

Mind the Gap input to the UNGPs 10+/ Next Decade BHR project December 2020

Mind the Gap is a four-year research project involving civil society organizations from around the world working on business and human rights, responsible business conduct and corporate accountability. The project advances research and analysis relevant to the UNGPs 10+/ Next Decade BHR project, including:

- In-depth study of select cases of protracted business-related human rights conflicts, with the goal of identifying harmful strategies that corporations are using to avoid responsibility, and specific governance gaps and barriers to justice in each case.
- Comprehensive investigation of corporate strategies for creating, maintaining and exploiting gaps and barriers to justice at national and international levels.
- Examination of successful and promising intervention strategies of human rights defenders and civil society organisations to counter harmful strategies used by corporations to avoid responsibility for human rights impacts.

The project was presented in side events during the 2018 and 2019 UN Forum on Business & Human Rights. In July 2020 the results and findings of the research project have been released on a dedicated website: www.mindthegap.ngo. Based on our research, we have completed the questionnaire below.

Thank you for your hard work and consideration.

Al-Haq, Conectas, ECCJ, Inkrispena, PODER and SOMO



(1) Where has progress taken place in UNGPs implementation over the course of the last decade? What are the promising developments and practices (by governments, businesses, international organizations, civil society organizations, etc.) that can be built on?

As a soft law instrument, the UNGPs have acted as a coherent and widely-accepted basis for moving forward norms surrounding the respective duties and responsibilities of Governments and business enterprises to prevent, address and remedy adverse impacts of business activities. Various instruments have emerged in the past decade inspired by the UNGPs, these include (but not limited to):

- International standards including the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy;
- due diligence practical frameworks including the OECD Due Diligence Guidance for Responsible Business Conduct;
- the 2018 report of the UN working group on business and Human Rights to the UN General Assembly; and
- The United Nations Office of the High Commissioner for Human Rights develops recommendations for States on how to improve access to remedy for people affected by business related human rights abuses, addressing the judicial strategies adopted by companies to avoid liability.ⁱ
- sectoral and gender guidelines, rankings, benchmarksⁱⁱ, company policies and reporting frameworksⁱⁱⁱ
- The second revised draft of the UN Treaty on business and human rights is also now more closely aligned with the UNGPs, as requested by the EU and other states in response to the first draft.

National/regional level:

- 24 National Action Plans^{iv} that have been launched which can be monitored against the UNGPs, in large part involving voluntary commitments rather than binding legislation; the main exception being the French Duty of Vigilance, which is currently being tested through litigation.
- There is a growing trend towards mandatory human rights and environmental due diligence: States, at national and regional level, increasingly require companies to conduct due diligence throughout their supply chains, defeating corporate strategies to construct deniability. An EU legislative proposal on human rights and environmental due diligence is expected in 2021^v following a recent European Commission study on due diligence requirements^{vi}.
- Support from the business community^{vii} for the UNGPs and mandatory human rights due diligence (mHRDD) legislation is increasingly mainstream. Prominent members of the business community also expressed support for mHRDD as a means to 'level the playing field' during events at the 2020 UN Forum on Business and Human Rights.
- Legislation in this field is now moving to the "third generation" of laws^{viii}, in which substantive HRDD obligations are backed with civil liability. The OHCHR has endorsed mHRDD legislation as an appropriate means of regulating of business conduct^{ix}. Liability for failure to appropriately gauge and mitigate risk of business operations is required in order to meaningfully ensure corporate accountability and prevent harms from occurring. Legislative developments and court rulings continue to develop the concepts of mandatory human rights due diligence and parent company liability, tackling how companies normally construct deniability and employ judicial strategies to avoid accountability for abuses in their supply chain or by subsidiaries.

(2) Where do gaps and challenges remain? What has not worked to date?

The way the global economic system has evolved, combined with a lack of rules or enforcement, creates a permissive environment or even an incentive structure in which harmful corporate strategies can be played out. As it currently stands at the international level, there are no direct human rights obligations for corporations, while states lack clear legal obligations to regulate the transnational activities of their corporate nationals. On the other hand, the limited liability regime combined with economic treaties like trade, investment and tax treaties grant companies protection and privileges beyond those granted to individuals.

The UNGPs have been deeply influential in addressing business-related human rights challenges, however there are gaps and challenges in both the implementation of the UNGPs as they stand, and within the content of the Principles themselves which need to be rectified in order to ensure that these have the intended impact on business practice. Specifically, environmental impacts and environmental standards are not explicitly included within the scope of the Principles.

The state duty to protect human rights (pillar I) requires effective implementation of the UNGPs, however consistent shortcomings in this regard are also undermining access to effective remedy for victims of business-related human rights abuse (pillar III). Gaps remain in the prevention of human rights and environmental impacts linked to global business operations, and the multiple obstacles to remedy faced by victims of corporate abuse need to be dismantled. For example, issues identified in ECCJ's 2017 National Action Plans (NAPs) assessment^x have not been rectified in more recent iterations of NAPs^{xi}.

