



## OHCHR Accountability and Remedy Project (Phase III)

### Research Proposals

### Background

The UN Guiding Principles on Business and Human Rights (UNGPs) were unanimously endorsed by the Human Rights Council in 2011 and represent the authoritative, global, normative framework outlining the obligations of States and responsibilities of business enterprises to prevent and address adverse human rights impacts related to business activity. This framework is divided into three pillars, the third of which focuses on the need for rights and obligations to be matched to appropriate and effective remedies when breached. This Third Pillar (on access to remedy) recognizes three categories of mechanisms through which business-related human rights grievances should be resolved: (i) State-based judicial mechanisms, (ii) State-based non-judicial grievance mechanisms, and (iii) **non-State-based grievance mechanisms**.

Since 2014, the Office of the UN High Commissioner for Human Rights (OHCHR) has led a project entitled the Accountability and Remedy Project (ARP), which is aimed at supporting more effective implementation of the Third Pillar of the UNGPs.<sup>1</sup> The project has been split into three phases, with each one corresponding to a category of grievance mechanism referred to in the UNGPs. In July 2018, the Human Rights Council requested OHCHR to begin work on the third phase of the Accountability and Remedy Project (ARP III), focusing on improving the effectiveness of **non-State-based grievance mechanisms**, and report back to the Council in June 2020.<sup>2</sup>

On 1 November 2018, OHCHR released a paper that outlines the proposed scope for ARP III and five work streams to focus the work:<sup>3</sup>

- **Work stream 1:** Practical steps that mechanisms can take to meet the “effectiveness criteria” of UNGP 31;
- **Work stream 2:** Understanding the interface between the work of non-State-based grievance mechanisms and the powers and functions of State-based institutions;
- **Work stream 3:** Understanding how companies and other organizations can work together through non-State-based grievance mechanisms to improve the prospects for effective remedy;
- **Work stream 4:** Safeguarding rights-holders, human rights defenders and others from retaliation and intimidation as a result of the actual or potential use of non-State-based grievance mechanisms; and
- **Work stream 5:** Meaningful stakeholder involvement in the design and implementation of remedial outcomes.

<sup>1</sup> <https://www.ohchr.org/EN/Issues/Business/Pages/OHCHRaccountabilityandremedyproject.aspx>.

<sup>2</sup> Relevant information on ARP III can be found at [https://www.ohchr.org/EN/Issues/Business/Pages/ARP\\_III.aspx](https://www.ohchr.org/EN/Issues/Business/Pages/ARP_III.aspx).

<sup>3</sup> <https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf>.

These work streams will be analyzed for primarily three categories of grievance mechanism:

1. **Company-Based Grievance Mechanisms:** mechanisms established and administered by companies (including, but not limited to, operational-level grievance mechanisms);
2. **Grievance Mechanisms Developed By Industry, Multi-Stakeholder, or Other Collaborative Initiatives:** mechanisms that are external to companies themselves and administer a set of commitments that companies have agreed to adhere to; and
3. **Grievance Mechanisms Associated with Development Finance Institutions:** mechanisms through which a person (or group of people) whose human rights have been adversely affected by an institution-financed project can raise a complaint with the financial institution itself, either through an independent accountability mechanism or through other means.

To undertake this work, OHCHR would greatly benefit from the contributions of outside institutions or researchers with various projects. These contributions could be compiled in a number of different ways; for instance, individual researchers or groups can submit contributions, teachers can structure semester-long projects to be completed by students, etc.

**Note:** Unfortunately, OHCHR is unable to provide any funding or enter into formal, contractual arrangements for any work product.

