

Summary Note
Ensuring access to effective judicial & non-judicial remedies: progress, trends & recommendations

1 December 2014, 11:45 am, Room XI

Panelists:

Mr. Mauricio Lazala, Business and Human Rights Resource Centre (moderator)

Ms. Katie Shay, ICAR

Ms. Genevieve Paul, FIDH

Mr. Juan Pichun Lonko, Spiritual Leader of the Lemulemu community

Professor Larry Catá Backer, W. Richard and Mary Eshelman Faculty Scholar and Professor of Law, Professor of International Affairs, Pennsylvania State University; Director, Coalition for Peace and Ethics;

Caio Borges, Conectas Human Rights

Ms. Karin Buhmann, the Danish National Contact Point

“Ensuring access to effective judicial & non-judicial remedies: progress, trends & recommendations” was a discussion of the barriers victims face when utilizing both judicial and non-judicial remedial mechanisms when trying to recover against businesses for human rights harms.

Mr. Mauricio Lazala, Business and Human Rights Resource Centre, moderated the discussion. He explained at the start of the event that through its work, the Business and Human Rights Resource Centre has noticed an increase in obstacles to access to remedy for victims of corporate abuse everywhere, as well as a few opportunities. To exemplify the challenges, the Centre recently published a blog on the topic. The blog highlighted an alarming statistic: at the time of the *Kiobel* decision, there were at least 19 corporate Alien Tort cases pending in U.S. courts. Since the *Kiobel* decision was issued, only one new Alien Tort case has been filed against a company in U.S. court.

The first panelist was **Ms. Katie Shay**, Legal and Policy Coordinator at the International Corporate Accountability Roundtable (ICAR). Ms. Shay presented on the ICAR Report, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*. This report was developed by experts in the field of business and human rights, Professor Gwynne Skinner, Professor Robert McCorquodale, Professor Olivier De Schutter, and Andie Lambe. Globally, States have failed in their duty to provide access to an effective judicial remedy. Of the report’s thirty recommendations, four apply across jurisdictions: States must (1) ensure that controlling entities within business enterprises have a legal duty with regard to all parts of the enterprise for human rights impacts, (2) enable victims of business’ human rights violations to bring a case in the business’ home State, (3) enact legislation to limit or remove financial barriers that prevent victims from bringing and prosecuting a case, and (4) develop and

enhance criminal laws to hold businesses accountable in their involvement in extraterritorial human rights violations. Efforts are now underway in the jurisdictions covered by the report to implement these recommendations, including two new ICAR projects examining criminal liability and limited liability. Learn more at www.accountabilityroundtable.org

Ms. Geneviève Paul, Head of the Globalisation and Human Rights desk at FIDH (International Federation for Human Rights), and steering group member of ECCJ (European Coalition for Corporate Justice, discussed recent trends and developments in the EU. Ms. Paul commended civil society initiatives for their positive impact in making remedies accessible. She mentioned a draft bill tabled in France aiming to introduce a duty of care for parent companies, as well as recent call from the Swiss parliament demanding a legal proposal making Human Rights Due Diligence mandatory for Swiss companies. She called on the EU to address access to justice as priorities in its implementation of the UN Guiding Principles and to seize the opportunity to collaborate at the UN level in the development of a binding instrument on business and human rights. Geneviève highlighted the urgency to focus on access to justice, particularly in a global context of increased vulnerability for human rights defenders, and in particular land rights defenders, where 95% of cases documented by the Observatory for the Protection of Human Rights Defenders are said to remain in total impunity.

Mr. Juan Pichun Lonko, Spiritual Leader of the Temulemu community emphasized the lack of recognition of indigenous rights, as well as the difficulty indigenous peoples have in regaining dispossessed lands. Also, anti-terror legislation has been used to prosecute members of the indigenous community. Mr. Lonko spoke about the Inter-American Court's condemnation of Chile for wrongly indicting individuals on grounds of terrorism, noting that anti-terror legislation should not apply in such instances. Indigenous communities suffer from violations of freedom of expression, but companies enjoy immunity from prosecution/judicial redress. He called for those wrongfully imprisoned to be released, and noted that it is imperative to seek justice for indigenous individuals killed during demonstrations.

Mr. Larry Catá Backer pointed to the conceptual, structural, and operationalization constraints on the obligation to remedy and to the means to begin to move beyond those constraints. The first is evidenced by the treatment of the third pillar as merely a procedural device rather than as the site for focus on the individual. The second is evidenced by an obsession with an idealized judicial mechanism as the best foundation for remediation. The third is evidenced by a rigid embrace of incoherence in developing an interpretive system for the UNGPs. Suggestions for moving forward included using national actions plans to inventory the actual extent of the state duty to protect, better developing internal corporate remedial mechanisms, and establishing a single point mechanism for the elaboration of interpretations of the UNGP in real disputes. This mechanism need not have any authority to bind States or enterprises. But it ought to have authority to bring parties before it to determine the scope and extent of the application of the UNGPs to particular disputes and to produce reasoned opinions explaining its positions.

Conectas Human Rights' attorney **Caio Borges** pointed that there is still an urgent need to shift the debate about access to remedies from the “mapping” of hurdles and obstacles to the

identification of best practices and to the devising of legal and practical solutions that can have concrete impact on the ground. He identified two shortcomings in the current debate: (1) an overreliance in the judicial, prosecutorial, and legal regimes of a few States to the detriment of a more detailed study of the achievements and institutional innovations in the domestic dimension in other countries and (2) the narrow scope of some studies aimed at identifying obstacles and solutions to the improvement of domestic legal remedies, such as the study by the Office of the High Commissioner on Human Rights on a “fairer and more effective system of domestic law remedies.” He then mentioned two concrete examples of non-judicial mechanisms that can be enhanced, drawn from the Brazilian reality. The Term of Adjustment of Conduct is an instrument that can be used by Brazilian authorities to impose obligations and make compromises with private actors in order to prevent or stop human rights abuses. This instrument needs to be more democratic and prosecutors should aim at a better enforcement. Through the case of the Brazilian Development Bank Ombudsman, Mr. Borges discussed the challenges of applying the efficacy criteria of the Guiding Principles (Principle N. 31) to operational-level grievance mechanisms of public financial institutions.

The Danish National Contact Point, **Ms. Karin Buhmann**, referred to the Danish Government’s intention to share lessons, to educate business, and thereby limit future violations. She highlighted the need to “turn the reactive to a proactive approach” as regards business and human rights. Ms. Buhmann further noted Denmark’s intention to share knowledge and education to prevent unintended/accidental violations of business and human rights, and noted the need to reflect on specific instances to “explain, digest, and share.” She also raised the need for a better understanding of social responsibility as applicable to NGOs as well as corporate contexts. Suggested revisions include reference to the Guiding Principles and a statutory basis; emphasis on visibility, and a strong focus on business and human rights due diligence and responsibility.

The session ended with interventions with the audience that included positive examples of work currently being done on the issue, the importance of access to information and protection of human rights defenders against reprisals, and the need for global, binding norms.