Binding obligations are an integral part of the UNGP "smart mix" however these are thin on the ground; implementation^{xii} of the "smart mix" requires binding legislation, states' commitment to enforce these obligations, and a variety of criminal, civil and other regulatory tools^{xiii}.

(3) What are key obstacles (both visible and hidden), drivers, and priorities that need to be addressed to achieve fuller realization of the UNGPs?

Key obstacles preventing appropriate scrutiny of business conduct and legal accountability include: the current state of corporate impunity^{xiv} and lack of access to judicial remedy for victims^{xv}; corporate capture of key regulatory institutions (for example, corporate lobbyists pushing back initiatives to regulate business activities substantially out-number those representing other stakeholders at EU institutions^{xvi}); and the deployment of legal strategies to undermine civil society scrutiny of business impacts, including Strategic Lawsuits Against Public Participation (SLAPP) ^{xviii}.

Binding legislation ensuring corporate liability for the human rights and environmental impacts of business activities is required in order to ensure fuller realisation of the UNGPs. Corporate liability for specific harms is on the rise in some jurisdictions^{xix}; covering consumer protection, child labour, and conflict minerals sourcing for example. HRDD for a broader range of harms with accompanying liability is therefore evidently possible, and also the most promising avenue for ending corporate impunity that undermines the realisation of the UNGPs.

(4) What systemic or structural challenges need to be tackled to realize sustainable development based on respect for human rights?

The Mind the Gap consortium has identified 5 recurrent strategies^{xx} companies use to avoid responsibility for their human rights abuses and environmental damage. These represent the means by which companies maintain and deploy structural power, hindering sustainable development.

1. Constructing deniability: Companies use different arguments and strategies to deny responsibility for human rights and environmental impacts within their supply chains. While working with a range of suppliers is a common business practice, when confronted with negative human rights impacts in their supply chains, companies often argue that such impacts are undetectable due to the complexity of the supply chain, or else they place responsibility for those impacts with their supplier. The truth is that they chose these arrangements, and by planning companies can control how complex or non-transparent their chains can be. Companies can also construct deniability by outsourcing high-liability activities and/or recruitment and employment, thereby limiting responsibility for those processes while still profiting from these. Another variation of this strategy is when companies opt to irresponsibly disengage from certain business activities thereby cutting their association with human rights harm and thus responsibility for remediation. Companies further construct deniability by directly refusing to disclose information that could tie them to (potential) human rights and environmental impacts.
2. Avoiding liability through judicial strategies: Judicial barriers to justice for victims in business and human rights cases have been well documented^{xxi}. When companies are challenged in court, they have a variety of tools at their disposal to avoid liability. Commonly used strategies include: abusing judicial processes in order to delay and complicate proceedings and withhold attention from the substance of the case; engaging in jurisdiction shopping; shielding parent companies from liability for harms conducted by entities within their corporate group; and settling cases out of court to avoid a guilty verdict and setting a precedent. The last strategy that can be categorized as a judicial strategy to avoid liability is to take states to international arbitration to avoid the adoption of more stringent legislation or to put pressure on states to drop criminal investigations.
3. Distracting and obfuscating stakeholders: The strategy to distract and obfuscate stakeholders can take a variety of forms. Companies can engage communities impacted by their operations in a symbolic rather than meaningful way to avoid community protests and subsequent demands for accountability directed at them. They can disseminate distorted information among the public to make their business seem more responsible than it is, or engage in downright fraudulent activities and disseminate false information to avoid responsibility for past or future harms. Another form in which this strategy manifests itself is by manipulation of scientific research, producing data that is favorable for the business while downgrading societal risks and impacts. Furthermore, companies can abuse standard systems that are designed to assure that products and production qualities conform with specific requirements to conceal unsustainable or substandard company practices. A last form identified here is the diversion of complaints through company controlled grievance mechanisms that pretend to offer remedy for victims, but actually delay or divert right-holders' complaints.
4. Undermining defenders and communities: The chosen mechanism for silencing criticism varies depending on the social context and judicial tools available. Strategies against defenders and communities can take the form of physical attacks or threats executed by affiliates of the company for opposing corporate activities. Or the judicial system can be weaponized against human rights defenders through strategic lawsuits, criminalization, and claims of defamation. Companies can also use community engagement and the promised developmental benefits of their investments to pit community

members against those protesting misconduct. And they can obstruct the collective organization of workers and thereby avoid having to respect other labor rights.

5. Utilizing State power: The instruments used by companies to gain and leverage state assistance vary in their legality and acceptance. One way companies do this is by exploiting the governance gaps created by states: (foreign) investment is attractive to governments, thus luring companies often involves preferential treatment of these entities, including disregarding internationally accepted standards for corporate conduct. Furthermore, corporate lobbying against regulations intended to protect human rights and the environment, but that potentially harm business interests, is a common practice. Another way companies use state power to avoid having to take responsibility for human rights abuses is by aligning with suppressive state institutions that violate human rights. Finally, companies can engage state security forces to protect their business interests, even when serious human rights violations can be expected as a result.

