playing a role for which it is not well suited because it could be seen as the only realistic option for people to have some form of redress.
- **43.** The Cerrejon case study took place in the context of Colombia, a middle-income country with a relatively well-developed legal and judicial system, reducing the need for recourse to the company-led OGM. Instead, the ICJ found that domestic courts, quite rightly, address several of the most salient human rights complaints. Here the ICJ found that local people considered certain judicial processes accessible, low cost and with relatively straightforward procedural and evidentiary requirements. However, they expressed concerns about the weak enforcement of judicial decisions.

29 Ibid., p. 4

²⁸ Shift, Remediation, Grievance Mechanisms and the Corporate Responsibility to Respect Human Rights, Workshop report No 5, May 2014, p. 4-5. Available at: https://www.shiftproject.org/media/resources/docs/Shift_remediationUNGPs_2014.pdf

- 44. The legal framework of the investor or multinational enterprise's home country is also relevant. The availability of judicial remedies in the home country of a company whose local subsidiary or business partner has caused harm abroad may provide an incentive for companies to address problems through an effective and legitimate local grievance mechanism. The ICJ emphasizes that one of the driving forces for revisions and improvements in the design of OGMs has been legal action and public pressure in the home country of companies.
- **45.** The OGM may also interact with law enforcement and the criminal justice system when human rights abuses potentially constituting criminal conduct have been committed. Questions such as whether the company should take any action via the OGM when the matter should be treated by the police and courts and what it should do in relation to the alleged offender are crucial points that need to be addressed in company policies which must be monitored and enforced at local level.
- 46. OGMs are unlikely to be as effective, and are certainly not appropriate as an exclusive remedy, when dealing with large-scale and/or gross human rights abuses, which because of their magnitude, gravity and complexity more properly remain within the jurisdiction of State authorities (Indeed, it is the obligation of States under international law to ensure accountability and redress in such instances). Recent examples include the 2015 failure of the Bento Rodrigues dam in Mariana, state of Minas Gerais, Brazil, owned by Samarco Mineracao SA a joint venture between Vale SA and BHP Billiton plc which resulted in the deaths of many people and flooded and polluted large areas affecting many communities. Another is the collapse of Rana Plaza in 2013, an eight-story commercial building in Dhaka, Bangladesh, killing and injuring thousands of garment workers and other people. These events clearly required the intervention of State authorities, including public prosecutions.
- **47.** Some of the companies associated with these large-scale disasters also engaged in some parallel forms of remediation. It is reported that Primark Stores Limited³⁰ and other retailers whose supply chain included companies that operated in Rana Plaza contributed to a fund to offer compensation to families able to provide evidence of their relatives' deaths in the collapse. In January 2019, following the collapse of its dam in Brumadhino, Brazil which killed an estimated 300 people, Vale SA was reported to have pledged to deliver financial compensation to the families of victims.³⁷ These kinds of disasters also require the creation of *ad hoc* official mechanisms to investigate, establish responsibilities and define reparation

³⁰ Primark, "Primark Announces Further Steps to Deliver Long Term Compensation". October 2013. Available at: https://www. primark.com/en/our-ethics/newsroom/primark-announces-further-steps-to-deliver-long-term-compensation/a/65a772c6b76a-4c96-9443-5fb2e34c169f

³⁷ Gram Slattery & Marta Nogueira, "Brazilian anger unabated by Vale vows after dam disaster", in *Reuters*, January 2019. Available at : https://www.reuters.com/article/us-vale-sa-disaster/brazilian-anger-unabated-by-vale-vows-after-dam-disaster-idUSKCN1PP0ZE

programmes. Any existing OGM will therefore need to fit in appropriately with the other mechanisms put in place as circumstances require.

OGMs, the OECD and International Financial Institutions

- **48.** Large financial institutions such as the World Bank and its private finance branch the IFC also have a role in the development of OGMs and providing an institutional setting for policy development and review of practice. Domestic financial institutions have also leveraged their power to encourage the adoption of OGMs, for instance across supply chains financed by State sponsored export development banks.
- **49.** Under the IFC's policy note, Addressing Grievances from Project Affected Communities, it is a requirement that where a new project risks having an adverse impact on surrounding communities, the recipient of funding will be required to establish a grievance mechanism to facilitate resolution of grievances regarding environmental and social performance. ³²
- **50.** Furthermore, the 2011 Environmental and Social Performance Standards of the IFC³³ contain a series of standards relating to the design and implementation of OGMs by private organizations that receive IFC financial support. Applicable performance standards address both grievances raised by affected communities and those grievances raised by the organization's own workers or, in certain circumstances, those of its sub-contractors.
- 51. The 2011 OECD Guidelines for Multinational Enterprises³⁴ also contains provisions regarding OGMs. They recommend that enterprises provide for or co-operate through legitimate processes in "the remediation of adverse human rights impacts where they identify that they have caused or contributed to these impacts". The OECD Guidelines identify more clearly the grievance process as part of enterprise due diligence processes and provide guidance largely consistent with the UNGP. The OECD Guidelines apply to all the companies' entities, including subsidiaries, franchisees and all business relations such as suppliers and sub-contractors.
- **52.** Other regional branches of financial institutions have also incorporated among their conditions for lending the establishment of an OGM by the borrower. The principles and guidance to be observed are laid out with varying degrees of

³² International Finance Corporation, above note 5.

³³ International Finance Corporation, Performance Standards on Environmental and Social Sustainability, World Bank Group, 2011. Available at: https://www.ifc.org/wps/wcm/connect/c8f524004a73daeca09afdf998895a12/IFC_Performance_Standards. pdf?MOD=AJPERES

³⁴ OECD, above note 5.

precision.³⁵ These arrangements can exert a significant influence over the design and implementation of OGMs, in particular adding an element of external review and accountability.

OGMs and multi-stakeholder initiatives

- 53. Multi-stakeholder initiatives (MSI) are institutional arrangements that typically bring together business enterprises, civil society groups, government institutions and trade unions, to agree and administer a set of rules applicable to specific sectors. Sometimes, MSIs provide for mechanisms to monitor, evaluate and/or receive complaints that can be lodged by people affected by the businesses participating in the scheme alleging breach of the rules set by the MSI.
- **54.** There are more than 40 such MSIs currently in operation with more in the planning phase.³⁶ Some MSIs provide access to their own grievance processes for those who allege abuse by member companies as well as imposing in their membership rules that members establish OGMs in accordance with a certain set of requirements.
- **55.** For instance, the Ethical Trading Initiative, allows civil society members to lodge complaints that refer to the breach of its code of conduct by a member or any part of its supply chain. When the terms of the complaint are accepted, both parties can move on to define remediation. If not, there will be a call for a mediation process.³⁷ However, in practice the accessibility of this mechanism depends on workers being aware of its availability. An interesting example is the International Code of Conduct Association (ICoCA), which promotes the responsible provision of security services via a code of conduct.³⁸ The ICoCA supports its members in meeting their commitments under the code of conduct via the adoption of an OGM and has produced a manual to assist member companies to establish these mechanisms.³⁹ The ICoCA may accept complaints directly from victims of abuse by security companies' personnel, but will also provide the complainant with advice on available remedies, including the companies' OGM where it exists. The ICoCA will itself investigate a complaint if it is alleged that a member company's OGM is unfair, inaccessible, or otherwise does not

³⁵ Asian Development Bank, Accountability Mechanism Policy, 2012, para. 25 p. 6. Available at: https://www.adb.org/documents/ accountability-mechanism-policy-2012

³⁶ The MSI Database website: https://msi-database.org/

³⁷ Connor, T. Delaney, A. & Rennie, S., The Ethical Trading Initiative: Negotiated solutions to human rights violations in global supply chains? 2016, p.14-15. Available at: https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/581046def7e0abd1f4 b8eeb9/1477461763862/NJM18_ETI.pdf

³⁸ ICoCA website: http://www.icoca.ch/en/the_icoc

³⁹ ICoCA, Manual: Developing and operating fair and accessible company grievance mechanisms that offer effective remedies, n.d. Available at: https://icoca.ch/sites/default/files/uploads/Manual.pdf

comply with the code of conduct, which defines a series of procedural rules the OGM should follow. In these cases, the ICoCA can suspend or terminate a company's membership after engaging in dialogue with a view to the company taking corrective measures and establish an OGM compliant with the code of conduct.

1.4 Policy considerations

- **56.** The effective protection of human rights requires special attention to certain individuals and groups that have been disadvantaged or marginalized and therefore suffered some form of discrimination which impedes the full realization of their rights. In relation to these groups, States have the duty to adopt special measures to prevent the violation of their rights and to guarantee their enjoyment. Those groups include, among others, women, children, indigenous peoples and ethnic, religious, racial or linguistic minorities.
- **57.** In reviewing the performance of OGMs, the ICJ is conscious of the need to pay special attention to the rights, needs and situation of women and to adopt a gender perspective to assess company OGM practices and the normative and policy considerations attached to them. Similarly, a culturally- sensitive approach is generally necessary but it is particularly important in a context where companies may operate in areas with a strong presence of indigenous peoples or minorities with unique culture, social structures and religious practices that may be vulnerable to discrimination.



Section 2

Establishment and functioning of OGMs in practice

- **58.** Section 2, like sections 3 and 4, is largely focussed on a review of actual practice of grievance mechanisms and Section 4 elaborates on the existing level of communication and transparency to show, at the level of company disclosure, the apparent limited practice of company grievance mechanisms. The Corporate Human Rights Benchmark Initiative a non-governmental organization that reports and ranks companies' human rights performance- attributes an average score of only 3.4 out of 15 to companies for their approach and policies to grievance mechanisms and remedies.⁴⁰ Against the backdrop of limited practice and information in relation to grievance mechanisms, the present report makes an attempt to identify trends and gaps.
- **59.** In terms of approaches and models of OGMs, it is often said that there is not a one size fits all approach⁴⁷ and all model have to adapt to the circumstances and type of business operation. It is also often assumed that it is incumbent on the company to adopt and implement a grievance mechanism without considering the role or even leadership that other stakeholders may play in this context. Throughout its research and consultation, the ICJ has come across a variety of examples of grievance mechanisms and processes of similar effectiveness initiated or run by

⁴⁰ Corporate Human Rights Benchmark website: https://www.corporatebenchmark.org/measurement-themes

⁴¹ Juan J. Alvarez & Katerina Yiannibas, Human Rights in Business:Removal of Barriers to Access to Justice in the European Union, London, 1 edition, Routledge, 2017, p. 85.

local communities or groups and accepted and actively used by the relevant companies.⁴² It is therefore important to dispel the assumption that company-led OGMs are the only possible model, despite their relative predominance. However, it should also be clear that for a non-company led OGM to be effective it will always need the commitment and actual participation of the relevant company.

- **60.** The establishment of an OGM is usually preceded by policy discussions and decisions taken at the highest levels of the company with the involvement of the relevant legal department. In large multinational companies, OGMs generally respond to a human rights-related policy adopted at head office level. To a lesser extent, subsidiaries or commercial partners take the lead, as the ICJ found with Telefonica, Colombia, which is the only part of the Telefonica group with an established OGM. This will be followed by a period of planning, scoping and mapping of stakeholders. It is crucially important to identify and involve members of the community who are intended to benefit from the OGM at the earliest possible stage to establish legitimacy from the outset before the mechanism is designed.
- **61.** In terms of process, an OGM typically contemplates the following procedural steps to address specific complaints:

a) Filing /registration of the grievance at the reception post

A frequent complaint from communities and other groups concerns the limited number of access points to the OGM.

b) Investigation by the relevant officer or team

Investigations may involve participation by one or several company departments depending on the issue. For instance, the department of environmental standards may be involved if the grievance relates to air pollution in a mine, or the human resources department may be involved when a grievance concerns a labour issue. A weakness of many OGMs is the lack of timely, transparent and effective investigation carried out jointly or shared with the complainants in order to create a level knowledge base on which the grievance can be treated thoroughly and fairly. This impacts on the perceived legitimacy and transparency of the OGM because the company controls not only these investigations, but access to the information that must be gathered. Various efforts have been made to address this. For example, the Cerrejon OGM involves the grievant or community representative in some steps of the process such as visits to/inspections of the place where the event complained about occurred. The Adidas third party complaint mechanism foresees recourse to an independent third party for the investigation or for mediation purposes when appropriate or needed.

⁴² See for instance, Ibid., p. 81; J. Kaufman & K. McDonnell, "Community-Driven Operational Grievance Mechanisms", in Business and Human Rights Journal, vol. 1:1, 2016, p. 129; reports of Earth Rights International on its project on community driven grievance mechanisms in Myanmar, on file with the ICJ.

c) Dialogue, negotiation, referral to third party resolution

Typically, this part involves some dialogue and negotiation with the complainant that may take various forms. Sometimes, a company officer may come with a solution/decision to communicate to the complainant, who may then comment and negotiate. In other cases, the complainant will be approached before a decision is taken internally at the company to hear his or her expectations. The latter is used by Cerrejon and is probably the model that takes better into account the perspective of the victims, a necessary element of any proper grievance process.⁴³

d) Adjudication, agreement and implementation

Where there is agreement between the company and the complainant on the facts and the kind of remedy to be granted, this is generally recorded in a formal settlement agreement. In the case of suppliers or contractors where the abuses complained about are regarded as linked to the company but not caused or contributed to by it, the agreement may be with the supplier and the complainant.

e) Referral to other mechanism

If there is no agreement between the parties or the complainant remains dissatisfied with the outcome, the option may exist to refer the matter to a higher-level body. In the case studies of Adidas, Cerrejon and Telefonica Colombia, this is the general counsel or head compliance officer. The North Mara OGM provides for a second level body with a degree of community participation. Another possibility is for the complainant to have recourse to an external mechanism in which the company participates, such as an MSI or arbitration. Recourse to lawsuits through judicial processes nearly always remain an option (In all the case studies that the ICJ looked at, except one, the OGMs expressly did not preclude complainants having recourse to the courts.)

f) Follow up and monitoring of implementation

This enables an assessment to be made of the effectiveness of the OGM in reaching satisfactory outcomes for rights holders. The ICJ generally found little information on follow up processes, with the exception of Adidas' third party complaints policy which requires the monitoring of the implementation of agreed remediation within an agreed timeframe. This is undertaken either by Adidas in-house or by an appointed partner which reports on an annual basis on the number of cases and their outcomes . Monitoring of implementation should also form part of the information publicly reported by the company in order enable potential users and third parties to assess the effectiveness of the mechanism.

⁴³ See guidance offered by the Working Group on the issue of human rights and transnational corporations and other business enterprises, Report to the General Assembly 2017, A/ 72/162,18 July 2017.