## Project Proposals

### Proposal 1: Research and analyze the effectiveness of one of the types of grievance mechanism focused on for ARP III

We intend to focus on three categories of non-State-based grievance mechanisms for ARP III.<sup>4</sup> Each category comprises different types of grievance mechanisms, with unique challenges and lessons to feed into the work of the project. For instance, the first category (**company-based grievance mechanisms**) includes both **operational-level grievance mechanisms** as well as **corporate-level mechanisms** removed from the site of adverse human rights impacts. To meet the effectiveness criteria of UNGP 31, each type will have to address issues such as accessibility and equitability in different ways. Similarly, the second category of mechanisms (**mechanisms developed by industry, multi-stakeholder, or other collaborative initiatives**) may be found in a variety of entities, including **certification bodies** (e.g., Forest Stewardship Council) and **multi-stakeholder initiatives** (e.g., Fair Food Program), and could cover mechanisms established to enforce **international framework agreements** or **collective bargaining agreements**. Each have different operating contexts and procedures that will need to be properly analyzed. The third category (**grievance mechanisms associated with development finance institutions**) primarily covers **independent accountability mechanisms** of different development finance institutions, but could also cover other mechanisms such as the Grievance Redress Service of the World Bank.

OHCHR could benefit from having an overview of the mechanisms that exist in a particular category, and an analysis of their effectiveness. Researchers could identify several of such mechanisms in a jurisdiction (or sector), research the cases the mechanisms have dealt with, and analyze the effectiveness

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<sup>4</sup> See pages 13-17 of the ARP III Scoping Paper, *available at* <https://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf>.

of the mechanisms (in accordance with Guiding Principle 31). The output could include a report on each mechanism, as well as a summary report on all of the mechanisms looked at and an outline of the main lessons learned.

### Proposal 2: Case studies of recourse to non-State-based grievance mechanisms

The Accountability and Remedy Project is an evidence-based initiative that seeks to understand how different mechanisms operate in practice. Oftentimes, when adverse impacts occur, those who have grievances seek to address them in several different fora. For instance, someone adversely affected by a project financed by a development finance institution may seek redress at an operational-level grievance mechanism, as well as the institution's independent accountability mechanism. In such situations, it will be particularly important to focus on the case rather than on a type of mechanism (as in research proposal 1). Thus, it would be useful to have case studies done on particular incidents, which track grievances from beginning to end.

Researchers could choose particular case studies for deep dives to learn which obstacles are faced by those seeking remedy, and how these obstacles are, or could be, overcome. Analyses of the options available, how they work in practice, and how they could be improved would be welcome.

### Proposal 3: Comparative analysis of regulatory regimes that facilitate (or hinder) access to effective non-State-based grievance mechanisms

Guiding Principle 28 calls on States to consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms. Work done in the first two phases of ARP (on State-based mechanisms) highlighted many points of intersection between different remedial systems. For instance, a number of regulatory regimes (e.g., in the field of labor or consumer protection regulation) may make prior reference to a company-based grievance mechanism a condition of access to State-based non-judicial grievance mechanisms. Additionally, State-based institutions may need to enforce outcomes from a private mediation process, or may be called upon to pronounce upon the validity of waivers of liability obtained in the course of a non-judicial process. On the other hand, States may adopt laws and policies that can have the effect of undermining the effectiveness of mechanisms.

OHCHR will need to know the different ways in which States' regulatory regimes provide for / interact with / hinder the use of non-State-based grievance mechanisms. Are such mechanisms covered in law? Do certain State-based mechanisms require prior recourse to non-State-based mechanisms? Are there formal means of referring cases to different types of mechanisms? Do States require companies to provide operational-level grievance mechanisms, and, if so, do the States undertake any activities to ensure such mechanisms' effectiveness? Do any States' laws reference the UNGPs?

Each researcher could cover one or more jurisdiction and write a report on each jurisdiction's regulatory regimes with respect to non-State-based grievance mechanisms. There will be a preference for a regional distribution of jurisdictions, hopefully containing different legal backgrounds and languages.