(5) In concrete terms, what will be needed in order to achieve meaningful progress with regard to those obstacles and priority areas? What are actionable and measurable targets for key actors in terms of meeting the UNGPs' expectations over the coming years?

Corporations around the globe continue to operate with impunity, as they often use strategies to avoid responsibility for human rights abuses and environmental damage. The wide prevalence and acceptance of these strategies is problematic. It emphasises the urgent need for a thorough revision of our global trade and production systems. To encourage genuine respect for human rights and the environment, the international community urgently needs to close the governance gaps that allow corporations to evade responsibility for their actions. The Mind the Gap Project concretely offers some 'counter-strategies' to tackle corporate strategies that prevent structural obstacles to corporate accountability and sustainable development to be overcome. Some concrete examples are:

1. Liability for both cause and contribution to adverse impacts through national, regional and international binding legislation

A key problem facing victims in typical business and human rights cases are the restrictive liability rules that shield powerful parent, buying and investing companies from liability for harm occurring in their corporate groups and value chains, including from relationships such as subsidiaries and suppliers which may not be underpinned by a contractual relationship.

The UNGPs extend a company's responsibility to respect human rights beyond the adverse impacts of its own activities to also include "business relationships". Furthermore, they clarify that if companies cause or contribute to adverse human rights impacts - through their acts or omissions, by themselves, together with or via a third party - they are responsible for (contributing to) remediating the harm. This provision should be enforceable through national, regional and international binding legislation. We note that in the EU competition law there is a judicial presumption that a parent company has control over its subsidiaries^{xvii}. Non-contractual elements such as control and "economic dependence" are useful for determining the relationship for liability purposes.

Multi-level regulatory responses are required because in judicial cases, victims are often denied access to courts in the jurisdiction where the parent company allegedly responsible for the harm is domiciled, by virtue of the application of the forum non conveniens doctrine. The doctrine holds that the courts of the place where the harm occurred are the "most appropriate forum" for the case, despite the existence of a connection to a controlling, influential and responsible parent company in the "home" jurisdiction.

Case examples:

Western brands in Rana Plaza

The 2013 Dhaka factory collapse killed over 1,100 workers, who were producing primarily for Western lead firms.^{xviii} Western lead firms reportedly claimed that they did not know that their products were being produced in the Rana Plaza factory and that there were no contracts underpinning the supply relationship, so no responsibility for them to contribute to remedy for the victims. CSOs have argued that even if the

brands did not know, they could and should have known, given the continuous stream of reports about safety risks in Bangladeshi factories, and that the brands contributed to the creation of an environment that ultimately led to the deaths and maiming of thousands of individuals.^{xxiv} It took a lot of campaigning to get the brands to contribute to a compensation fund for the victims, but liability has been lacking to date.

Vedanta

In the leading British case on parent company liability, it was found that Vedanta could be liable for the harm caused by its subsidiary not by virtue of a contractual relationship, but by one of control and knowledge.^{xxv} The judgment in Vedanta provides important insights for the proposed LBI.^{xxvi}

Union Carbide and Bhopal disaster in India

The 1984 mass gas leak in Bhopal, India was the biggest industrial disaster in history killing over 2,000 people in one night, and injuring over 200,000. Indian victims brought lawsuits against the U.S.-based Union Carbide they held responsible for the leak. However, the court accepted the company's plea of the *forum non conveniens* doctrine, and required that the cases be heard in India despite widespread concerns that the Indian judicial system would not be able to cope with such a complex case. These concerns were raised by the Chief Justice of the Supreme Court of India, who stated that due, amongst other things, to the serious backlog of cases in the Indian courts, the victims' only chance of receiving a fair and proper remedy would be for the case to be heard in the U.S.^{xxvii} Victims had to wait until 2002 for all the cases related to the leak to be heard, and achieved meagre settlements in comparison with what they would likely have been awarded by a U.S. court.

Canadian companies building illegal settlements in Occupied West Bank

The Israeli government hired Canadian companies Greenpark and Green Mountain to construct houses in the Israeli-occupied West Bank. Palestinian affected individual plaintiffs brought a civil suit against the companies in Canada under the Fourth Geneva Convention for assisting war crimes (forceful displacement and settlement). The judges applied the *forum non conveniens* doctrine, and required that the case had to be heard in Israel^{xxviii}.