2.1 Early involvement of potential users

- 62. Robust involvement of the intended beneficiaries of the OGM from the earliest stages is of crucial importance for its legitimacy and accessibility. In almost all cases studied by the ICJ, the OGM would have benefitted at the design stage and operational stages from more profound involvement of the local communities and other stakeholders, including workers of suppliers. At the same time, there were often significant levels of distrust of the OGMs among external stakeholders, with the most frequent complaint being the lack of independence of a process seen as controlled by the company and functional to its interests.
- **63.** A context where involvement is particularly sensitive is the extractive sector, where many companies sometimes operate in areas populated by indigenous peoples, minorities, subsistence communities and other marginalized or disadvantaged groups. They are therefore likely to have high levels of interaction with these people and international standards and best practice require that they are involved at the design stage and in ongoing consultation. For instance, Cerrejon consulted the Wayuu people living in their vicinity of its operations. The Wayuu are actively engaged in certain aspects of the OGM and as security staff, but more attention to the position of women and children would have been desirable.
- **64.** As with participation in the pre-design and design stages where community involvement in ensuring optimal accessibility of the OGM is essential, it is similarly important for communities to have input in how grievances will be investigated, how harm caused will be determined and how appropriate remedies will be applied. Most OGMs have been established after business operations have started, frequently in response to external pressure. Therefore broad consultation at an early stage is often not straightforward and companies have sometimes appeared reluctant to share information or consult with groups or individuals that they may perceive as critical of the company operations or as irritants to management, not genuinely interested in contributing to the effectiveness of the OGM. On the other hand, communities and individuals may prefer not to participate in consultations that they regard as insincere, illegitimate or even counterproductive. In certain cases, such as with the Tampakan mining project in the Philippines, local communities are divided, with one part of the community rejecting the mining project altogether.⁴⁴

⁴⁴ Brigitte Hamm, Anne Schax, and Christian Scheper, Human Rights Impact Assessment of the Tampakan Copper- Gold Project, Mindanao, Philippines, Misereor (Germany) and Fastenopfer (Switzerland), 2013, p. 39 and ff.., and 55 ff. Available at: https://www. misereor.org/fileadmin/user_upload/misereor_org/Publications/englisch/study-human-rights-impact-assessment-tampakancopper-gold-project-2013.pdf

- 65. Adidas Group policy does not specifically contemplate a role for the grievant or the trade union in the investigation of the complaint although it sometimes uses the services of the Fair Labour Association to carry out investigations or provide expertise.⁴⁵ But, in Indonesia, where the ICJ case study was conducted, Adidas has developed a Freedom of Association Protocol designed in partnership with the local unions that aim to complement the OGM and support grievance resolution and remedy. Cerrejon carries out some of the relevant investigations together with community delegates and engages in negotiation with them and the direct victims to determine appropriate remedies. For instance, when a mine dumping pit slid into the land of a community member causing damage, company representatives and experts were called to the site and carried out an inspection jointly with the family and community delegates after which a mutually agreeable solution was found. North Mara's OGM policy provides for grievants' participation only in the form of provision of evidence to substantiate their claims. Concerned NGOs have highlighted the fact that the mine controls evidence such as CCTV footage as a crucial imbalance in the system.⁴⁶
- **66.** Available evidence suggests that there is a significant deficit of involvement and participation of intended beneficiaries at various stages, including the design and running of the OGMs. Participation of communities is, at best, limited to certain tasks or stages in the process, but in no case did the ICJ find a whole programme permeated by community/stakeholder participation that would lead to co-design and co-implementation. Remedying this gap represents a significant opportunity to increase the effectiveness, the legitimacy and the level of access to the surveyed OGMs and to OGMs in general. It would also be consistent with the 2017 recommendations of the UN Working Group on Business and Human Rights.⁴⁷
- **67.** Consultation and participation of the intended beneficiaries or users of the OGM are essential to build trust and legitimacy and to enable learning and constant improvement. Such consultation and participation should ideally take the form of co-design and co-management of the grievance process when appropriate to the context of business operations. The UNGP criteria of legitimacy, continuous learning, engagement and dialogue require consultation and participation. They can take place at the design stage of the mechanism, during its operation, for

⁴⁵ See Adidas Group, Summary of Human Rights Complaints Handled by adidas in 2017 and Summary of Third Party Complaints Handled by adidas Group in 2016. Available at: https://www.adidas-group.com/media/filer_public/d3/e3/d3e3e552-e96a-4e29-92d6-8bd266b73d14/summary_of_human_rights_complaints_handled_by_adidas_in_2017_en.pdf and https://www. adidas-group.com/media/filer_public/a1/db/a1db897b-4a50-4b6f-8b1d-e37a78a6a9b8/summary_of_human_rights_complaints_ handled_by_adidas_group_in_2016.pdf

⁴⁶ Rights and Accountability in Development (RAID), Acacia Mining's Revised Operational Grievance Mechanism at North Mara Gold Mine, Tanzania, Assessment and Recommendations, April 2018, p. 5. Available at: http://www.raid-uk.org/sites/default/ files/raid_lhrc_assessment_of_acacia_ogm.pdf

⁴⁷ See 2017 UN Working Group on transnational corporations and other business enterprises, above note 6, paras. 20-25, 32-54, 79-81, 84-87.

instance for third-party or multi-stakeholder panels to deal with certain complex issues; for purposes of oversight and accountability; or evaluation and improvement of the mechanism. It is also important that the representatives of user groups with whom this interaction takes place are themselves legitimate, able to speak on behalf of the group they represent, have good access to information and that their participation is genuinely encouraged in the process.

2.2 Legitimacy and the issue of independence

68. The commentary to UNGP 31(h) stressed that OGM "mechanisms should focus on reaching agreed solutions through dialogue" given that an OGM led by a company would not be perceived as independent. But while dialogue with the grievant as a method may be effective in solving the dispute and generating a level of legitimacy, it does not do away with the need for independence and impartiality which will be especially crucial in complex cases or where agreement among the parties is elusive. When there is disagreement between the parties concerning the facts or the appropriate remedy, there will be an increased relevance of independent third parties, including mediators or arbitrators and the judiciary.



- **69.** Companies may participate in or contribute to the establishment of external or third-party grievance mechanisms that may function independently from the company. There are examples such as the Fair Wear Foundation and recent models of global agreements between industry brands and global labour union federations that provide for the submission of disputes to third party arbitral panels. Examples exist of companies using an independent NGO to administer their OGM, for instance Hewlett Packard Mexico, which contracted a local labour rights NGO to handle all grievances initiated by their employees or workers at supplier factories.⁴⁸ Further examples of the involvement of NGOs in OGM administration are discussed in Section 2.6 below.
- 70. Where companies choose not to create structures to enhance the independence of the OGM, this may be because they believe that to do so would curtail the exchange between the company and the complainants and prevent the OGM from fulfilling intended functions such as improving company practices and preventing future harm, in line with what was envisaged by UNGP 31 (g). There may also be logistical issues that make independent structures difficult, for example with complaints across extended supply chains involving infringement of rights in supplier factories where the investigations and outcomes are likely to principally involve dialogue between the affected party and the supplier. However, the most frequent reason is companies' reluctance to "lose" control of every aspect of the GM design and implementation.
- **71.** Practice examined by the ICJ reveals a mixed picture. Of the case studies, the North Mara OGM policy provides for a role for the Community Grievance Committee to decide whether a human rights impact has occurred and/or identifies rights-compatible remedies when there is no agreement between the parties through the normal first level mechanism.⁴⁹ This Community Grievance Committee is composed of three members appointed from rosters of community and mine representatives and a chairperson roster, selected on the basis of their "independence and good character".⁵⁰ However, concerned NGOs have criticized the structure as in fact being largely controlled by the mine,⁵¹ highlighting again the potential limits of a mechanism that is company-led.
- **72.** Cerrejon relies on the company's grievance team to investigate and lead in the determination of the appropriate remedy. However, the company told the ICJ that

⁴⁸ Linder, Lukas and Steinkellner, above note 10, p. 73.

⁴⁹ Acacia North Mara Gold Mine, Community Grievance Process: Standard Operating Procedure, 2018, p. 5. Available at: https:// www.acaciamining.com/-/media/Files/A/Acacia/documents/grievance/community-grievance-process-sop-20171207.pdf

⁵⁰ Ibid., art. 8, p. 8

⁵¹ Catherine Coumans, Review of Barrick Gold/Acacia Mining's Draft "Community Grievance Process - Standard Operating Procedure" for the North Mara Gold Mine in Tanzania, Miningwatch Canada, April 2018. Available at: https://miningwatch.ca/sites/default/ files/review_of_new_north_mara_grievance_mechanism_april_2018_final_0.pdf

it is open to considering a role for a committee with community representation in it for the future. Telefonica Colombia and Adidas have wholly internal OGM processes without third party involvement. Adidas' "Third Party complaint process" provides for the Social and Environmental Affairs department to examine the substance of the complaint and all documentary material related to suppliers or contractors, or by their compliance officers if the complaint relates to Adidas' own operations. If the complainant is unhappy with the process and/or outcome of the case, it may be reviewed by their general counsel or chief compliance officer. If dissatisfaction persists, the complainant may have recourse to the judiciary, to the Fair Labour Association's Third-Party Complaint Process in the case of labour rights or to the German National Contact Point as external mechanisms.⁵²

- 73. With company controlled adjudicative OGMs, measures to build legitimacy and address the unavoidable conflict whereby the company is judging its own actions will include high levels of transparency, clear due process rules and the involvement of community members to design and participate in the mechanism. A separation of functions may also serve to enhance credibility, for example by putting a separate unit in charge of the grievance programme that does not depend on operational departments and which reports directly to a senior board director. The company may also separate within its grievance programme the functions of investigation from the negotiation and dialogue with the complainant. Such measures should improve the grievance mechanism's capacity to identify the sources of problems and suggest solutions in the interest of the company and its stakeholders through dialogue which the operational departments may be reluctant or ill trained to engage in.
- 74. Legitimacy will be enhanced where it is clear both internally and externally that the OGM has support at the highest levels of the company. If potential users know that senior people at the company are personally invested in the effectiveness of their OGM they will be more likely to trust it, and internally if staff know that the OGM has senior board champions they are more likely to work hard to make the OGM effective. As Shift noted in their 2014 report,⁵³where OGMs have been most effective in practice is where business leaders have recognized and articulated the value to the business of having an effective system in place for identifying and remediating impacts when they occur.

⁵² Adidas Group, *Third Party Complaint Process for Breaches to Adidas Group workplace Standards or Violations of International Human Rights Norms*, Version 3, November 2016, p. 7-8, 10. Available at: https://www.adidas-group.com/media/filer_public/47/95/47956de4-7a3b-4559-a449-51ef963c7f9e/adidas_group_complaint_process_november_2016.pdf

⁵³ Shift, above note 28, p.6.

COMMUNITY-DRIVEN GRIEVANCE PROCESSES: TVI RESOURCE DEVELOPMENT

TVI Resource Development, a Canadian company operating in the Philippines, used existing community structures for company-community engagement. The use of these traditional structures which rely on the moral authority of tribal leaders and which the company does not host or administer, improved community relations with the company and encouraged people to engage with and use the OGM,

The authors of the study concluded that the case "demonstrates there is not always a need for a formalized grievance mechanism to be administered by a company when localised complaints procedures are already institutionalized within a community, or where quasi-adjudicative mechanisms are offered by the government. Instead, a company-community grievance mechanism can use local customary procedures for engaging with communities. A company may benefit from considering enshrined local practices before formalising a grievance procedure that communities may not relate to, or at least considering the preferred means by which communities discuss issues and communicate. Though perhaps more informal than a company-run mechanism, these procedures can carry more legitimacy within the communities." 54

The effectiveness of the mechanism used by TVI was in part due to the fact that there was legislation regarding public participation and the recognition of the rights of indigenous communities. In this context, the grievance mechanism also worked as a tool to support the free, prior and informed consent of local communities, guaranteed under Filipino law.⁵⁵

GOOD PRACTICE

⁵⁴ E. Wilson & E. Blackmore, Dispute or Dialogue? Community perspectives on company-led grievance mechanisms, International Institute for Environment and Development, 2013, p. 121

⁵⁵ Ibid., p. 126.

2.3 Accessibility, predictability and transparency towards the community

75. To encourage their accessibility by stakeholders, the existence of OGMs and details of their processes must be known to them. Information for the potential users of the OGM and wider communication to the general public are essential. Communication to the public goes beyond mere statistics of the number of cases received and should also offer analysis or trends in cases and substance. The company should communicate sufficient information to enable the community and potential users to understand the objectives, process and potential outcomes of the OGM. An example of a company with very extended supply chains which has made respect for human rights within it a matter of its public communications is UK food retailer Tesco plc ⁵⁶ In 2009 Tesco piloted an OGM for farmworkers in South Africa, a key component of their agricultural supply chain. ⁵⁷ Part of the lessons learned from the Tesco experience of attempting to implement these mechanisms in a labour market with high levels of distrust was the importance of open and clear communication to encourage access. Transparency, in the form of keeping parties to a grievance once it is in process regularly informed, is also one of the criteria of effectiveness formulated in the UNGP.

A. Dissemination of relevant information to the potential users and to the community

76. For an OGM to be predictable, its stages, the potential outcomes and timelines should be communicated to the intended users in a manner, language and format that the users easily understand. Many cases reviewed by the ICJ suggested deficits in communication with the community and general public. If little information is available on the company's website, this will impact the confidence in the mechanism by potential users and the NGOs that support them. Other forms of communication such as leaflets or cards that the ICJ saw during visits did not always contain all the necessary information for the intended user. A central goal of such transparency should be for individuals and communities to have sufficient knowledge to make informed decisions about participating in the OGM. Provisions may also be required to protect users by enabling anonymous complainants and establishing and publicising measures to prevent and sanction retaliation.

⁵⁶ Tesco, "Our approach to human rights", April 2019. Available at: https://www.tescoplc.com/reports-and-policies/our-approach-to-human-rights-in-our-supply-chain/

⁵⁷ Hendrik Kotze, Farmworker Grievances in Western Cape, South Africa, ACCESS Case Series No. 3, January 2014. Available at: http://accessfacility.org/sites/default/files/Farmworker%20Grievances%20Western%20Cape%20South%20Africa.pdf



- 77. Clear communication and effective community relations are especially important when a company has had historically difficult relations with local people and is seeking to reform its practices. At North Mara the OGM standard operating procedures, manuals for grievants and specific policies for the treatment of human rights abuses are on the company website - a significant change from past practice, although their effective implementation in the field has been open to question. North Mara explained to the ICJ that it organises outreach sessions with villagers and workshops with their leaders to explain the OGM process and provided educational material in various accessible formats. Cerrejon uses the same methods and hands out paper sheets containing its human rights policy and a card on the OGM process. Adidas requires its suppliers to exhibit signs and instructions about relevant hotlines at their workplaces. The effectiveness of these measures will depend on whether they convey the necessary information, the resources committed and how well managed they are. The ICJ found that significant gaps in knowledge of the respective OGMs in the cases it reviewed, including communities around Cerrejon's mine, the villagers around the North Mara operations, communities around Telefonica's installations, or workers of Adidas' suppliers in relation to Adidas Third party complaint mechanism.
- 78. In a report⁵⁸ analysing 74 large listed companies from seven sectors, Shift mapped their human rights disclosures against the UNGP framework. They found that only 30 percent provided specific information about engagements on human rights

⁵⁸ Shift, Human Rights Reporting: Are Companies Telling Investors What They Need to Know? May 2017. Available at: https://www. shiftproject.org/media/resources/docs/Shift_MaturityofHumanRightsReporting_May2017.pdf

issues and that one of the least reported areas was remediation and measures taken to disseminate information regarding their OGMs to potential users.