#### Proposal 4: Researching instances of collaboration between non-State-based grievance mechanisms

There can be instances where multiple companies or grievance mechanisms are relevant for the same business-related human rights grievance. For ARP III, OHCHR would like to gain a better understanding of the different ways in which non-State-based grievance mechanisms cooperate in practice and the implications of this cooperation for access to remedy in specific cases. When multiple grievance mechanisms are relevant, to what extent is there coordination and collaboration? Are there arrangements for referrals between different mechanisms, and, if so, what considerations need to be taken into account? What are the main challenges posed by cooperation between non-State-based grievance mechanisms and how are these addressed in practice? What good practice exists in this field, and can it be replicated in other settings?

Researchers could find and analyze instances of cooperation between non-State-based grievance mechanisms, particularly for the four scenarios referenced in work stream 3 of the scoping paper for ARP III.<sup>5</sup> A report could be drafted on a particular case or a number of cases, emphasizing good practice and areas that need improvement.

#### Proposal 5: Analysis of the legal risk implications of companies using or participating in operational-level grievance mechanisms

Guiding Principle 29 notes that “[t]o 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.” Furthermore, Guiding Principle 31(e) calls on such mechanisms to be transparent, “providing sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake.” One concern voiced by corporate counsel is that, by participating in transparent operational-level grievance mechanisms, companies open themselves up to legal risk, as potential plaintiffs may be able to use the cases of or outcomes from non-State-based grievance mechanism processes as evidence in establishing cases against such companies (for example, in a civil lawsuit in a judicial proceeding). Whether this concern is valid is largely an empirical question that should be researched and analyzed.

Researchers could parse through filings and decisions to determine the extent to which parties and decision-makers make reference to companies’ use of operational-level grievance mechanisms in practice. Do judicial decisions ever reference such mechanisms? What about specific instances analyzed by OECD National Contact Points, or recommendations of National Human Rights Institutions? In other words, when is the existence of a dispute at an operational-level grievance mechanism relevant to State-based dispute resolution? Researchers could focus on particular jurisdictions and submit a report on each.

#### Proposal 6: Helping with OHCHR Data Mining

During the research for ARP II, OHCHR conducted a data mining exercise that attempted to analyze every case (reported on the Business and Human Rights Resource Centre) of recourse to a State-based non-judicial grievance mechanism in certain sectors over a three-year span. This exercise looked at

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<sup>5</sup> See pages 22 – 27 of the ARP III Scoping Paper, on work stream 3. *Id.*

over 400 complaints lodged in over 200 different State-based non-judicial mechanisms in dozens of countries.

OHCHR is conducting a similar exercise for ARP III, but over a longer time span and including more sectors. The exercise involves going through every article on the Business and Human Rights Resource Centre for a particular sector,<sup>6</sup> and answering a set of questions online in our data mining response form. OHCHR will need help filling in the online form for the vast amounts of content on the Centre's website.

#### Proposal 7: Study on negotiations with large groups / communities

Oftentimes, business-related human rights harms affect large groups at the same time, giving rise to multiple similar grievances. For instance, if an extractive company pollutes a river, entire communities' rights may be infringed. When a grievance mechanism is faced with such a situation, there are unique issues that arise with respect to group claimants. For instance, how can mechanisms be sure that those claiming to speak on behalf of a group are legitimate representatives?

Researchers would be asked to identify good practices for appropriately negotiating with large groups. Lessons could be learned from State-based institutions' negotiations with indigenous groups (e.g., in the Australian or New Zealand context), systems for class action lawsuits, large-scale mediations, as well as the actions of non-State entities who have faced similar situations. A report can be drafted that covers relevant cases, as well as good and bad practices that should be considered.

#### Proposal 8: Developing a different project

If you have an idea for a project that can feed into the work of ARP III, OHCHR is open to new ideas and willing to help develop any terms of reference.

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<sup>6</sup> E.g., clothing & textile: <https://www.business-humanrights.org/en/sectors/apparel-textile/clothing-textile>.