2. Anti-SLAPP measures

Since the 1980s, "SLAPP" (Strategic Lawsuit Against Public Participation) has become a common term for lawsuits brought by companies against civil actors for the sole purpose of intimidating and silencing public opposition to, or criticism of, their activities. In these cases, the heart of the corporate plaintiff's claims – e.g. defamation or libel – is a secondary motivation; the primary motive is to intimidate, threaten or otherwise overwhelm the civil society actor with burdensome litigation proceedings. Actions provoking corporate SLAPP suits have included writing letters to the editor, circulating petitions, participating in a demonstration, commenting at public hearings, and filing complaints or lawsuits. SLAPP suits allow well-funded corporate plaintiffs to harass civil society actors with expensive, protracted and ultimately ill-founded litigation which is by definition abusive. SLAPP suits have a considerable "chilling effect" on public discourse and have been known to destroy civil society defendants without the means or funds to defend themselves by responding in court.

So-called "anti-SLAPP" legislation protecting civil society actors from corporate SLAPP suits exists in a large number of states across Australia^{xxix}, Canada^{xxx} and the U.S.^{xxxi} As of 2020, the European Commission has also begun preparing EU-level anti-SLAPP legislation.^{xxxii} Anti-SLAPP regulations can be derived from international and regional principles protecting freedom of expression and of speech, such as Art. 19 of the *International Covenant on Civil and Political Rights* and Art. 10 of the *European Convention on Human Rights*.

The UN Committee on Economic, Social and Cultural Rights developed States' obligation to protect individuals under their jurisdiction from interference by third parties in its *General Comment No. 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights* in the context of Business Activities^{xxxiii} by imposing a positive duty on States to create a legal framework that guarantees citizens' human rights.^{xxxiv} It states,

"The introduction by corporations of actions to discourage individuals or groups from exercising remedies, for instance by alleging damage to a corporation's reputation, should not be abused to

create a chilling effect on the legitimate exercise of such remedies” (para. 44).

A 2016 joint report by a former Special Rapporteur on the rights to freedom of peaceful assembly and of association and former Special Rapporteur on extrajudicial, summary or arbitrary executions^{xxxv} states: “Business entities commonly seek injunctions and other civil remedies against assembly organizers and participants on the basis, for example, of anti-harassment, trespass or defamation laws, sometimes referred to as strategic lawsuits against public participation. States have an obligation to ensure due process and to protect people from civil actions that lack merit”^{xxxvi}.

Another former UN Special Rapporteur to the rights to freedom of peaceful assembly and of association, Ms Ciampi made the following recommendations to States in her *SLAPPs Info Note*:

“States should protect and facilitate the rights to freedom of expression, assembly and association to ensure that these rights are enjoyed by everyone by, inter alia, enacting anti-SLAPPs legislation, allowing an early dismissal (with an award of costs) of such suits and the use of measures to penalize abuse.”^{xxxvii}

Finally, in its *Guidance on National Action Plans on Business and Human Rights*, the UN Working Group on Business and Human Rights recommended that States enact anti-SLAPP legislation to ensure that human rights defenders do not incur civil liability for their activities.^{xxxviii}

- Mind the Gap recommends specifically adding a sub article under Art 4. Rights of Victims of the UN Treaty on business and Human Rights reading: *State Parties shall ensure effective legislative and judicial protection from frivolous Strategic Litigation Against Public Participation (SLAPP) lawsuits brought by corporate plaintiffs against civil society actors, including but not limited to NGOs, civil society groups, trade unions, citizens, journalists and human rights defenders, in order to protect the latter’s right to free speech, association, petition and public communication from ill-founded judicial claims amounting to intimidation and harassment. Civil society actors shall be afforded a special motion to swiftly dismiss such frivolous SLAPP claims against them with award of costs and initiators of SLAPP actions shall be subject to penalties and sanction.*

Case examples:

Energy Transfer Partners v. Greenpeace, Banktrack

NGOs Greenpeace and Banktrack campaigned against the controversial U.S Dakota Access Pipeline by writing and organising public letters to the financial institutions supporting the pipeline. In August 2017 the NGOs were taken to court by Energy Transfer Partners, the company running the pipeline, which alleged that the NGOs had engaged in “racketeering” under the *Racketeer Influenced and Corruption Organizations Act*. The civil society defendants were drawn into a lengthy and expensive court case that used up a lot of their time and resources. Energy Transfer Partners dropped the litigation against Banktrack after almost a year of proceedings, but the suit against Greenpeace is ongoing.^{xxxix}

Vinci Construction v. Sherpa

In 2015, French legal NGO, Sherpa, initiated proceedings against French construction multinational VINCI and its Qatari subsidiary, alleging that they were using forced and bonded labour in their Qatari operations. In response, VINCI initiated defamation proceedings against Sherpa and three individual VINCI employees, filing for damages of over 400,000 euros. The defamation proceedings lasted over two years, draining much of Sherpa’s resources as well as putting the employees under psychological pressure. All of these SLAPP suits were ultimately dismissed.^{xi}