- **79.** Some companies declare to take more robust steps to communicate effectively. BHP Billiton's policy is that its OGM must be communicated to stakeholders and the OGM must meet a number of requirements: "use an understandable and transparent process... [and] be readily accessible to all segments of the affected host communities." Unilever maintains that it provides training and organizes global awareness programs on how concerns can be raised.⁵⁹ Clearly, the effectiveness of these will be measured in the awareness levels among actual or potential users.
- 80. Public reporting and disclosure by companies on OGMs should contain information about steps taken to disseminate understandable information on how users can access the OGM, the stages of the OGM process and the potential remedies available. Companies should also measure awareness of their OGMs amongst potential users, incentivise staff to make year on year improvements in awareness and report those figures publicly.

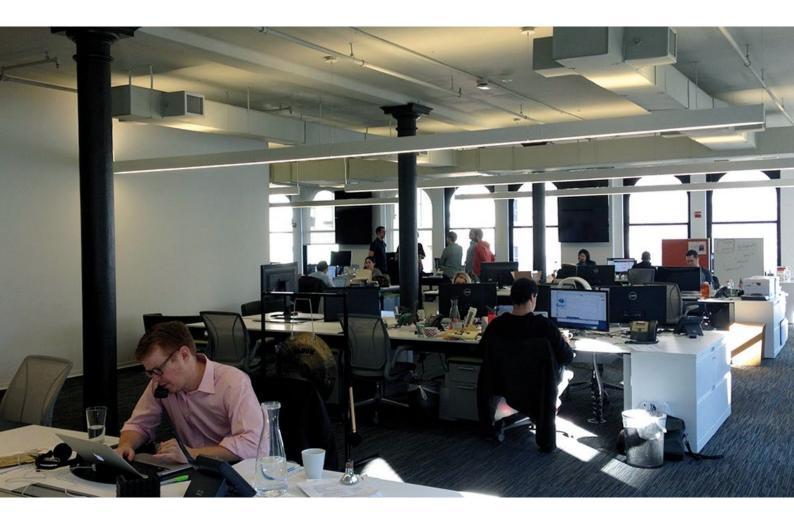
2.4 Subject matter: community concerns and human rights abuses

- 81. In the UNGP, "a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities." In turn, a grievance mechanism is defined as "any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought."⁵⁰
- 82. More specifically for companies, OGMs should deal with a broad range of subject matter giving rise concerns or complaints, not only those formulated as "human rights abuses". Concerns formulated in general terms, if unaddressed, can escalate to full-fledged disputes or may hide other deeper concerns. OGMs may function here as early warning mechanisms that help prevent potentially more serious disputes. To do so they should not focus only on abuses that have occurred with a view to providing redress but also be connected to company efforts to identify and prevent potential future abuses.

⁵⁹ See BHP Billiton, Integrity Resilience Growth Sustainability Report 2016, p. 47. Available at https://www.bhp.com/-/media/bhp/ documents/investors/annualreports/2016/bhpbillitonsustainabilityreport2016.pdf See also Unilever, Human Rights Progress Report 2017, p. 69. Available at: https://www.unilever.com/Images/human-rights-progress-report_tcm244-513973_en.pdf

⁶⁰ Human Rights Council, above note 4, Commentary to GP 25.

83. The evidence suggests that although there is a need to differentiate between general concerns and grievances and complaints regarding human rights, such distinction is rarely made in practice. Complaints of human rights abuses may entail legal liability and reputational damage for the company, but also trigger the application of standards, including sometimes legal standards, relating to the interpretation and application of human rights that need to be embedded in the design and operation of the OGM. North Mara has two policy documents in place relating specifically to human rights impacts and including issues such as reasonable use of force and appropriate rights compatible remedies. Others, such as Telefonica, state that they have a human rights grievance programme but their policies are in fact designed to address all grievances without distinction, including, for instance, nuisances and damages resulting from deteriorating infrastructure, which may be seen, at most, as indirectly impacting on a human rights norms" as subject matter of its grievance programme.



⁶¹ Atención de reclamaciones de terceros por daños o perjuicios generados con infraestructura, y activos de la compañía, 2013. Telefonica's general statement of human rights policy is available at: https://www.telefonica.com/en/web/responsible-business/ our-commitments/human-rights/introduccion

PORGERA REMEDIATION FRAMEWORK BOX 5 The PRF was established by Barrick Gold Corporation in Papua New Guinea specifically to address grievances related to claims of sexual violence that had been committed by employees of Porgera Joint Venture mine as an alternative to the local justice system. The PRF was set up following a 2011 Human Rights Watch report identifying a pattern of systemic sexual violence by mine security personnel. The PRF was one of the first company-created OGMs implemented to address serious human rights violations following the adoption of the UNGP. It provided a remedy that many women would otherwise have been unable to receive via ineffective state-based mechanisms, but its design, implementation and outcome was seriously flawed including inadequate consultation with stakeholders and considerations of their needs and a failure to consider issues of security and stigmatization. The mechanism operated for two years during which time 120 women signed remedy agreements that included a legal waiver of their right to sue Barrick Gold. 11 women who refused to sign the agreements received international legal representation and received settlements estimated to be approximately ten

84. Looking at the Porgera Remediation Framework (PRF) established by Barrick Gold Corporation in Papua New Guinea, serious questions arise about whether a mechanism that is suitable to address all kinds of grievances can be suitable to address complaints about gross human rights violations.⁶²

times greater than those that settled through the PRF.

⁶² See criticism by Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic in Righting Wrongs? Barrick Gold's Remedy Mechanism for Sexual Violence in Papua New Guinea: Key Concerns and Lessons Learned, November 2015.

Gross human rights violations are violations "which, by their very grave nature, constitute an affront to human dignity".63 Certain kinds of violations, including those which constitute crimes under international law, will by their nature be gross violations, but other violations committed on a large scale may also amount to gross human rights violations. Gross human rights violations include arbitrary deprivation of the right to life and the right to physical and moral integrity of the human person, genocide, slavery and slave trade, murder, enforced disappearances, torture or other cruel, inhuman or degrading treatment or punishment, prolonged arbitrary detention, deportation or forcible transfer of population, and systematic racial discrimination fall into this category. Deliberate and systematic deprivation of essential foodstuffs, essential primary health care or basic shelter and housing will also amount to gross violations of human rights.64

- **85.** It must be noted however, that some gross human rights violations refer to conduct by the State, although certain conduct, including slavery, war crimes and crimes against humanity may also be the responsibility of non-State actors under international law. But there is little question abuses committed by companies that constitute criminal conduct should be treated with equal opprobrium. In these cases, clearly the State has an obligation to investigate and prosecute these offences, and victims have a right to judicial remedy. The question remains whether and how the harm underlying gross human rights abuses by companies may be addressed, as supplemental matter, through an OGM, particularly where other forms of redress are unavailable or unlikely to be effective. This point will be discussed further, but here it may be said that there is a strong rationale for giving gross human rights abuses specific and distinct treatment.
- **86.** Another issue is whether the OGM could be focused on one specific set of human rights grievances or should be designed to address all human rights grievances.

⁶³ UN General Assembly, above note 13.

⁶⁴ ICJ, Practitioners Guide 2: The Right to a Remedy and Reparation for Gross Human Rights Violations, 2018, p. xii.

- **87.** The Porgera Remedy Framework (PRF) was limited to claims of "sexual violence", which in practice company officials further restricted to "rape", and it was found that this had an important limiting impact on the ability of the company to communicate about the OGM, victims' access to the mechanism and victims' own security and well-being as part of the local community where they were stigmatized and isolated.⁶⁵ In addition, the PRF was also limited to past abuses, leaving aside not only acts that occurred after a certain date but also a number of grievances that did not amount to violations as defined by the mechanism.
- **88.** According to CSR-Europe, labour or worker rights issues are sometimes included in a general grievance mechanism, but most companies with a grievance programme seem to limit it only to grievances by employees and not communities or the general public. Grievance mechanisms may be classified by the target group the mechanism is intended to serve: employees, both employees and communities at the same time and/or only communities. A small but growing number of companies are establishing mechanisms intended only to persons from local communities.⁶⁶ For all the ICJ case studies the companies had separate grievance programmes for workers and although some labour issues have been presented to Cerrejon's OGM, they were a small minority.
- **89.** In relation to labour rights, there is lack of total clarity, as seen further below, about the position and treatment of the workers of a company's suppliers and contractors, given the strong reliance on those business relationships in contemporary business structures and practices. Labour unions organizing Cerrejon workers make conscious and persistent efforts to bring those workers into the established labour relations processes and structures created for direct employees of the company, but the company prefers to use its leverage with sub-contractors to ensure these provide remediation to grievances presented by their "own workers". Adidas has created a grievance programme explicitly covering complaints from suppliers and contractors' workers and it is in the process of developing a digital factory-level OGM for suppliers, to provide greater visibility into dispute resolution.
- **90.** As a general rule, the size and organization of a company-led OGM process appears to be proportional to the type of challenges the particular industry sector faces, as well as the size and type of business operations. There is growing awareness among businesses that human rights complaints deserve separate treatment from other grievances and therefore businesses may reserve or create specific guidelines to address those issues. For instance, North Mara's OGM applies to all grievances but there is a specific policy that defines standards and parameters

⁶⁵ Yousuf Aftab, above note 10, p 3-4.

⁶⁶ CSR-Europe, Assessing the Effectiveness of Company grievance Mechanisms-CSR-Europe's Management of Complaints Assessment (MOC-A) Results, December 2013, p. 34. Available at: https://www.csreurope.org/sites/default/files/uploads/Assessing%20 the%20effectiveness%20of%20Company%20Grievance%20Mechanisms%20-%20CSR%20Europe%20%282013%29_0.pdf



specific to security-related human rights grievances. Looking at past practice, for example by Barrick Gold Corporation in Papua New Guinea, designing a grievance and remediation programme limited in scope to a narrow range of human rights problems, in that case sexual abuse of women, may have more disadvantages than advantages. It may neglect a series of potential concerns or abuses that are latent, it may exclude legitimate claims of some stakeholders, and may not have the capacity to address new challenges that arise. Furthermore, it may create a setting that increases potential stigmatization of victims of certain abuses, such as rape and other sexual violence.

91. Cerrejon and Telefonica Colombia both have a broad coverage of grievances although, in practice, they deal with certain kind of grievances more than with others. Adidas' Third-Party Complaints Process concerns breaches of its code of conduct and workplace standards or violations of international human rights norms. Claims may concern its own operations and also those of its suppliers and contractors. The structure of Adidas operations, heavily relying on a global network of suppliers and their sub-contractors, determines that all grievances received and solved by the Group, for instance during 2017, related to those suppliers and contractors. In turn, the grievance processes of the two Adidas' suppliers the ICJ visited, deal with all concerns from workers in the workplace, with only a certain percentage focussing on labour rights issues.

2.5 Considerations of procedural fairness

92. As mechanisms typically set up by companies, OGMs have inherent limitations even when genuine efforts are made to create "independent" third party mechanisms.⁶⁷ Users and NGOs often highlight the inherent imbalance of power in any dialogue or negotiation between a company and affected individuals and groups. A company will most likely have superior knowledge as to facts relevant to the dispute, and will

have advisors and consultants, plus lawyers to advise on the legal ramifications. By contrast, affected individuals and groups are unlikely to have the resources and knowledge necessary to negotiate on an equal footing. This is particularly the case with a legalized adjudicatory dispute system, where the role of independent experienced mediators, supportive NGOs, and measures to support the community with legal aid and capacity building will be important.

- **93.** Independence and impartiality are overarching principles that apply in a strict manner to judicial institutions and other State-based organs with similar mandates to determine rights and obligations. Fair trials and hearing require independence and impartiality and both are closely related and usually assessed together. While independence refers to the status or relationship of the judiciary to others -particularly to the executive branch of government that rests on objective conditions or guarantees, involving individual and institutional dimensions,⁶⁰ impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties".⁶⁹ Not only should adjudicators not hold prejudices or bias but there must be "guarantees to exclude any legitimate doubt in this respect". Even "appearances may be of a certain importance", because "what is at stake is the confidence which the courts in a democratic society must inspire in the public and above all in the parties to the proceedings."⁷⁰
- **94.** The concept of corporate responsibility to respect human rights based on social expectations has related but distinct conceptual and normative foundations than those associated with State obligations under international law.⁷⁷ International law and standards relating to the administration of justice, including the overarching principles of independence and impartiality, applicable in the context of State-based mechanisms to provide effective remedy and fair trial are therefore not directly transposable to company mechanisms. Nonetheless, the rationale that undergirds them, to provide for justice and fairness, is the same and their essential elements should be respected if a decision-making body within or related to the OGM is to command legitimacy and trust from local communities and potential users. "Independence" in this context is somewhat different than, for example, in respect of a judiciary, where even the administrative apparatus of the judiciary must remain independent of the executive. In a company context, the importance lies in the functional independence of the adjudicators while the OGMs may be technically administered by the company as a whole.

⁶⁸ See Valiente v. The Queen 673, (1985) 2.S.C.R, cited in: OHCHR, Independence and Impartiality of Judges, Prosecutors and Lawyers, available at: https://www.ohchr.org/Documents/Publications/training9chapter4en.pdf

⁶⁹ Human Rights Committee, Views of 23 October 1992, Arvo O. Karttunen v. Finland, Communication No. 387/1989, para. 7.2.

⁷⁰ European Court of Human Rights, Judgment of 11 January 2000, Daktaras v. Lithuania, Application no. 42095/98, para. 30, 32

⁷¹ Ruggie, John Gerard & Sherman, John F., "The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: Reply to Professors Bonnitcha and Mccorquodale", in European Journal of International Law, March 15, 2017.

- **95.** The principles of independence and impartiality remain important for companies to observe if they decide to establish a third-party adjudicating mechanism such as in Barrick's PRF in Porgera, Papua New Guinea. Also, companies should observe fundamental principles of procedural fairness in dealing with grievances. In this context, it is also useful to recall the commentary to UNGP Principle 31, which states that "[w]here adjudication is needed this should be provided by a legitimate, independent third party mechanism" which suggests that determining human rights violations should not be left to OGMs. Having a clearly defined process with clear lines of responsibility and accountability as well as trust resulting from continued participation and consultation of the intended beneficiaries are seen as key elements for the legitimacy of OGMs.⁷²
- 96. While there is no consistent practice, there appears to be a growing understanding of the need to adopt a flexible approach to the standard to assess evidence and determine social responsibility. For instance, North Mara's OGM adopts a standard of "balance of probabilities" to assess whether an adverse impact has occurred, while restating that the standard shall not be applied as rigidly as in a judicial process.⁷³ North Mara adopts a more stringent approach in its policy for security-related human rights impacts where it requires proof that the harm has a causal link to the mine's operation; that there be "evidence to substantiate the effect of the impact -that is, evidence showing the Aggrieved Party's situation or condition before and after the impact."⁷⁴ In all cases access to evidence is highly likely to be imbalanced given that the company will have control over the worksite, internal documents and data.
- **97.** Asymmetry of power between company and complainants has important consequences for the design and implementation of OGMs. Procedural fairness must be observed to counter or mitigate inequalities, and its absence or insufficiency may be a serious flaw with an OGM.⁷⁵
- 98. OGMs have tried to address asymmetry with independent legal advisors or legal aid to act at various stages, including investigation, assessment of options and advice to grievants on the implications of compensation and settlements. A genuine policy to empower claimants will need to be properly resourced and managed.
- **99.** North Mara has a stated policy of providing a voucher for four hours of legal advice of the complainant's choice. Concerned NGOs have raised questions as to the actual application of this policy in practice.⁷⁶ In any event, four hours will not be

⁷² CSR-Europe, above note 66, p. 11.