Pilatus Bank v. Caruana Galizia

Daphne Caruana Galizia was an investigative journalist who focused on corruption stories in Malta. On her blog, she reported allegations that the Maltese Pilatus Bank was being used to launder money, that it secretly held documents related to the wife of the Maltese Prime Minister, and that it had ordered staff to conceal information from the Maltese financial authorities. Subsequently, Pilatus Bank filed a SLAPP suit against Caruana Galizia in the court of the U.S. state where her blog was registered.^{xii} The bank dropped the case after Caruana Galizia was killed by a car bomb in October 2017.^{xiii}

3. Corporate and supply chain transparency

Lead firms at the top of supply chains often do not properly map or do not publicly disclose who their suppliers are or where they are source from. Without such supply chain information, specifically information regarding the names and locations of suppliers, advocates are left unable to hold lead firms and parent companies to account for harms that take place in the supply chain; it becomes difficult to assess the due diligence measures taken. Supply chain disclosure enables civil society to assist companies in fulfilling their due diligence responsibilities by identifying how the lead firm/parent company can exert pressure and use its influence to improve conditions in the supply chain.

In some jurisdictions, such as the United States^{xliii}, it is possible to obtain important information about a company's supply chain through information requests to the government. In some jurisdictions, this data can be purchased from the government or from companies responsible for managing import/export data. This data is valuable as it enables business and human rights advocates to trace the supply chains of companies in their jurisdiction to see where the company is sourcing from, and where (and subsequently how) its products are made. It can then enable them to hold the company to account and assist with its due diligence efforts.

The release of supply chain information is now considered best practice in the textile and garment sector, with major brands and labels voluntarily releasing this information for accountability purposes.^{xliv} Evidence of a willingness to map supply chains, gather information, and increase transparency counters the argument that to do so is unfeasible or uncompetitive for business.

Case examples:

Global Mica Mining

Mica mining has been associated with violations of children's rights. There is a high risk of child labour in the industry, and there were 7 child deaths in 2 months in India in 2016^{xlv}. Investigations reveal that electronics and automobile companies that participated in the Responsible Minerals Initiative (RMI), which includes more than 360 members, were largely unaware of the source of the mica present in their products, because the companies they source from were not able to provide them with the information either.^{xlvi}

Textile Transparency

Since 2005, Nike and Adidas have been publishing their supplier factory information, and other brands have followed. Some brands that closely guarded factory names as "competitive information" have now released this data. In 2013, fashion group H&M—which, according to a company representative, used to keep its supplier factories list locked in a safe in Stockholm—became the first fashion brand to publish the names and addresses of its supplier factories. Other companies followed suit in 2016, with big companies like C&A, Esprit, Marks and Spencer, and Gap Inc. also publishing information about their suppliers.^{xlvii}

4. Proper or adequate indigenous peoples and local community engagement

Indigenous communities are some of the most impacted by business operations, given the value of the natural resources that exist in and on their lands. However indigenous communities are continuously denied proper consultation through which they may either consent to or reject a project, even though they have a recognised right to Free, Prior and Informed Consent.

Free Prior Informed Consent (FPIC) is an international legal standard derived from *the United Nations Declaration on the Rights of Indigenous Peoples* (2007)^{xlviii}, *the International Labour Organization Convention 169* (1989)^{xlix} and the *Convention on Biological Diversity* (1993).¹

FPIC is a specific right that pertains to indigenous peoples allowing them to give or withhold consent to a project that may affect them or their territories. In the event that they go give their consent, they are entitled to withdraw it at any stage. Furthermore, FPIC enables them to negotiate the conditions under which the project will be designed, implemented, monitored and evaluated. This is also embedded within the universal right to self-determination. The standard has been incorporated into national laws in countries such as Bolivia, and has begun to be taken up in standard-setting by international organisations such as the World Bank's International Finance Corporation and the International Council of Metals and Mining.ⁱⁱ The Food and Agricultural Organization also operates under this principle.ⁱⁱⁱ

Appropriate and complete compliance with FPIC standard needs to be assured in the future implementation of the UNGPs.

Case examples:

Vedanta’s operations in Niyamgiri, India

In 2002, Vedanta Aluminium Limited began acquiring land inhabited by the Dongria Kondh indigenous community for a proposed refinery in Niyamgiri. The community relied on this land for sustenance. Indigenous inhabitants were not properly consulted and did not have access to the necessary relevant information, so they were not aware of the potential impacts of the mine until well after the land had been acquired by the company.^{liii} Furthermore, it has been reported that Vedanta’s private security forces repeatedly intimidated those that protested against the development and pursued a “campaign of fear” in Niyamgiri.^{liv} A long legal battle has ensued, with property rights and economic development continuing to clash, even though the Indian Supreme Court decided in 2013 that Vedanta’s mining activities could only be implemented if all local communities agreed.^{lv}

Wanbao Mining operations in Letpadaung, Myanmar

In 2011, Wanbao Mining began operations in Letpadaung, originally presenting a comprehensive CSR plan including promises of employment and significant financial compensations for every family that would lose land. The company claimed that “every villager impacted by the project had a direct one-on-one discussion with the Myanmar Wanbao leadership.”^{lvi} CSO researchers found this not to be true, concluding that “the company claims are false, and that far from reaching all affected people, the consultations excluded many people affected by the land acquisition”.^{lvii} Internal company documents revealed that only 1,032 of the estimated 16,694 most highly impacted inhabitants were consulted.^{lviii} The mine has consistently been associated with negative human rights impacts, including a series of forced evictions causing public protest and subsequent violent suppression.^{lix}

5. Access to group claim mechanisms

Victims in jurisdictions that do not allow group claims (also known as class actions or collective redress measures), are in a far more precarious position in terms of defending their rights legally and seeking remedy. The financial costs and risks of litigation for an individual against a typically well-resourced corporate defendant are often prohibitively high, and include lawyers’ fees, court costs, and expert evidence; as well as the risk of financial ruin in the event of loss due to the typical application of the loser pays principle. In situations of mass harm, individual victims have to bring their own, individual and competing claims, meaning less efficient use of state resources.

Group claims have consistently been identified by both international and regional human rights institutions and bodies as a key tool of redress in scenarios involving abuse by business entities, as expressed by the UN High Commissioner for Human Rights in his report to the UN Human Rights Council in 2016.^{lx} The Committee of Ministers of the Council of Europe also adopted *Recommendation CM/Rec* in 2016^{lxi}, endorsing the use of group claims as means to further the implementation of the UNGPs, which was in turn endorsed by the Council of the European Union in its conclusions on business and human rights.^{lxii}

In addition to the jurisdictions mentioned in the examples above, group claims are permitted in a diverse range of other states including India, Mexico, China, Indonesia and Brazil. The European Union is in the process of finalising inter-state collective redress measures for European consumers.^{lxiii}

Case examples:

South Africa 2018

Through a collective claim, 100,000 miners achieve a \$400 million settlement against six mining companies for silicosis poisoning caused by their working conditions.^{lxiv}

Australia 2018

Through a collective claim, 1905 asylum seekers and refugees detained in offshore centres achieve a \$70 million settlement against the Australian government and the corporate contractors managing the facilities. Another two class-actions representing another 1200 people are currently underway.^{lxv}

United Kingdom 2015

Through a collective claim, 15,600 Nigerian villagers achieve a £55 million settlement against Shell for oil spills resulting from its business operations in the Niger Delta.^{lxvi}

(6) Is there other information relevant to the UNGPs 10+ project that you'd like to share?

Corporate legal accountability is essential for the realisation of the UNGPs moving forward. For further information on the work and research of Mind the Gap please see: <<https://www.mindthegap.ngo>>. The website sheds light on the harmful effects of the identified strategies, focuses on the wide use of these strategies, and calls on the business and the international community to close the underlying governance gaps.

ENDNOTES

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

ⁱⁱ <https://www.corporatebenchmark.org/>

ⁱⁱⁱ <http://www.ungpreporting.org/>

^{iv} <https://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx>

^v <https://home.extranet.ep.europa.eu/info/law/better-regulation/have-your-say/initiatives/DanaInfo=ec.europa.eu,SSL+12548-Sustainable-corporate-governance>

^{vi} <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>

^{vii} List of large businesses and associations that support human rights due diligence regulation: <https://www.business-humanrights.org/en/latest-news/eu-mandatory-due-diligence/>

^{viii} The French Duty of Vigilance Law (2017) is the most notorious example, while Switzerland is also discussing a legislative proposal which establishes mandatory HRDD and corporate liability.

^{ix} Report of the UN High Commissioner on Human Rights, "Improving accountability and access to remedy for victims of business-related human rights abuse: The Relevance of human rights due diligence to determinations of corporate liability", June 2018.

^x Reference to NAPs' assessment in this section refers to the publication ICAR, ECCJ, De Justicia, "Assessment of existing national action plans (NAPs) on business and human rights", August 2017:

- NAPs are overly vague and mainly focused on describing past government's actions and policies, thereby hindering adequate stakeholder monitoring of the NAP's implementation and the capacity of the plan to ensure a systemic and effective approach to business and human rights.
- Most action plans fail to sufficiently explore regulatory options to prevent corporate-related human rights abuses and ensure access to remedy.
- The majority of assessed NAPs are primarily focused on a voluntary approach to the corporate responsibility to respect human rights. Most action points focus on actions involving awareness-raising, training, research, and other voluntary measures.
- This insufficient approach to the state regulatory capacity presents a major hurdle to addressing the persistent governance gaps in dealing with business human rights and environmental impacts. However, the NAPs' assessment also reflects a general situation of asymmetry with respect to government regulation of businesses' rights to conduct their operations, and of companies' duties to respect human and environmental rights throughout their global operations. Companies enjoy a vast array of rights and benefits in the form of government promotion to business activities while generally lacking the adequate mechanisms to ensure that promoted business activities don't harm human rights.
- Focus on non-judicial mechanisms obscures consideration of domestic barriers to judicial remedy for victims of business-related human rights abuses which occur at home and abroad.