⁷³ Catherine Coumans, above note 51, art. 25, p. 14.

⁷⁴ Ibid., p. 6

⁷⁵ See Columbia Law School Human Rights Clinic and Harvard Law School International Human Rights Clinic, above note 62, p. 3.

⁷⁶ Catherine Coumans, Inequality of Arms: A summary of concerns raised by victims of violence by private and public mine security at Barrick Gold's North Mara Gold Mine in Tanzania regarding the mine's new Operation-level Grievance Mechanism, MiningWatch Canada, September 2018, p. 5. Available at: https://miningwatch.ca/sites/default/files/north_mara_final_brief_-_inequality_ of_arms_september_2018_-_clean_0.pdf

sufficient to prepare and pursue any but the simplest cases and in this respect the OGM falls short of the requirements of procedural fairness.⁷⁷ The provision of legal aid requires greater flexibility, taking into account the complexity and seriousness of a given case.

BOX 6

NGOS AS ADVISERS TO COMMUNITIES

Cerrejon does not provide payment or vouchers for legal advice to the complainants, but there is evidence that the company agreed to use another modality. Since 2009, three resettled communities (Roche, Tamaguito and Las Casitas) chose the local NGO INDEPAZ as advisers in their negotiation with Cerrejon on the terms of their resettlement. This arose from the recommendations of an independent panel that communities should have their own advisers. Communities were concerned that their ignorance of rights and procedure would put them at a disadvantage. The advice focused on land, productive projects, houses, water, and other issues under negotiation. In 2013 Roche families that did not relocate in 2010 chose also INDEPAZ as mediators in the negotiation to verify the breaches attributed to the company. At first the communities demanded the company's advice or refused to sit at the negotiating table, but when the company agreed to pay for independent advice the communities chose their own advice and they chose INDEPAZ. The company contributes the resources, but the terms of the agreement require that every payment must have the approval of the communities and that INDEPAZ would report only to the communities. The relationship of INDEPAZ with Cerrejón was limited to the payment and in this way they considered their independence to be protected. At some point INDEPAZ also received contributions from international NGOs under the same modality. However, INDEPAZ reported and were accountable only to the communities.⁷⁸

GOOD PRACTICE

⁷⁷ See Acacia Mining, above note 49, art 21, p. 13; See also Rights and Accountability in Development (RAID), above note 46, April 2018, p. 6.

⁷⁸ INDEPAZ acted as partner for the ICJ to assist in the organization of the site visit paid to the Cerrejon's site in La Guajira.

100. Some NGOs in South Africa have proposed the establishment of a trust fund to which the companies would contribute to provide support to victims who use the relevant company OGM.

BOX 7

LEARNING FROM EXPERIENCE IN CONSUMER BANKING

A number of commercial banks have existing experience in bank-level grievance mechanisms in the retail banking space, where there is a direct and immediate relationship with the consumer. In Australia, in response to action by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, leading Australian commercial banks have been stepping up efforts to meet their responsibility towards consumers. For example, Westpac has strengthened its consumer banking complaints architecture in various ways, including ensuring that its Customer Advocate who oversees the mechanism pays particular attention to customers that may be the most vulnerable (such as those lacking financial literacy or in difficult personal circumstances due to mental health issues or situations of domestic violence). Importantly, the Customer Advocate's team start from a presumption that the complainant is right and that it is up to the business to disprove the individual's claim if it can. Shifting the 'burden of proof' in this way can have a profound effect on how effective a company grievance mechanism is, given the information and other asymmetries between users of such a mechanism and the company.79

GOOD PRACTICE

⁷⁹ Adapted from: David Kovick & Rachel Davis, Tackling Modern Slavery and Human Trafficking at Scale Through Financial Sector Leverage, Shift, 2019, p. 22. Available at: https://www.financialsectorcommission.org/wp-content/uploads/2019/02/ SecretariatBriefingPaper2.pdf

2.6 Workers grievances in the supply chain and with contractors

- 101. The use of global networks of suppliers and contractors is a feature of many modern business enterprises structure and operating mode that has led consumer and civil society activists to push global companies to play a more active role to ensure remediation in this context, including by requiring their suppliers to develop effective OGMs.⁸⁰ These include requiring suppliers' codes of conduct to include factory-level grievance mechanisms, examples of which include worldwide clothing retailer GAP and its suppliers in Lesotho.⁸¹ According to the Fashion Revolution's 2018 Transparency Index, 49 percent of the 100 brands and retailers in their index disclose some form of grievance mechanism in their supplier code of conduct.⁸²
- **102.** Some businesses include the presence of factory-level grievance mechanisms as part of their requirements from suppliers. For example, Adidas includes provisions in its contracts requiring suppliers to establish workers' grievance processes in their factories. Failure to do so may lead to the termination of the contract. It also requires that workers at supplier companies are able to file complaints to Adidas' grievance mechanism if appropriate.⁸³ The most certain way that a company can establish that OGMs are available and effective throughout its supply chain is to ensure that through the chain of contracts every entity in the supply chain undertakes to establish OGMs. In addition, they should maintain a system of auditing that would allow the company to obtain detailed information as to the effective operation of a supplier's grievance process.
- 103. An early example of extended supply chain grievance mechanisms, which led to adidas making positive changes to its structures, was established by the organizing committee for the 2012 London Olympic and Paralympic Games, LOCOG.⁸⁴ To back their code of sustainable sourcing for the games which they asked all suppliers, licensees and contractors to adhere to, LOCOG set up a grievance mechanism to process complaints from sources such as workers in supplier factories.

⁸⁰ Shift, above 28, p. 10.

⁸¹ Linder, Lukas and Steinkellner, above note 10, p. 64.

⁸² Fashion Revolution, Fashion Transparency Index 2018 Edition, p.49. Available at: https://issuu.com/fashionrevolution/docs/ fr_fashiontransparencyindex2018

⁸³ Adidas Group, Third Party Complaint Process for Breaches to the adidas Group Workplace Standards or Violations of International Human Rights Norms, Version 2, October 2014. Available at: https://www.adidas-group.com/media/filer_public/3a/a8/3aa87bcf-9af9-477b-a2a5-100530e46b19/adidas_group_complaint_process_october_2014.pdf

⁸⁴ Laura Curtze & Steve Gibbons, Access to remedy, operational grievance mechanisms An issues paper for ETI, Ergon, October 2017, p.16. Available at:https://www.ethicaltrade.org/sites/default/files/shared_resources/ergon_-_issues_paper_on_access_ to_remedy_and_operational_grievance_mechanims_-revised_draft.pdf

BOX 8

POLICY FRAMEWORK

A 2017 revised version of the International Labour Organization's Tripartite Declaration of principles concerning multinational enterprises and social policy (MNE Declaration)⁸⁵ recommends the establishment of OGMs. Concerning human rights grievances relating to multinational enterprises' business partners, Principle 65 of the MNE Declaration recommends that multinational enterprises "use their leverage to encourage their business partners to provide effective means of enabling remediation for abuses of internationally recognized human rights." Grievances at the operation level should be dealt with in full respect to ILO recommendation N° 130 concerning the examination of grievances within the undertaking, as referred to above. The International Finance Corporation's Performance Standards on Environmental and Social Sustainability require clients to ensure that workers contracted by a third party performing work for the client should also have access to a grievance mechanism, or otherwise "the client will extend its own grievance mechanism to serve workers engaged by the third party."⁸⁶

104. Equally with sub-contractors, it is pertinent to distinguish between situations where the company causes or contributes to the harm and where its contractor causes the harm. By using contractors the company may disenfranchise workers from the protections applicable to direct employees including access to the company's grievance process. Furthermore, situations of a main company's complicity with the commission of abuses in this context may arise.⁸⁷

⁸⁵ ILO MNE Declaration, above note 23.

⁸⁶ IFC, above note 33, para. 26, p.21

⁸⁷ ICJ, Corporate Complicity and Legal Accountability, 2008, Vol. 1, p. 29-30. Available at: https://www.icj.org/wp-content/ uploads/2012/06/Vol.1-Corporate-legal-accountability-thematic-report-2008.pdf

- **105.** Looking at company practice from the case studies, Cerrejon adopts an active approach to grievances arising out the operations of its contractors and several examples show the way it uses its leverage. In certain cases, the company is present in several steps of the investigation or dialogue between the contractor, its worker and/or community members. However, workers union's delegates are not allowed to participate and are sometimes only notified of the final outcome. Cerrejon considers that SINTRACARBON, the main union in the region, is not a party in such disputes that do not concern Cerrejon and one of its direct employees. This position is certainly not satisfactory to workers and their unions, who regard the practice of sub-contracting as a pernicious strategy to disenfranchise workers from their rights. As described above, Adidas uses its supplier contracts to require OGMs and carries out audits to ensure compliance. It may terminate a business relationship in serious cases of non-compliance.
- **106.** Given the complexity and length of modern supply chains the use of local partners and modern communication technology has become increasingly relevant to make OGMs across them effective. A study by the Ethical Trading Initiative (ETI) on NGOs and their role in OGMs offers some examples of supply chain OGMs where NGO roles were found to improve effectiveness.⁸⁸ These examples include the Issara Institute, an NGO based in Thailand working with large retailers and brands to operate OGMs on their behalf along their supply chains. They do this using a multilingual 24-7 helpline, smartphone applications and social media, developed involving migrant workers to ensure it was designed with input from potential users. Having received and verified a grievance Issara works with the supplier to develop a corrective action plan and stays in contact with the grievant to ensure the remedy is implemented and to assess its adequacy. For the most serious situations, the findings and corrective actions are shared with the end brand or retailer.
- 107. The ETI study also looked at the experience of an NGO in Bangladesh providing grievance mechanisms for over a million garment workers in 900 factories across the country. The mechanisms were frequently accessed, receiving an average of 400 calls a month via a mix of voice over internet protocol and interactive voice response, available 24/7 toll free and the study found that the use of the local NGO reinforced workers' trust in the helpline. In factories where unions were strong, they would be involved and information shared with them. To create transparency and to strengthen worker confidence, data was published quarterly on calls received and issues resolved. Structurally the mechanism worked via interaction with factory management and subsequent consultation with the

⁸⁸ Jesse Hudson & Mark Winters, NGO Leadership in Grievance Mechanisms and Access to Remedy in Global Supply Chains, Ethical Trade Initiative, 2018. Available at: https://www.ethicaltrade.org/sites/default/files/shared_resources/ngo_leadership_in_gms_ and_remedy_paper._eti_revised_feb_2018.pdf



complainants to ensure that the agreed remedy had been implemented, failing which the issue would be referred to the brand or retailer.

- **108.** NGOs and civil society organizations can contribute to OGMs in helping complainants access remedy by helping to file claims, supporting them in mediation or via investigations. Also, in complex environments where factories are typically making products for many different end retailers and brands, having a single point of contact for an OGM operated by a trusted NGO helps build worker confidence and the end companies can maintain their own OGM in the background.
- **109.** The ICJ considers that the most important factor towards enhancing the effectiveness of OGMs in this context is to assign an important role to the legitimate worker union or its leaders in the process, whether with the intercession of an NGO or not. The union and its representatives can play a vital role to help alleviate the inherent imbalanced power relations between individual workers and company, unless independent unions do not exist. Union leaders are also entitled to enhanced facilities and protections under the law that enable them to act effectively in support to individual workers.
- **110.** When workers grievance processes are separate from processes for external stakeholders such as local communities, they should observe, at a minimum, the principles of ILO Recommendation 130 and those covered in the UNGP. Among other guidelines, Recommendation 130 provides that workers' organizations or representatives in the undertaking should be associated with employers, "preferably by way of agreement", in the establishment and implementation of grievance procedures within the undertaking. The outsourcing of work to contractors and suppliers should observe the same parameters. The UNGP also provide that grievance mechanisms should not undermine the role of legitimate trade unions.

111. However, in practice, because of the complexity of global supply chains, the impact of measures taken by individual companies will be limited in many cases. Most manufacturers supply goods to several purchasing companies at the same time and the leverage any purchaser can exercise over a supplier to use OGMs for their workers is likely to be limited to the facilities producing goods destined for it.

2.7 Grievance mechanisms and situations of contribution to harm

- **112.** Human rights abuses may be committed with the involvement of both company officials and state officials. Clearly, in such circumstances if the company has contributed to the harm for which State agents were the principal actors, the company has a responsibility to provide for or cooperate in remediation. Across jurisdictions, the law of civil remedies and criminal laws contemplate legal liability for companies that have been complicit or contributed substantially to the harm caused by others.
- **113.** In terms of practice, Barrick Gold's Porgera Remedy Framework was limited to claims of sexual violence committed by employees of PJV, the company, but not by others such as police and private guards in the service of the company. This is problematic on the grounds that it is not consistent with the UNGP's categories of abuses "caused or contributed to" by the corporation.⁸⁹ At North Mara the company denied responsibility for the abuses that police forces are alleged to have committed at or around the mine, where the company had an agreement in place to contribute financially to the police presence and security services around the mine.⁹⁰ These cases raise the broader question of how to evaluate the contribution to harm by the company and the scope of the responsibility to remedy grievances when the company may have been complicit in serious abuses.

2.8 Relationship with judicial remedies and the criminal justice system

114. The interface and interaction between OGMs and the law enforcement and judicial system of a given country is an issue of critical concern where confusion frequently arises. This issue may also be seen from the angle of the scope of OGMs regarding the subject matter of complaints. Some claims may concern serious human rights violations or abuses potentially amounting to criminal

⁸⁹ Yousuf Aftab, above note 10. p.4.

⁹⁰ Acacia Mining, "Response to RAID Press Release", 11 July 2017, p. 3-4. Available at: https://business-humanrights.org/sites/ default/files/documents/Response%20to%20RAID%20-%2011%20July%202016%20Final.pdf

offences, which are normally the subject of official investigation and prosecution by responsible government authorities. A company has no legal power to carry out criminal investigation or criminally sanction the perpetrators. As the UNGP recognized, these kind of grievance processes should not be used to preclude access to judicial or other non judicial mechanisms.⁹⁷

- **115.** Instances of grievances that reveal underlying potentially criminal conduct must be reported to the relevant law enforcement agencies from the start. Company personnel should be trained to identify conduct that is a possible criminal offence and escalate up the grievance when such conduct is involved. The company may also investigate the events to provide relief to the victims, start disciplinary procedures to establish internal accountability of any responsible individuals, if appropriate, and for the purpose of identifying systemic issues in the organization or procedures inside the company that may need to be adjusted to prevent reoccurrence. As with civil claims following the same facts as a criminal investigation, care will need to be taken that the OGM processes do not prejudice the criminal investigation and will likely be suspended if the public authority commences a prosecution. Where necessary, safeguards to protect individuals, including withholding their identity, and to protect the scene of the potential crime may need to be in place and guaranteed before referral to law enforcement.
- 116. In practice, some OGMs have dealt with very serious cases constituting criminal offences. For instance, Barrick's Porgera Remedy Framework in Papua New Guinea, discussed above, was exclusively focused on sexual violence. The framework was criticized on a number of grounds, although none of the assessments carried out by external groups recommended that the framework not deal at all with cases that would constitute criminal offences. North Mara's OGM has addressed some extremely serious complaints including allegations of injuries by shootings, rape and excessive violence, but these are not intended to preclude official investigations, which have priority according to its rules.
- 117. In cases of potentially criminal abuses the situation becomes more complicated when State authorities are unable or unwilling to effectively investigate and/ or are themselves implicated in abuse. States have a duty to investigate, and where appropriate prosecute and sanction the perpetrators of gross human rights abuses, and should put in place the necessary normative and institutional machinery to discharge these duties.

⁹¹ Human Rights Council, above note 4, Commentary to GP 29.



Section 3

Effective remedy

- **118.** As noted above, it is a general principle of law that whoever causes harm to another person in violation of a legal duty, has the duty to repair it. By providing reparation to the affected person or community without waiting for a third-party adjudication of the matter, a company does nothing but comply with this universal precept.
- **119.** Due to the limited corporate practice of publicizing details about the remedies granted when a negative impact has been identified, there is sparse information about the resolution of grievances and remedies given. But at the level of policy formulation, the North Mara mine provides explanations about the kinds of remedies they provide:⁹²

⁹² Acacia Mining, Community Grievance Process Remedies for Security-Related Human Rights Impacts Reference Guide, April 2018. Available at:

http://www.acaciamining.com/-/media/Files/A/Acacia/documents/grievance/cgp_remedies_security_hr_impacts_reference_ guide_201804.pdf

BOX 9	EXAMPLES OF REMEDIES PROVIDED BY THE NORTH MARA OGM	
1	Restitution	Restitution of rights, replacement or return of property, reinstatement of opportunities
2	Compensation	Compensation for economic loss (loss of income, loss of business);
3	Compensation for non-economic loss	(distress; pain and suffering; grief, anguish, sadness; etc.)
4	Rehabilitation	Restorative care and support (in particular, medical care and attention, medical support for long term disability, etc.)
5	Satisfaction	Acknowledgements of Impacts; apologies Guarantees of non-repetition: Preventative measures against future adverse Impacts.

120. What constitutes an effective remedy or adequate or full reparation in substantial terms is frequently contentious. In the PRF, Barrick Gold is reported to have promised to provide the women who had been sexually assaulted with reparation, including a package of compensation, school fees, access to medical and counselling services and improvement policies to avoid recurrence of abuses. However, the package has been reasonably criticized as not proportionate to the harm suffered and not tailored to the needs of the affected women. Some of the women initially refused to accept the compensation package and after renegotiation (with the support of the NGO Earth Rights International) they obtained a sum nearly 10 times the initial offering. This led to protests by those who received the initial package despite similar facts and who subsequently received further payments from the company though still received less than those who had been supported by Earth Rights International.⁹³ At North Mara, affected women were allegedly offered a package that they say was never completely delivered, and other forms of compensation were regarded as inadequate.⁹⁴ A key determinant of the extent of compensation in these cases seems to be the

⁹³ Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, above note 62, p. 69-72.

⁹⁴ See also E. Wilson & E. Blackmore, above note 54, p. 60. Access by affected local people to benefit grants provided by BP was "heterogeneous".

availability of external advisors for the complainant that improves his or her bargaining position and their capacity to draw comparisons with compensation offered in similar circumstances and prevailing standards and practice in the home country of the parent corporation. This illustrates the benefit of having arrangements in place to enable independent advice for grievants. Of course, irrespective of advisors, the determination made by the grievant herself or himself as to harms and needs remains crucial.

- 121. There are several ways in which the company may negotiate an agreement with the complainant. In certain cases, consultation will take place and the agreement will be explained to the complainant and advice on available options provided.⁹⁵ In cases where complainants decline to sign the agreement, company representatives may fully explain the purpose of the agreement to the complainants. Examples drawn from the project Piloting Principles for Effective Company-Stakeholder grievance Mechanisms carried out by a team working with John Ruggie are on point. At Sakhalin, if the complainant was not satisfied by the outcome, the company staff may inform them of available external recourse mechanisms, including bringing the case to court or to a prosecutor. At Tesco, the human resources department initially, would communicate the outcome of the grievance in writing to the complainants and the case was closed, but that process has since evolved to including a discussion of the outcome with the complainant with a view to verifying their satisfaction.⁹⁶
- **122.** In other reported cases, the complainants have signed forms without actually agreeing the amount of the compensation or being informed of available alternative avenues.⁹⁷ This and similar examples suggest that there are instances where people are signing "agreements" without adequate understanding or independent advice and sometimes under the explicit or implicit threat of not being given anything if they refuse.

3.1 Community and workers participation in the determination of the appropriate remedy

123. Several companies publicly report that they take victims' input into consideration when determining remedies, but critics often point out that what is stated publicly is often not reflected in the actual treatment of grievants. But there are indications of change in practice. For example, although Barrick Gold's performance on grievance management has been in many respects problematic, it recently

97 Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, above note 62, p. 58, 97.

⁹⁵ C. Rees, above note 2, p. 55-58.

⁹⁶ Ibid., p. 58 and 60.

published reports on victim participation, stakeholder input, and independence as important in the process of determining what remedies should be provided.

- 124. BHP Billiton Brazil, Vale SA and the Brazilian authorities signed an agreement in 2016 following the Bento Rodrigues dam failure providing for a set of remediation and compensation action and environmental and socio-economic programmes to restore and compensate the communities and environment affected by the dam failure. BHP Billiton reports that the agreement "mandates strong community involvement in the development of programs through a formal advisory committee that will include direct representation from the impacted communities and a social dialogue programme. It includes a local-level grievance mechanism and the establishment of an ombudsman-like process, designed with input from international experts and affected communities."⁹⁹ However, the remedy agreement was mired in controversy due its lack of community consultation and participation, which prompted the parties to the agreement to conclude additional protocols including one creating a participatory structure for communities to recommend adjustments to the remedy programmes. Although officially sanctioned by the judiciary, at the time of writing the new agreement has yet to be implemented.⁹⁹
- 125. To meet the agreements entered into with resettled communities Cerrejon implements a series of projects to create sustainable livelihoods, food security, access to water, farming and entrepreneurship. However, the ICJ found that the resettled communities continue to face problems in relation to access to adequate land, water and other resources for agriculture and animal raising, cultural and religious sites, schools and other collective buildings. All communities interviewed by the ICJ delegation expressed that they do not know of the Cerrejon's OGM and had not used them to file their complaints. They use a system of social analysts/delegates working for Cerrejon who generally take note of their claims and requests and process them within Cerrejon. Resettled communities complained that such a system was unreliable and ineffective. One community, Tamaquito 2, stated that they do use the resettlement department's complaint system, which works well for them and that the OGM is seen as not independent because it is controlled by the company.

3.2 Waiver and exchange of final mutual releases

126. Although the UNGP position is clear that OGMs must not preclude access to judicial mechanisms, in practice the use of legal waivers in which the grievant cedes his or her right to a judicial process has persisted. Grievants may be required to waive their rights to have recourse to courts as a condition to access

⁹⁸ BHP Billiton, above 59, p. 3.

⁹⁹ Nabuco Joana & Aleixo Leticia, "Rights Holders' Participation and Access to Remedies: Lessons learned from the Doce River Dam Disaster", in *Business and Human Rights Journal*, 2018, p. 1-7.

the OGM or to receive reparation. They may also be required to do so as part of a final settlement such as an out of court settlement. Its use may be seen as an effective instrument of impunity. But for companies it may be just a normal instrument intended to provide certainty. After some initial controversy with the use of legal waivers the emerging trend is for companies not to employ them in the context of OGMs.

- 127. In the Porgera case, the complainant had to state her satisfaction with the terms of the agreement and had to commit not to sue the company in "any jurisdiction in the world" and not only in Papua New Guinea.¹⁰⁰ In addition to the inherent problems with waiving such rights, the complainants lacked independent and adequate legal advice about the implications of signing the waiver of rights to sue which were compounded by their lack of knowledge about other available avenues for remedy and where to raise their grievances. This situation resulted in their inability to truly understand the terms of this agreement and its consequences. In addition, the legal waiver in the settlement agreement proposed by Barrick was non-negotiable.¹⁰¹
- **128.** Even when the claimants had access to an independent legal advisor during the PRF process, it appears the advisor had not assisted them in the process of signing the waiver. Many women reportedly believed that they had no choice or no other feasible options.⁷⁰² The available advisor "was paid and housed in the mechanism office", which clearly puts his or her independence and impartiality under question.
- **129.** A similar scheme was used in the past at North Mara which on occasion required that the complainant sign away his or her right to legal remedy, renouncing the right to file a lawsuit against the company or its subsidiaries in any jurisdiction for the claim initially raised once compensation had been accepted. Further, the complainant had to sign a "covenant not to sue" meaning that he or she agreed to renounce the right to be a party in a proceeding against the company and its affiliates.
- **130.** The OHCHR noted that UNGP Principle 29 indicates that "participation in an operational-level grievance mechanism must be without prejudice to individuals' right to go to court", but at the same time if both parties agree "they are entitled to settle a claim through such operational-level grievance mechanisms." Regarding the use of the legal waiver, "the presumption should be that as far as possible, no waiver should be imposed on any claims settled through a non-judicial grievance mechanism."¹⁰³ For OHCHR, international standards and practice do not outright prohibit the use of legal waivers and these may be appropriate in

¹⁰⁰ Columbia Law School Human Rights Clinic & Harvard Law School International Human Rights Clinic, above note 62, p. 5.

¹⁰¹ Ibid., p. 93.

¹⁰² Ibid., p. 94-95.

¹⁰³ Quoted from the OHCHR's observations on Allegations regarding the Porgera Joint Venture remedy framework, July 2013, p. 8-9. Available at: http://www.ohchr.org/Documents/Issues/Business/LetterPorgera.pdf

certain limited circumstances. But in such situations the legal waiver should be narrowly construed and "preserve the right of claimants to seek judicial recourse for any criminal claims", especially in cases of gross human rights violations. Finally, the OHCHR suggests that national courts may be called to rule on the enforcement of a waiver in particular cases.



131. International human rights law prohibits amnesties, prescriptions and other similar exemptions of responsibility in cases of gross human rights violations. In this vein, a waiver of the right to judicial remedies in these kinds of cases are equally prohibited. The ICJ believes that, in addition to these considerations, OGMs gain the confidence of potential users more effectively when legal waivers are not used as an entry condition nor as an outcome of the OGM. Cerrejon does not use waivers and the communities the ICJ visited as part of its case study confirmed that this was the case. North Mara has expressly stopped requiring claimants to sign waivers. The North Mara OGM now provides that persons affected "shall not be required to waive their rights to bring a claim against the mine in another forum in order to participate in or resolve grievances through the grievance process". North Mara OGM is referred to as "part of [the company's] corporate social responsibilities, including those reflected in the United Nations Guiding Principles on Business and Human Rights... The Grievance

Process does not seek to determine or establish legal rights, including in respect of remedies or redress which might be legally due to a legal claimant."¹⁰⁴ However, in practice the costs and other barriers to taking legal action will often mean victims do not realistically have the option of taking legal action.

- **132.** Adidas' policy is that a complainant does not need to waive their rights to pursue available judicial remedies in parallel or following Adidas' determination of their complaint under the third party complaint policy. It may be even vital that they do try other legal avenues. By contrast, it would appear that Telefonica Colombia continues to use legal waivers within their final settlement agreement with the claimant.
- 133. Other companies appear to be following the trend of not using legal waivers. BHP Billiton's 2016 Sustainability Report further elaborates on how it aims to protect complainants' ability to seek resolution of their grievances through alternative avenues:

"We do not require affected individuals or communities permanently to waive their legal rights to bring a claim through a judicial process as a condition of participating in a BHP Billiton grievance mechanism. We would provide reasonable cooperation and seek to participate constructively in the event a claim were brought against BHP Billiton through a recognised state-based non-judicial grievance mechanism. We would seek to agree the most appropriate forum, if a claim were brought through more than one mechanism or through a mechanism without a reasonable nexus."¹⁰⁵

- **134.** More generally, with regards to criminal matters or potential crimes, a legal waiver is necessarily without consequence, as crimes are prosecuted according to principles of public policy and justice. When gross human rights violations are involved, the State has a duty to investigate, prosecute and sanction the perpetrators, as explained above.
- **135.** The ICJ considers that OGMs should not contain such conditions as a matter of principle. Mutual releases of responsibility may be included in the final agreements

¹⁰⁴ Acacia Mining, above note 92, p. 2.

¹⁰⁵ BHP Billiton, above note 59, p. 47.

of the negotiation in the OGM in very limited circumstances governed by the strictest possible rules regarding protection of the rights of the complainant. The most appropriate avenue for final releases are not the OGM procedures, but the applicable avenues and processes provided under the law for conciliation and/or the negotiation and conclusion of out of court settlements.

3.3 Ensuring implementation of the agreement/decision

- **136.** Shift,¹⁰⁶ in the study of companies' human rights disclosures referenced above, found that 96 per cent of those reviewed reported having a hotline or other channel that could receive human rights complaints. However, only 19 per cent reported clearly identified grievance channels, details of the review process and information about the types of grievances received. Shift found that companies rarely disclose information about actually providing the remedy agreed.
- 137. Furthermore, Shift found that while many companies reported having grievance mechanisms in place in line with their code of conduct or human rights policy, a closer study often revealed that some potential human rights impacts were not covered in the relevant code or policy, potentially making access to remedy difficult or impossible. In a handful of cases, company policies required the creation of human rights grievance mechanisms, but the related public disclosures contained no information about how the mechanisms were implemented in practice, or if they existed at all.
- **138.** Among the ICJ case studies, Adidas stands out as having the most explicit provisions¹⁰⁷ on following up on the implementation of agreements. Depending on the type of remedial action agreed, their company policy is that the parties will seek to reach agreement on how it will be monitored and checked to ensure that it is implemented within the agreed timescale. Adidas will normally monitor the implementation of the agreements in-house or will appoint a third party to do so.
- **139.** The ICJ emphasizes that it is vital to embed provisions in final agreements to ensure monitoring of effective implementation. These arrangements should also foresee corrective measures in the event of non-compliance and businesses should ensure that full regard is given to the actual outcomes for users provided by their OGMs.

¹⁰⁶ Shift, above note 58, p. 8.

¹⁰⁷ Adidas Group, above note 83.



Section 4

Monitoring of OGM performance and ongoing supervision

140. Monitoring OGM performance is crucial to assess its effectiveness and improve its design and operation. Internal company mechanisms can provide valuable information, but regular monitoring and evaluation should also be delegated to independent and non-profit third parties, which add integrity and legitimacy to the process. In all cases, the public availability of consistent, detailed and regular reporting is crucial with a focus on the outcomes delivered to the users. This information is also essential to enable proper management of the OGM and making the required changes from time to time to continuously improve its functioning.