^{xi} Summary of main barriers to access remedy from business-related abuses and policy recommendations are included in ECCJ et al, "The EU's business: Recommended actions for the EU and its Member States to ensure access to judicial remedy for business-related human rights abuses", 2014.

^{xii} <https://corporatejustice.org/news/16780-a-coherent-implementation-of-the-ungps-demands-legislation-that-makes-companies-respect-human-rights-eccj-says-to-the-un-working-group-on-bhr>

^{xiii} De Schutter et al, "Human Rights Due Diligence: the Role of States", Commissioned by ECCJ. ICAR, CNCA, December 2012.

^{xiv} The European Parliament report on '[Access to legal remedies for victims of corporate human rights abuses in third countries](#)' found that out of the 35 cases on which the study focused, the defendant company was found liable in only three, and in only two out of the 20 civil law proceedings brought against companies was compensation granted by the court.

^{xv} <https://fas.org/sgp/crs/misc/LSB10147.pdf>

^{xvi} https://corporatejustice.org/documents/publications/eccj/the_third_pillar_-_access_to_judicial_remedies_for_human_rights_violation.-1-2.pdf

^{xvii} <https://lobbyfacts.eu/articles/30-01-2017/crowding-corridors-power-corporate-lobbyists-outnumber-ngos-and-unions-european>

- xviii <https://www.mindthegap.ngo/harmful-strategies/undermining-defenders-communities/filing-lawsuits-to-intimidate-critics/>
- xix <https://corporatejustice.org/hrdd-role-of-states-3-dec-2012.pdf>
- xx <https://www.mindthegap.ngo/about-us/summary/>
- xxi https://www.mindthegap.ngo/harmful-strategies/avoiding-liability-through-judicial-strategies/#_ftn1
- xxii https://ec.europa.eu/competition/publications/cpn/2010_1_9.pdf
- xxiii See: <https://qz.com/79173/benneton-says-it-wasnt-making-clothes-in-bangladesh-factory-where-377-died-so-what-is-this-https://www.theguardian.com/global-development-professionals-network/2013/may/30/rana-plaza-bangladesh-forced-labour-supply-chains->
- xxiv <https://cleanclothes.org/campaigns/past/rana-plaza>
- xxv <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/vedanta-v-lungowe-and-kiobel-v-shell-the-implications-for-parent-company-accountability/A80FF498945A96A73B8747C7971D0014>
- xxvi <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/vedanta-v-lungowe-and-kiobel-v-shell-the-implications-for-parent-company-accountability/A80FF498945A96A73B8747C7971D0014>
- xxvii James B. Stewart, "Legal Liability: Why Suits for Damages Such as Bhopal Are Very Rare in India," *The Wall Street Journal*, January 23, 1985.
- xxviii <http://www.internationalcrimesdatabase.org/Case/938/Bil%27in-v-Green-Park/>
- xxix In the Australian Capital Territory http://classic.austlii.edu.au/au/legis/act/consol_act/poppa2008360/
- xxx In the states of British Columbia <https://www.cbc.ca/news/canada/british-columbia/legislature-passes-anti-slapp-1.5049927>, Ontario <https://www.ola.org/en/legislative-business/bills/parliament-41/session-1/bill-52>, and Quebec <https://lawinquebec.com/anti-slapp-part-i-a-look-at-quebec-developments/>.
- xxxi Over [thirty U.S states](https://www.business-humanrights.org/en/27-ngos-call-on-european-commissioner-to-include-all-parties-impacted-by-slapps-in-new-eu-legislation) have anti-SLAPP legislation in place.
- xxxii <https://www.business-humanrights.org/en/27-ngos-call-on-european-commissioner-to-include-all-parties-impacted-by-slapps-in-new-eu-legislation>
- xxxiii https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=E/C.12/GC/24&Lang=en
- xxxiv https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolNo=E/C.12/GC/24&Lang=en
- xxxv <https://digitallibrary.un.org/record/831673?ln=en>
- xxxvi UN Doc. A/HRC/31/66, 4 February 2016, para. 84.
- xxxvii <https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPsFoAA.docx>
- xxxviii [Guidance on National Action Plans on Business and Human Rights](https://www.ohchr.org/Documents/Issues/FAssociation/InfoNoteSLAPsFoAA.docx), United Nations Working Group on Business and Human Rights, December 2014, p. 37, UNGP 25.
- xxxix <https://earthrights.org/case/energy-transfer-partners-v-greenpeace-banktrack-et-al/#documentsff69-1a905f26-f4b6>
- xl <https://www.asso-sherpa.org/legal-action-vinci-qatar-vinci-institutes-defamation-proceedings-claiming-exorbitant-damages-sherpa-organisation-employees>, <https://www.asso-sherpa.org/slapps-brought-by-vinci-against-sherpa-a-new-victory>
- xli <https://www.theguardian.com/world/2018/feb/02/daphne-caruana-galizia-was-being-sued-defamation-at-time-of-her-murder>
- xlii <https://www.theguardian.com/world/2017/oct/16/malta-car-bomb-kills-panama-papers-journalist>
- xliii See: <https://www.cbp.gov/document/guidance/global-supply-chain-documents>
- xliv <https://www.hrw.org/world-report/2018/essay/transparency-in-apparel-industry#048e5c>
- xlv https://www.somo.nl/wp-content/uploads/2018/03/NL180313_GLOBAL-MICA-MINING-.pdf
- xlvi Responsible Minerals Initiative, "Member," <http://www.responsiblemineralsinitiative.org/about/members-and-collaborations/> (accessed October 31, 2019); Schipper and Cowan.
- xlvii <https://www.hrw.org/world-report/2018/essay/transparency-in-apparel-industry#048e5c>
- xlviii https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf
- xlix https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:::12100_instrument_id:312314
- i <https://www.cbd.int/convention/>
- ii <https://politicsandpoverty.oxfamamerica.org/2013/05/icmm-commits-to-free-prior-informed-consent-standard/>
- iii <http://www.fao.org/indigenous-peoples/our-pillars/fpic/en/>
- iiii Romy Kraemer, Gail Whiteman, and Bobby Banerjee, "Conflict and Astroturfing in Niyamgiri: The Importance of National Advocacy Networks in Anti-Corporate Social Movements," *Organization Studies* 34, no. 5-6 (May 2013): 846, <https://doi.org/10.1177/0170840613479240> (accessed October 22, 2019); Rizvi Amir Abbas Syed, "Vedanta Corp: Creating Happiness or Creating Misery?," *Amnesty International USA*, <https://www.amnestyusa.org/vedanta-corp-creating-happiness-or-creating-misery/> (accessed October 22, 2019).
- lv Kraemer, Whiteman, and Banerjee, 833.
- lv G. Seetharaman, "The Story of One of the Biggest Land Conflicts: No Mine Now, but Is It All Fine in Niyamgiri?," *The Economic Times*, April 18, 2018, <https://economictimes.indiatimes.com/industry/indl-goods/svs/metals-mining/theres-no-mine-but-is-it-all-fine-on-niyam-hills/articleshow/63763978.cms> (accessed October 22, 2019).
- lvi Amnesty International, Mountain of Trouble: Human Rights Abuses Continue at Myanmar's Letpadaung Mine (London: Amnesty International Ltd., 2017), 13., <https://www.amnesty.org/download/Documents/ASA1655642017ENGLISH.PDF> (accessed October 22, 2019).
- lvii Amnesty International, Mountain of Trouble, 15; Feifei Cai, The Social Responsibility of China's OFDI and NGOs' Engagement: Taking the Myanmar Letpadaung Copper Mining Project as an Example (Beijing: Social Resources Institute, 2017), 76., https://www.business-humanrights.org/sites/default/files/documents/SRI_The%20Social%20Responsibility%20of%20China%27s%20OFDI%20and%20ONGOs%27%20Engagement.pdf (accessed October 22, 2019).
- lviii Amnesty International, Mountain of Trouble.
- lix Amnesty International, Mountain of Trouble: Human Rights Abuses Continue at Myanmar's Letpadaung Mine (London: Amnesty International Ltd., 2017), 33., <https://www.amnesty.org/download/Documents/ASA1655642017ENGLISH.PDF> (accessed October 22, 2019).
- lx UNHRC, 10 May 2016, "Improving accountability and access to remedy for victims of business-related human rights abuse" pt. 15.3. Available at: http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/A_HRC_32_19_AEV.pdf
- lxi Available at: <https://edoc.coe.int/en/fundamental-freedoms/7302-human-rights-and-business-recommendation-cmrec20163-of-the-committee-of-ministers-to-member-states.html> page 19.
- lxii Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/council_conclusions_on_business_and_human_rights_foreign_affairs_council.pdf
- lxiii <https://www.europarl.europa.eu/news/en/press-room/20200108IPR69812/negotiations-on-new-eu-collective-redress-rules-to-begin>
- lxiv <https://www.reuters.com/article/us-safrica-mining-silicosis/south-africa-miners-reach-400-million-silicosis-settlement-with-mining-companies-idUSKBN1141B9>

^{lxv} <https://www.theguardian.com/australia-news/2017/jun/14/government-to-pay-damages-to-manus-island-detainees-in-class-action>
^{lxvi} <https://www.theguardian.com/environment/2015/jan/07/shell-announces-55m-payout-for-nigeria-oil-spills>