4.1 Publication and accessibility of data performance

141. Publication of data concerning the operation, outcomes and performance of the OGM is critical to encourage participation by stakeholders and improve internal practices and methods. Transparency in this respect also helps potential users evaluate their chances of success, select the appropriate remedy and identify any violations of the procedure established by the company. However, the ICJ findings in this regard corroborate existing assessments that few companies disclose sufficiently precise and disaggregated data on remedial mechanisms where they participate.

- 142. Only 37 per cent of the companies reviewed by Shift provided an explanation of the company's process to address grievances in their public disclosures. Most companies only provided basic information without details on their processes to address grievances, examples of how grievances are addressed in practice, or the governance of remediation processes. In terms of industry sectors, the oil, gas and mining companies reviewed disclosed more on average, with 53 per cent of them making such disclosures.
- 143. A review of international and national surveys of company practice, carried with publicly available information, showed that only a small percentage of companies have so far adopted some form of OGM. The proportion of those which have done so is small in relation to the range of companies adopting human rights practices, which is itself a limited universe. For instance, the Corporate Benchmark, an initiative that rates 100 of the largest listed companies, found in 2017 that although two-thirds of companies report they have a grievance mechanism for employees' grievances, only one-third have a mechanism for communication about OGMs.¹⁰⁸ Another national survey of the 35 largest publicly listed Spanish companies found that only four, representing 11 per cent of the universe, provided information to the public about their OGMs.¹⁰⁹
- **144.** Looking more closely at specific sectors, a recently published Responsible Mining Index rates some 30 largest mining companies and, with regard to grievances and remedies, presents a scathing conclusion:

"With only a few exceptions, there is little evidence of companies tracking and reviewing the effectiveness of their grievance mechanisms for both communities and workers. The widespread lack of evidence of any performance tracking of grievance mechanisms implies that companies do not see the need to demonstrate that these mechanisms are working, and could even suggest that companies are not particularly interested in whether they are working or not. Publicly reporting on how worker and community grievances are addressed and how remedy is provided can help build stakeholder confidence in these mechanisms."

¹⁰⁸ Corporate Human Rights Benchmark, Corporate Human Rights Benchmark Key findings 2017, March 2017. Available at : https:// www.corporatebenchmark.org/sites/default/files/styles/thumbnail/public/2017-03/Key%20Findings%20Report/CHRB%20 Key%20Findings%20report%20-%20May%202017.pdf

¹⁰⁹ La Responsabilidad Social Corporativa en las memorias anuales de las empresas del IBEX 35-Derechos Humanos y derechos Laborales, Ejercicio 2015.

145. As to monitoring of suppliers, an example is the IOI Group, a Malaysian palm oil business, which has created a list of requirements based on the UNGP. In collaboration with its partner, Proforest, a non-profit group that works with companies on responsible sourcing policies, it seeks to ensure that suppliers are compliant with these requirements. "IOI will inform its suppliers about the requirements and request its suppliers take steps to develop a grievance mechanism in line with the requirements. IOI Group will monitor suppliers' compliance with the requirements through field verifications of the Sustainable Palm Oil Policy."⁷⁷⁰

110 IOI Group, Grievance Procedure, June 2018, p. 6. Available at: https://www.ioigroup.com/Content/S/PDF/Grievance_mechanism.pdf



Conclusions from the review of practice

- **146.** Some general conclusions may be extracted from the above analysis of current practice.
- 147. The quantity and quality of information that companies disclose regarding their OGMs and their performance is currently quite limited. There is a great need to improve disclosure requirements and practices in this regard to enable independent monitoring. Civil society and State authorities can play an important role in providing incentives or mandates and sanctions for companies especially in the most risky operational contexts such as those operating in areas of weak governance to report publicly and periodically on key issues.
- 148. Community and stakeholder participation in the pre-design, design and operation of OGMs is frequently below the levels required to create trust in the mechanism. Community and stakeholder participation need to be enhanced, including by privileging collaborative approaches of co-design and co-implementation and the use of community-driven OGM when these exist. UNGP 31 (h) states that OGMs should be based on engagement and dialogue and indeed the ICJ considers that

enhanced participation will improve the legitimacy of OGMs and make them more effective at solving disputes. There are many examples where more stakeholder participation has made a positive impact. For instance, Unilever, ^m having invited the United Kingdom- based charity Oxfam to study workers' rights in part of its supply chain went on to make significant changes to its OGM to make it more accessible, predictable and transparent as a response to the work undertaken by Oxfam.¹¹²

- 149. There are significant shortcomings in the way certain OGMs operate which in many instances exacerbate the existing imbalance of power between the parties to the dispute. Very often, large companies are better equipped than claimants in the dialogue and negotiation to resolve a grievance. Without appropriate measures to enhance the capacity and position of the other party to negotiate there is a risk of an unfair and unsatisfactory outcome for the two parties. As covered in UNGP 31 (d), OGMs should be designed to incorporate provisions such as providing reasonable access to information to re-balance the relationship in order to equitably preserve the rights and interests of the people involved.
- **150.** Although OGMs are not State-based mechanisms, independence and impartiality continue to be important for claimants and other stakeholders who often point to shortcomings in this regard. Enhanced participation of stakeholders can alleviate the perception of partiality of the OGM, and so will adequate organization and better location of the OGM within the company structure. In certain cases, third parties such as NGOs have been entrusted to administer company's OGM. In other rare cases, grievance mechanisms were set up at the industry level in certain regions.
- **151.** Many OGMs are still conceived of primarily as mechanisms to adjudicate claims, but there is a growing company practice that regards OGMs as a tool of corporate responsibility that are neither designed nor used to adjudicate on rights or obligations in a legal sense. The use of waivers of rights to sue in court is regrettably still relatively frequent in mechanisms that are designed as legal tools.
- **152.** The understanding of OGMs primarily as mechanisms for companies to avoid judicial proceedings to solve human rights complaints is still prevalent. This has led to a perception that OGMs may be a substitute to judicial adjudication. To overcome existing deficits in relation to complementarity with judicial remedies, companies need to take special care to design OGMs that are complementary and not at cross-purposes with the operation of judicial and other State-based

¹¹¹ Unilever, above note 59, p. 69.

¹¹² Rachel Wilshaw et al., Labour Rights in Vietnam, Unilever's Progress and Systemic Challenges, Oxfam, July 2016. Available at: https://www-cdn.oxfam.org/s3fs-public/file_attachments/rr-unilever-vietnam-progress-challenges-040716-en.pdf



mechanisms when these are available and effective. This consideration is without prejudice to the recognition that some claimants may come to an OGM as a preference when they believe they will achieve a more rapid and effective outcome.

153. The operation and effectiveness of OGMs in relation to human rights abuses related to the company's suppliers, contractors or subcontractors and others with whom it has business relationships have not received enough attention. Because the practice of employing contractors or using large webs of suppliers is common in certain industry sectors, many human rights abuses occur in those contexts and companies should not leave them unattended. Existing company practice in this area is very diverse and/or opaque. Some leading companies require their contractors or suppliers to have OGMs and report on their operation, and even provide the option to grievants to access its own OGM if they remain unsatisfied with the OGM at the contractor or supplier level, or these do not exist.

154. Significant additional study of OGMs, their prevalence and their impact in different industry sectors is necessary on a continuous basis to understand their impact and improve their performance, as envisaged in UNGP 31 (g) highlighting the need for OGMs to be a source of continuous learning.



Part II

Section 1 The Way Forward

Section 2 Recommendations and Performance Standards for OGMs

General Recommendations

Proposed Performance Standards



Section 1

The Way Forward

155. The ICJ considers that OGMs need to be understood as a vital element in the broader relationship between the company and social stakeholders. For companies, they should be part of a strategy to build the company's legitimacy and acceptance in the community. For grievants and affected individuals, they are a potential source of redress. Grievance mechanisms should not be a tool for lawyers to stage "mini-trials" through company-sponsored procedures. Nor should they be a tool for companies to run cosmetic public relations strategies.¹⁷³ Instead they should be part of the company's understanding of its place and role in society and a tool for the company to contribute to the well being and realization of human rights in its own immediate environs. This vision contrasts with the current situation, where these mechanisms are still often better in their design level than in their actual implementation in the field, although there are signs of increasing awareness among businesses of their importance.

n3 See in this regard the sharp criticism by Maria Hengeveld, "Big Business Has a New Scam: The 'Purpose Paradigm", in The Nation, 4 January 2019. Available at: https://www.thenation.com/article/big-business-has-a-new-scam-the-purpose-paradigm/

- **156.** The ICJ observes that companies' policies and practices around human rights and OGMs are clearly evolving. As an illustration, a survey¹¹⁴ of over 800 senior executives from a range of industries found that 83 per cent of respondents agree that human rights are a matter for business as well as governments. Further, 71 per cent said their company's responsibility to respect these rights went beyond obeying applicable laws. The survey found that the leading drivers of corporate human rights policies, which were broadly consistent across industries and regions, are: building sustainable relationships with local communities, protecting the company brand and reputation, meeting employee expectations and moral/ ethical considerations. But there is also growing social pressure on companies to demonstrating their concern for the social and environmental impacts of their activities. Beyond formulated standards, concern for human rights and the environment are increasingly becoming a normal part of practice. No doubt, that process of transformation is slow and by no means linear or consistent. However, there are clear indicators of progress.
- 157. The UNGP and their predecessor the Framework "Protect, Respect and Remedy" were milestones and a key factor in the evolution in companies' practices. But the current wave of challenge to existing rules and structures of economic globalization, international trade and investment, also fuel the impetus to rethink the common understandings and ways to do business on a global scale and also locally. It is in that context that companies, investors, stakeholder communities and workers are moving to (re) design strategies and instruments to respond to the demands and needs of the times. This includes an increased focus on the benefit of using grievance mechanisms to prevent harm and provide remedies.
- **158.** There is increasing interest in requirements for companies to undertake human rights due diligence, and growing pressure for State regulation to make human rights due diligence mandatory, including for businesses where the greatest human rights impacts are likely to arise. There is also increasing attention to company's practice of grievance mechanisms, as part of the international priority on the need to ensure access to remedy to negatively impacted people. There are reports of progress, but the current state of play is still far from optimal and the incipient practices fall short of what would be needed for remedy to become mainstream in company operations.
- **159.** There is now a broader consensus that corporations have a social purpose that goes well beyond making returns for their shareholders, and the need to behave responsibly adopting human rights due diligence and grievance processes should

¹¹⁴ Aviva Freudman, "The road from principles to practice - Today's challenges for business in respecting human rights", in *The Economist*, October 2015. Available at: https://eiuperspectives.economist.com/strategy-leadership/road-principles-practice/white-paper/road-principles-practice-todays-challenges-business-respecting-human-rights

be consistent with that purpose.⁷⁵ A business enterprise is more than the sum of financial interest of its members and its operations go far beyond the mere process of making profit to extend to a network of social partners (workers, suppliers, customers, local associations and authorities). At the core of this understanding of the enterprise as the expression of the collective interest of its members lies the necessary care for their well-being and human rights and the protection of the natural environment where it operates which are vital for its sustainability.

- 160. This calls for a broader reflection on the place and importance of the relationship between the company and its social and natural environment. The concept of "social license" is sometimes evoked to convey the need for a company to have the social acceptance and legitimacy to be successful and sustainable. A company that carries out operations that are not socially acceptable sooner or later will run the risk of sustainability problems. The social license could sometimes be obtained through the prior undertaking of consultation processes (such as with regard to indigenous peoples) and risk and impact assessments but cannot be exhausted in those steps. The purpose and objective of the company as expressed in its operations has to be socially acceptable. Thus, a mining or oil company whose operations in a given region face opposition or is seen undesirable by local communities runs a very high risk of conflict with those communities.
- 161. The responsibility of companies to carry out human rights due diligence and remediation is instrumental in the process of companies building acceptance and legitimacy for their operations in a given environment. Still too few companies undertake those processes with true understanding of being part of the community where they operate and true concern for the local communities or workers' well-being. Concerns regarding reputational risks or legal compliance- or even legal liability risks- are still predominant as drivers of companies' efforts. But there is potential for change and the practice of some of the companies studied in the context of the ICJ initiative on operational grievance mechanisms indicate that important sections or departments of business enterprises understand the vital need to have good relations with the local social environment and use human rights due diligence and grievance processes as tools to build good relationships with communities and cement their social licence.
- **162.** Based on the analysis of practice in Part I of this report, the ICJ proposes a series of elements to assist companies and their stakeholders.

¹¹⁵ See for instance the report commissioned by the French Government: l'entreprise, objet d'intérêt collectif- Rapport aux Ministres de la Transition écologique et solidaire, de la Justice, de l'Economie et des Finances du Travail, par Nicole NOTAT et Jean-Dominique SENARD, 9 mars 2018. Business Roundtable "Statement on the Purpose of a Corporation", 19 August 2019, at https://opportunity. businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf



Participation and consultation

- **163.** The first element to consider in the design and implementation of a grievance mechanism is the participation of the affected groups (including workers and their unions) and their representatives, civil society, or communities for whom the mechanism is intended. Effective participation of users is crucial for the right design of a process that is fit to address the real concerns of workers and communities but also for its overall legitimacy and effectiveness. Identifying the right method for stakeholder participation is not always straightforward, and the company, in consultation with other stakeholders, will have to do significant exploration at the preparatory stage including through its human rights due diligence processes. Companies may also need to do significant work at the pre-design stage to engage with affected groups before moving to design any details for a grievance mechanism; in other words, there should be early community engagement so that legitimacy is established before heading into the design stage.
- 164. In certain cases, such as conflict or post-conflict contexts or because of the temporary nature of the company operations, it may not be easy to have adequate participation and the company will have to look for other options, including the option of using existing processes within communities or other companies (particularly the contracting company, if any). The key message here is that there should be a level of ownership by the intended beneficiaries of the grievance process, which ideally should materialise in some sort of co-design. In all cases -and perhaps as a matter of priority-, the company may consider using existing processes and mechanisms within its surrounding communities, some of them

indigenous or traditional. In all cases, it is imperative that companies abandon a unilateral understanding of grievance processes as something companies do for the benefit of external stakeholders without their significant involvement.

- 165. A good OGM will also be designed to be consistent with and/or bearing in mind local culture, including beliefs, social structures of authority and social cohesion and harmony within the community, for instance an indigenous community. At the same time, it will avoid reinforcing existing power structures incompatible with the human rights of individual members of the community, including gender inequality. In order to promote their accessibility OGMs must be well advertised via appropriate channels and their operation must be adapted to local culture and circumstances. As covered in the UNGP, an OGM can only serve its purpose if the people it is intended to serve know about it, trust it and are able to use it. For this to be achieved it is crucial for the design of OGMs to have input from local individuals who are familiar with relevant customs and traditions. When local culture or customs diverge from international human rights law, the grievance team should ensure international standards are not compromised, although they should be implemented with due regard to local customs. This will require flexibility and adaptation.
- 166. A special place in the participation process should be given to external actors such as development and human rights NGOs operating in the locality. NGOs are often essential to support the organization, facilitating training and serving as a conduit of advice from local communities and labour unions. Their work, as well as the individual work of their members as human rights defenders, is of interest and importance for the broader community and should be protected against harassment and attack. Although company relations with NGOs and human rights defenders are sometimes strained, it is precisely such individuals and organizations that can provide a company with external and critical input essential for the design of robust instruments. As such NGOs and similar groups should also be involved in a consultation processes from the start.

Adaptation to context

- 167. Grievance mechanisms will vary depending on the type of industry, operation and context. Companies in the extractive sector face heightened risks of harming the people living near their operations which usually have a clear territorial footprint with environmental and social impacts. These conditions may be exacerbated in zones where conflict is prevalent or where the public authorities and institutions are weak. In these contexts, OGMs may offer the only realistic option of redress for impacted communities. But it is also in these cases that OGMs are most prone to misuse because of the lack of external restraints or alternatives such as an effective judiciary.
- **168.** As set out in UNGP 23, in conflict, post conflict or "weak governance" zones, companies run a higher risk of being involved in the commission of serious human

rights abuses. There are many examples of companies facing legal action for their alleged complicity with the commission of rights violations including, in some cases, crimes under international law. For these reasons, it is important to understand that having a sophisticated human rights due diligence and grievance processes is not a guarantee of immunity to these risks to the company nor to the population.

169. If the necessary conditions for the company to obtain social acceptance and legitimacy in its operations are not in place it may mean that its business could become socially unsustainable, even if financially profitable. In those circumstances, the company should seriously consider whether continuing operations in that area can be justified.

Defining the scope

- 170. It is important that the scope of the OGM is defined as broadly as possible for the mechanism to be able to catch as many situations and concerns that could constitute human rights abuses as possible. Consistent with UNGP 31 (f), it is important that in order to deal with cases concerning human rights abuses the OGM staff have a solid knowledge of the normative framework of international human rights. They must also have a clear understanding of what effective remedy entails in these circumstances, including the options of external Statebased avenues of redress.
- **171.** One difficult question is how the OGM should seek to remediate incidents entailing potentially criminal conduct, in particular if those acts may amount to serious crimes or complicity with those crimes. The investigation, prosecution and punishment of crimes in general, and specially crimes of a serious nature, belong to the public authority. No OGM should attempt to take on the State function of criminally sanctioning individuals or entities. However, it is in the company interest to address the underlying conduct and provide reparation that do lie within its power. In relation to serious crimes or systematic abuses where the company participated, such as crimes against humanity and war crimes, companies have sometimes taken action to provide out-of-court compensation schemes. For example, companies participated in funds to provide compensation to victims of the Holocaust or their descendants. However, in some of these cases, they have done so for lack of realistic prospects of criminal prosecution, for example because the perpetrator is dead or is impossible to identify. In other cases, such as slave workers, there may be no realistic prospect of the victim of serious abuse having access to the OGM without external support and representation.
- **172.** Another difficult issue in terms of scope as well as for other areas is the operation of OGMs in the context of supply chains and the use of contractors or sub-contractors. The practice of contracting or sub-contracting parts of the main work of the company to other companies or to company suppliers

who will perform the work independently, should not be a way to circumvent obligations to observe relevant standards, including on remediation. For that reason, companies should require other companies with whom they conclude commercial contracts to adopt their own OGM, at least observing the standards of the contracting company's OGM and for them to in turn cascade this OGM and its requirements to their own suppliers. Contracts should also provide for audits and regular reporting on performance. The OGM of the contracting company should remain available for grievants who are unable to use an OGM at the contracted company.

Independence and legitimacy

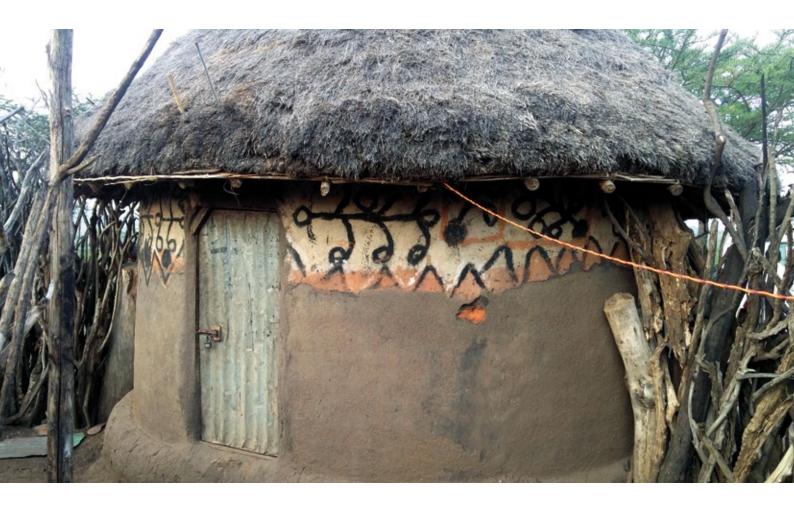
- 173. The most commonly expressed reservation that the ICJ heard when speaking to users and potential users of OGMs and with NGOs who work in the field was around independence. The UNGP stress that "Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism." (GP 31) This is a complex issue for companies, but on the basis of evidence, the ICJ is convinced that OGMs that are designed and implemented on the basis of dialogue and strong participation by workers and/or communities are best fitted to resist charges of lack of independence or legitimacy. Stakeholders are more likely to support mechanisms that they contributed to designing or implementing. When there is some form of adjudication, the OGM itself should provide some form of appeal and this appeal body should have independence is both an objective standard and one that is a matter of perception.
- 174. A good practice is to involve an independent third-party body such as an NGO, MSI or collaborative initiative. Another option, discussed further below, is some form of judicial or arbitral tribunal to which the parties have lent their consent or to whose jurisdiction they are otherwise subject.
- **175.** In all cases, to enhance credibility, companies should keep a separate unit in charge of the OGM that does not depend on operational departments and which reports directly to a senior level. The company may also separate within its grievance programme the functions of investigation from the negotiation and dialogue with the complainant. Such measures should improve the OGM's capacity to identify the sources of systemic problems and suggest solutions which operational departments may otherwise be reluctant to address.

Minimum procedural fairness principles

176. Transparency and communication are pivotal for the legitimacy and effectiveness of an OGM. Users must understand how their claim will be treated, should be given a realistic estimate of the time that it will take to investigate their case and what is expected of them, for example in terms of evidence. As addressed in the UNGP communicating regularly with parties about the progress of individual

grievances is essential to retaining confidence in the process. Users must be given reasons for any decisions made and the route to appeal those decisions carefully explained. Companies should also have a policy of transparency in place regarding internal documents and all other information pertinent to a complaint to provide users and their advisers with access to those documents. This is essential for the OGM to function on fair, informed and respectful terms and for it to be predictable.

177. Complainants should be given the opportunity to have advisers, including legal counsel, of their own choosing to clearly understand the process and the possible outcomes of the grievance process as well as the alternative redress options. It is good practice and essential in serious cases that companies support the provision of independent legal and other advice and support to workers or affected communities by providing facilities or otherwise by contributing to financial support to help overcome asymmetries in power. Such advice should be available at all stages of the process. The role of legitimate and independent trade unions here is critical not only to equalize power asymmetries but also to provide protection and support to complainants against potential retaliation from company or public officials. The OGM policy should contemplate a protocol to provide protection against retaliation.



Governance

- **178.** As stated above, it is good practice for companies to keep a separate unit in charge of the grievance programme that is administratively distinct and does not depend on operational departments and reports directly to a senior top board director and enjoy certain budgetary discretion. The company should also separate within its grievance programme the functions of investigation from the negotiation and dialogue with the complainant. Such measures should improve the grievance mechanism's capacity to identify the sources of systemic problems and suggest solutions in the interest of the company and its stakeholders, sources that the operational departments may be reluctant to address. Beyond the internal governance processes and bodies, the whole grievance programme, however it is organized, will benefit from a multi-stakeholder oversight body or its equivalent to ensure an adequate process of feedback and learning from experience.
- **179.** OGMs often depend on the local staff to operate them and one key determinant of success is ensuring that the staff are empowered, well- resourced and motivated. This will be a management and corporate structure issue and a company will need to consider staff selection and training, appropriate reporting lines and internal communication between departments. Cohesion between the staff dealing with the OGM and other staff in regular contact with the local community is important and all staff, including security personnel, who meet with potential users of the OGM must have proper training and familiarity with the OGM.
- 180. A clearly defined but flexible OGM will enable people with varied degrees of experience, literacy and capability to access the process and to use it in different ways. The process should be flexible in the manner in which people can choose to engage with it and sensitive to the possibility that potential users may have suffered specific traumas or face security or similar risks. As an example that arose in the case studies the ICJ undertook, women who have suffered sexual violence will be highly likely to require that they engage with women in the process and certain measures of privacy protection.

Grievance in supply chains and contractors

181. The commentary to UNGP 19 provides that where human rights impacts are directly linked to a business operations, products or services and the business has leverage to prevent or mitigate the adverse impact it should do so. One of the most effective uses of leverage will typically be to push those responsible to provide an effective remedy. So the company should direct its leverage to ensure remedy is provided. Companies can effectively use contractual obligations to ensure partners provide remediation through grievance processes and also carry out audits and provide access to its own grievance mechanism. Practically speaking this means the lead company takes responsibility to ensure remediation of abuses in its whole supply chain, at least at tier 1 level.

- **182.** However, global supply chains are complex. Frequently, companies in the supply chain supply goods and/or services to the main or lead company and to several other companies at the same time. There are few cases where a company supplies only for one buyer. Even in situations in which the supplier has a strategic position in terms of duration of contract and a significant percentage of production going to the same buyer, there is always the chance that the situation will evolve over the years and change. The leverage any one lead company can exercise over a supplier to use OGMs for their workers is likely to be limited to the facilities producing goods destined for it. To address this limitation there are several options. One is the creation of a coordinated approach among the buyers of a single supplier, exercising in that way a coordinated leverage, within the limits imposed by national and international competition law. Another option could be the establishment of an industry-level grievance process in a given locality, requiring enormous coordination efforts and may pose issues of accessibility for grievants. The lead company may also conclude a framework agreement with a global union representing the interests of workers in its whole supply chain, including also provision of mandatory arbitration when disputes arise. In all cases, the state authority's role is of utmost importance through adequate regulation, enforcement and monitoring at the factory level.
- 183. Over extended supply chains consideration must also be given to the need to create a grievance ecosystem, where the parts are designed at multiple levels, with the appropriate linkages and monitoring procedures. The context will be varied, including local laws, the relevant brand-driven human rights due diligence, promotion of worker representation and exercise of freedom of association and collective bargaining.
- 184. Often there are existing grievance mechanisms in the companies for workers which have been established by trade unions via collective bargaining and following ILO recommendation 130. In many cases the role of the OGM would be to widen principles established by collective bargaining for remediating workers' grievances to the wider community affected by the business' operations.
- **185.** When engaging contractors, especially from sectors such as private security companies, the company should contractually require the company to have its own grievance process consistent with the company's standards or international highest standards or make its own OGM available to workers or stakeholders of the contractor.

Reporting, monitoring and evaluation

186. Reporting of OGM features and outcomes is a crucial part of garnering trust. Clear, regular and detailed communication on complaints received, the time taken to treat them and the outcomes delivered is an essential component of a transparent and effective OGM. Where a grievant requires confidentiality for privacy and other considerations this needs to be respected. Reporting and measurement are also essential management tools. When a company has operations in many different locations, a best practice is for the design of OGMs appropriate for the local conditions and for the company to use centralized tools to measure their performance centrally against a set of common criteria. Companies should also report statistics on the number and type of grievances that are turned down as a proportion of the overall number received, as this will give an indication of the performance of the mechanism. Auditing and reporting on the actual delivery of the remedies agreed is also important, as is regular communication with users who have on-going complaints so that they understand what is happening and what to expect next.

Link with external third-party mechanisms of dispute resolution

- 187. OGM should provide some form of appeal or review process for decisions taken on grievances or when the parties fail to reach an agreement, and this "appeal body" should have independence from the decision process that made the original determination. Engaging with NGOs and MSIs are options for providing appeal mechanisms, as are State based judicial bodies or arbitral tribunals to which the parties have lent their consent or are otherwise subject to.
- **188.** There is also some practice, in particular in the context of global framework agreements between global unions and global brands, of providing the option to submit disputes to a third party in the form of an international arbitral tribunal. The ICJ is aware that a large federation of global unions and a group of independent experts are currently working to create a model of such a tribunal to work for all international agreements. In parallel, a group of experts are working to create a facility to deal with complaints brought by individuals and groups against companies within the Permanent Court of Arbitration, an intergovernmental organization based in The Hague that provides dispute resolution services.⁷⁶

¹¹⁶ Holdcroft, Jenny, "Supply chain justice through binding global agreements", January 2019. Available at: http://www.industriallunion.org/feature-supply-chain-justice-through-binding-global-agreements; and The Hague Rules on Business and Human Rights Arbitration, available at: https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/



Section 2

Recommendations and performance standards for OGM

1. General recommendations

- **189.** The following are general recommendations addressed to companies but also to States and civil society groups, which have a role in the design and implementation of OGMs. Many concrete recommendations are already embedded in Part II, section 1, on the "Way forward", and also in the annexed set of "performance standards", and this present section does not intend to repeat nor summarize them. Instead, this part only provides the main recommendations formulated in a general fashion.
- **190.** Companies and their advisors should conceive OGMs as a tool to improve their relations with the community where they operate by addressing and remediating their negative impacts on human rights through dialogue and negotiation. They should not use OGMs primarily as a tool to settle out of court claims and avoid legal proceedings. There should always be a sharp focus on the actual outcome for users, which is clearly the most important criteria when judging an OGM's effectiveness.

- **191.** The effectiveness criteria of transparency contained at 31(c) of the UNGP says that companies should keep parties to a grievance informed about its progress and provide sufficient information about the mechanism's performance to build confidence in its effectiveness. It is clear for the ICJ that companies must improve their policies and practices of public reporting about the operation and performance of their OGMs. Reporting or disclosures should be regular and contain sufficiently disaggregated data to enable external stakeholders and observers to make their own assessments.
- 192. Companies should design and operate OGMs with the fullest involvement possible by the workers and stakeholder groups intended to use them who should be involved in the pre-design, design and operation of OGMs while maintaining their independence from the company. Collaborative approaches of co-design and co-implementation should be pursued and existing community-driven OGMs should be taken into account and encouraged. As described in the UNGP effectiveness criteria, enhanced participation will improve the legitimacy of OGMs and make them more effective at solving disputes.
- **193.** The requirement in the UNGP that OGMs are equitable is highly important and companies should ensure grievants have access to independent advisors, including lawyers, when necessary and that they have access to the necessary documents and information for the effective and fair disposition of the grievance.
- **194.** Contracting or buying companies should incorporate requirements regarding OGMs in their contracting practices with contractors or/ and suppliers to ensure rights holders potentially affected by the actions of these contractors and suppliers have an available remedial mechanism. In particular, they should require their contractors or suppliers to set up their own OGMs and report on its operation consistent with international standards and best practice, or allow their workers or stakeholders access to the contracting company's OGM if they are unable to set up their own.
- **195.** Companies need to take special care to design OGMs that are not at crosspurposes with the operation of judicial and other mechanisms such as labour agreements. The right to an effective judicial remedy is of paramount importance and should not be undermined. As the commentary to UNGP 26 makes clear "effective judicial mechanisms are at the core of ensuring access to remedy". Settlement of cases out of court should follow the strict parameters established under the law. OGMs are not the most appropriate tool to negotiate or conclude these agreements. Grievances which disclose facts of potential criminal nature should be reported to authorities without preventing the company taking appropriate internal action, including safeguarding privacy and evidence and where appropriate providing compensation to victims. Companies also need to establish clear policies requiring referral of potential criminal activity by any business partners including suppliers or contractors to State authorities.

- **196.** NGOs, other civil society groups and trade unions can play an important role in the monitoring of the performance of the OGM and in supporting grievants through the process. To this end, companies should respect and promote their free organization and action and engage actively with them.
- **197.** States have an important role in providing incentives or sanctions to encourage companies to establish OGMs and States that have not done so should enact legislation and administrative and other measures to this end.
- **198.** States should ensure their courts of law are empowered to assess the legality and compliance with international standards of agreements resulting from negotiation within the OGMs and containing mutual releases of responsibility between a company and grievants.
- **199.** Significant additional study of OGMs, their prevalence and their impact in different industry sectors is necessary on a continuous basis to understand how they evolve and hopefully improve their performance over time.

2. Performance standards

- **200.** The ICJ offers the attached set of performance standards to assist companies' staff and external advisers and stakeholders in general in the design and implementation of OGMs that are effective in providing effective remedies in cases of human rights abuses caused or linked to the companies' operations. They are formulated to allow for their use in assessments as well as in the design of OGMs and are intended for use by anyone else who has a stake in the design and functioning of OGMs.
- **201.** As such, the performance standards focus not only on the design and internal operation of OGMs, but also on their interaction with judicial remedies.



Proposed Performance Standards

for Operational-level Grievance Mechanisms

International Commission of Jurist, 2019

The general performance standards presented below are applicable to all Operationallevel Grievance Mechanisms (OGM) based upon the research and analysis presented in the preceding report. Although they maintain a distinct objective and are organized in a different framework, the performance standards take into account and are compatible with the effectiveness criteria set out in the UN Guiding Principles on Business and Human Rights, ILO Recommendation 130 and other guidance for nonjudicial grievance mechanisms.

The application of these standards needs to be adapted to the industry and context within which the company in question operates or its size. Some standards may be more relevant for certain industry sectors than for others. More exacting standards or sub-standards may be required for specific industries but not relevant to others, or some standards may require more adaptation to the kind and size of industry. But, generally, compliance with the standards proposed below will no doubt enhance the effectiveness of all kinds of OGM.

These performance standards are directed at a range of stakeholders. First, they seek to provide companies with compliance guidance to ensure an effective creation, design and implementation of OGM. Second, they give civil society organizations, lawyers, investors and other external organizations and affected rights holders, workers and members of the community in which a company is based, a tool to measure and assess key components of a company's OGM.

The performance standards propose a model of OGM that is created and administered jointly by companies and their employees, external stakeholders, or at least it has a strong participation by the latter groups, on the basis of internationally recognized principles including participation, independence and transparency.

1.0 Pre-design

The pre-design stage strives to identify key issues, gather information and develop and assess options for the design of the OGM.

- **1.1** Identify key actors. Identify those within the company and/or external partners that will be responsible for the development of the grievance mechanism.
 - Identify and begin coordination among different departments or units within a company that are likely to be involved in the OGM processes. (These are likely to include community relations, legal, operations/ production, human resources, and policy makers.)
 - Ensure commitment to the development of a grievance mechanism from high-level management at the company and from external partners.
 - Identify key external actors, including civil society members and technical experts, who might be called on to participate in the assessment, design and implementation phases.
 - Identify potential users and beneficiaries, including those that may have been or potentially will be directly adversely affected by the operations of the company as well as those who may be indirectly affected.
- **1.2 Identifying & Assessing Human Rights Issues.** As part of its human rights due diligence responsibility, conduct a human rights impact assessment of actual or potential human rights impacts.
 - Identify adverse human rights impacts that the business enterprise may be at risk of causing or contributing to through its own activities, or which may be directly linked to its operations, products or services by its business relationships.
 - Assess the contemporaneous impact of company operations on rights-

holders as well as, where appropriate, on relationships with communities.

- Conduct the impact assessment in consultation with all relevant stakeholders, and ensure meaningful engagement with rights holders and the legitimate representatives of those who may be potentially affected.
- Ensure the impact assessment includes a gender perspective and pays particular attention to the challenges faced by other individuals or groups that may be at heightened risk of vulnerability or marginalization.

1.3 Identify & Assess key grievance processes and mechanisms.

- Gather information about existing grievance resolution mechanisms and practices, including culturally specific practices.
- Evaluate the option of using existing grievance processes such as those within the surrounding communities/ labour unions and/or company associations.
- Establish dialogue with those responsible for relevant external (state-based and non state-based) grievance mechanisms Ensure OGM does not serve to generally undermine the role of legitimate and effective trade unions nor preclude access to other existing grievance mechanisms.

2.0 Development

Using information from the pre-design phase, the development phase includes planning for design and making decisions about the OGM's scope and mandate as well as putting in place efforts to ensure its independence and accessibility.

- **2.1** Develop a planning document reflecting the strategy for the development and design of an OGM
 - Integrate the results with a view to addressing the particular challenges identified by the human rights impact assessment and grievance-related assessment that includes an analysis of contextual factors such as local legal systems, government involvement and relevant industry and government standards. The planning document should also consider opportunities that the OGM may provide (e.g., preventing escalation of conflicts, improving relationships with communities).
- **2.2** Define a broad scope of types of grievances that can be filed to the OGM, taking into account perspectives expressed in the initial assessment stage.

- **2.3** Define what constitutes a grievance for human rights abuse in a way that is compatible with international human rights law and standards.
- **2.4** Identify those whose actions can be subject of the grievance, including all those whose actions or omissions can be attributed to the business enterprise through causation and/or contribution.
- **2.5** Define how those affected by activities of its business relationships, such as subsidiaries or suppliers' activities, may access its own grievance mechanism.
 - Adopt a policy that requires contractors and suppliers to ensure anyone who may be adversely impacted by their operations has access to an effective OGM and define audit and reporting protocols. The policy should include measures to ensure that suppliers in turn apply this requirement to their own suppliers.
 - Ensure its OGM is open to grievances from those adversely impacted by activities of business relationships directly linked to its operations and when these do not have effective grievance mechanisms in place. Clearly state or require business partnerships to communicate the existence of the OGM to stakeholder groups.



- **2.6** Ensure real participation. If a new mechanism is established, it should be based on dialogue and negotiation between the company and potential users and rights holders and/or their selected representatives.
 - Where appropriate, consult and engage with local individuals familiar with relevant customs and traditions.



- **2.7** Ensure functional independence. Ensure the mechanism is functionally independent from company operations but has the authority to affect change within these operations.
 - Wherever practicable the grievance mechanism should be operated by a third party or shared with other industries to improve impartiality.
 - Where company workers raise grievances ensure these will be reviewed by an impartial entity who is not in any way situated in the line of supervision of the individuals concerned.

- Ensure, where interested, NGOs, unions or other trusted groups have a role in advising, supporting and assisting potential users of the OGM in pursuing a complaint.
- **2.8** Ensure Accessibility & Address power Imbalances. Resource the mechanism adequately including provisions for necessary support for grievants to ensure equal access.
 - Ensure that the existence of, procedures for, and possible remedial outcomes of the mechanism are known and accessible to all those who may be adversely impacted, taking into account particular challenges that may be faced by individuals or groups that may be at heightened risk of vulnerability, marginalization or have particular requirements such as children and people with disabilities, and with due regard to the different risks faced by men and women.
 - Define a plan for wide dissemination of information about the mechanism and how this can be used and accessed among potential users Provide measures to address potential barriers to accessing the mechanism and provide assistance to that effect.
- **2.9** Define and make known the relationship with other avenues of potential redress, including State-based criminal, civil and administrative actions.
 - Recognize that once impacts have escalated and dialogue and negotiation failed, adjudication should be provided by a legitimate, independent third-party mechanism.
 - Define options for the grievant to submit the matter to a third party and/or an oversight mechanism in the event of excessive delay or dissatisfaction with the initial position of the company.
 - Define options for the OGM to provide referrals to other relevant mechanisms that may already exist.
 - Treat the impacts revealing serious criminal conduct and gross human rights violations or abuses as legal compliance issues in need independent adjudication.
 - Adopt a protocol to deal with grievances that reveal underlying potential criminal conduct. The protocol should contain safeguards to avoid prejudice any criminal investigations, and to protect the privacy, physical and moral integrity of concerned individuals.
 - Clarify under which conditions the mechanism may run in parallel with legal proceedings without undermining these.

- Define what actions the OGM should take to cooperate with other judicial and non-judicial means of redress.
- Define what company officials must do to cooperate with law enforcement in investigating an offence, and to follow up on investigations instigated by the company and report on the outcome
- Establish clear policies, and ensure staff are fully trained, requiring referral of potential criminal activity to State authorities.
- Define internal processes and procedures to determine whether there is a civil wrong underlying any criminal offence that the company must take action to remediate.

3.0 Development: procedure of the mechanism

- **3.1** Establish and set out in clear, comprehensible and accessible terms the procedures for bringing grievances can be brought.
- **3.2** Ensure all reported grievances and any evidence received are properly documented.
- **3.3** Define the internal processes that will be used to reach an outcome and their time frames.
 - Define the separation of and differences between the inquiry and decision-making processes.
- 3.4 Define criteria for determining whether an investigation might interfere or overlap with existing or prospective law enforcement action in cases of potential criminal conduct, and what measures company staff must take to avoid compromising evidence or the identity and rights of those involved.
- **3.5** In adopting any time limitations on the bringing of grievances ensure that these are reasonable and that they do not create unnecessary barriers to accessing the mechanism.
- **3.6** Transparency. Ensure transparency by keeping parties to a grievance informed about its progress at each stage and ensuring reasons are given for any delays.
 - Ensure labour union or other representatives that have acted as conduit or adviser to the grievant, are kept informed throughout the process unless the grievant objects.

- **3.7** Procedural Equity & Equitable Resourcing. Ensure procedural equity by seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms.
 - Establish equitable options for support for the grievant that include access to independent advice of their choosing.
 - Ensure right to effective, independent and trusted support during proceedings where the OGM leads to a process of adjudication.
 - Enable access and full disclosure of relevant information and facts gathered by a company enquiry to ensure equitability, taking into account right to privacy consideration of third parties.
 - Provide adequate resources that ensure accessibility to enable grievant to pursue their grievance at every stage of the process.
 - Provide the right to appeal to an independent authority if agreement cannot be reached or the outcome is unsatisfactory.
- **3.8** To improve predictability.
 - Provide a clearly communicated, well disseminated and accessible procedure in the resolution of the grievance.
 - Provide a clear and known and expeditious and reasonable time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation.
 - Define clearly what kind of remedial outcomes may be available.
 - Identify, in accordance with human rights law and standards, the kind of evidence that may demonstrate an infringement of a human right, taking into consideration a complainant's ability to recognize such a violation and to be able to gather and present such evidence.
 - Ensure predictability by establishing reasonable criteria to achieve a conclusion that a grievance has taken place, avoiding strict legal terminology (i.e. use "more likely than not", "but for company action")
 - Inform right holders, concerned civil society organizations unions and other stakeholders about the existence, procedures, acceptable grievances and possible outcomes of the mechanism, using formats that are accessible to the intended user.



3.9 Continuous learning. Ensure the mechanism has direct access and reports to the highest level possible within the company, so that it may serve as a source of continuous learning to improve the mechanisms and prevent future harms that may give rise to grievances.

4.0 Implementation: safeguards within the mechanism

- **4.1** Ensure protection of any complainants, potential complainants, their representatives, advisers and supporters to avoid possible retaliation or reprisal
 - Ensure that a formal anti-retaliation policy exists and is incorporated into company policy that clearly states that any individuals using the mechanism can do so without fear of penalty, dismissal or reprisal of any other kind.
- **4.2** Develop a confidential procedure for the processing of grievances with clear indications of what information may be shared with others and when this will take place and provide appropriate mechanisms for anonymous complaints where necessary, with a view to protecting the right to privacy, including of third parties.
- **4.3** Ensure company staff or third-party entities involved in the OGM are fully trained on their roles and responsibilities including an awareness of when grievances should be referred to other mechanisms, such as in relation to criminal conduct.

5.0 Determination and implementation of reparations

- 5.1 Those involved in the OGM process must ensure that any reparation agreed is commensurate with the nature and gravity of the harm established.
- **5.2** Engage and undertake dialogue with affected persons or groups to agree upon the kind and means of delivery of any remedy to be provided.
- 5.3 In agreement with those affected, establish a timeline for determination and implementation of remediation agreements.Ensure agreed outcomes are delivered on time and in accordance with the agreement, and that there are consequences for the failure to deliver.
 - Define additional remedies and corrective action to be provided in cases of undue delay.
 - Adopt a follow-up protocol to enable continued dialogue and ensure implementation of agreed outcomes.
- **5.4** When grievance impacts a wider group or community, work with them to define how an available remedy or remedies contemplate the restoration and/or enhancement of relationships with the group or community, and how this will be communicated to others.
- 5.5 Consider any potential contractual remedies necessary to resolve a grievance.
 - Avoid the use of legal waivers in the OGM context that would preclude the complainants from pursuing judicial remedies If allowed, define strict conditions under which the final agreement may contain mutual releases of responsibility but ensure that any such releases of responsibility do not bar access to pursuit of further proceedings if these are required by internationally recognized human rights standards.

6.0 Public reporting and external monitoring

- 6.1 Provide full information about the mechanism's performance to wider stakeholders, through statistics and a detailed accounting about the handling of cases to build confidence in its effectiveness and meet any public interest at stake.
- **6.2** Report all grievances and their outcomes to high level management within the company to enable continuous learning that allows the mechanism to be improved and future grievances and harms prevented.
- **6.3** Report, unless the grievant objects, outcomes of individual grievance to all affected stakeholders including, where appropriate and with adequate safeguards in place, to any other stakeholders that may not have been directly

involved in the grievance proceedings. In case the grievant objects, provide a summary that protects the identity of the grievant.

- 6.4 Arrange for the public disclosure of sufficiently precise, timely and disaggregated data to ensure public scrutiny and trust in the mechanism.
 - Include information regarding the number of grievances received and their status.
 - Explain the criteria used for admitting and deciding on the matter.
- 6.5 Define that reporting includes clear reasoning for the outcome of the grievance and disclosure of the timetable on delivery of agreed remedy.

7.0 Monitoring and evaluation of grievance mechanism outcomes and compliance

- 7.1 Where possible, create an independent oversight mechanism for the OGM to assess ongoing effectiveness and facilitate lessons learned, designed with stakeholder engagement and dialogue.
- **7.2** Systematically review and enable continuous learning from the grievance mechanisms to identify how processes can be improved and future grievances and harms prevented.
 - When appropriate for the user, conduct meaningful engagement via consultation and dialogue with users and potential users of the grievance mechanism during the review process.
 - Ensure any relevant company policies are updated in accordance with lessons learned from evaluation and regular analysis of frequency, patterns and causes of grievances, in order to avoid the recurrence of human rights abuses and the break of relationships with local communities.
 - Information sharing. Publicly share the results of the reviews and analysis, as well as lessons learned and implementation efforts.

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