

Improving Accountability and Access to Remedy for Business and Human Rights Abuses: A submission from the Office of the United Nations High Commissioner for Human Rights (OHCHR) on the Third Revised Draft of the legally binding instrument (LBI) to regulate, in international human rights law, the activities of transnational corporations and other business enterprises

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1. Introduction

The purpose of this note is to draw attention to OHCHR's work on accountability and access to remedy which might usefully be considered by members of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (IGWG) in the context of the negotiations to take place at its [Seventh Session](#).

Since 2014, OHCHR has received multiple mandates from the Human Rights Council (Resolutions [26/22](#), [32/10](#), [38/13](#) & [44/15](#)) to strengthen the implementation of the Access to Remedy Pillar of the UN Guiding Principles on Business and Human Rights (UNGPs) and thus improve the prospects for corporate accountability and remedy in business and human rights cases.

In furtherance of these mandates, OHCHR's [Accountability and Remedy Project \(ARP\)](#) has delivered recommended actions to enhance the effectiveness of different remedial mechanisms (both judicial and non-judicial) in cases involving business-related human rights abuse. Thus far, three sets of major reports have been submitted to the Human Rights Council, which cover the roles of:

- [judicial mechanisms \(ARP I\)](#);¹
- [State-based non-judicial grievance mechanisms \(ARP II\)](#);² and
- [non-State-based grievance mechanism \(ARP III\)](#).³

The Human Rights Council has welcomed this work, noted "with appreciation" the relevant reports, and requested OHCHR to continue its work in this area.⁴

The ARP recommended actions have been drafted in a deliberately flexible format to be implementable in a wide range of legal systems and contexts, while also being practical, forward-looking and reflective of international standards on access to remedy; thus, they can be incorporated into any relevant standard-setting process. Taken together, these materials provide a robust, evidence-based resource for States seeking to improve the effectiveness of their legal and policy responses to business and human rights challenges, whether at the domestic level (e.g. through National Action Plans on Business and Human Rights and domestic law reform) or through international institutions and law-making initiatives.

¹ Recommended actions can be found in the annex of the [2016 report](#) and [2016 explanatory addendum](#).

² Recommended actions can be found in the annex of the [2018 report](#) and [2018 explanatory addendum](#).

³ Recommended actions can be found in the annex of the [2020 report](#) and [2020 explanatory addendum](#).

⁴ See [Resolution 32/10](#) in relation to ARP I, [Resolution 38/13](#) in relation to ARP II, and [Resolution 44/15](#) in relation to ARP III.

2. Insights from OHCHR's work on accountability and remedy relevant to the Third Revised Draft LBI

OHCHR's work on accountability and remedy (in particular, ARP) and the treaty process share a common goal: increasing access to effective remedy for victims of corporate abuses and ensuring accountability for such abuses.

This note builds on OHCHR's recent work on accountability and remedy in business-related human rights cases, and focuses on the preamble of the LBI and those articles relating to mandatory human rights due diligence.

a. Access to remedy in the preamble

The preamble of the Third Revised Draft LBI makes reference to important and relevant international law concepts, including in relation to access to remedy.

For over eight years, OHCHR has provided expertise and led discussion around access to remedy for business-related human rights harms. Its Accountability and Remedy Project has examined good practices from around the world in relation to judicial and non-judicial mechanisms (both State-based and non-State-based) and produced major reports to the Human Rights Council providing practical recommendations for improving the effectiveness of remedial systems based on the good practices identified. Through consensus resolutions, the Human Rights Council has specifically welcomed this work and noted these reports with appreciation.

One of the main purposes of the LBI is to ensure access to justice and effective remedy (Art. 2.1(d)). Given that the ARP reports represent the most detailed and comprehensive work undertaken at the UN level on accountability and access to remedy for business-related human rights abuse, and that they enjoy wide-ranging political support, we recommend that the preamble makes reference to this work. A new paragraph could be added along the lines of:

Taking into account the reports from the Accountability and Remedy Project of the UN High Commissioner for Human Rights.

Additionally, we recommend a few textual changes to some provisions in the preamble addressing access to remedy so as to bring the language more in line with relevant human rights standards. The recommendations in track changes are:

(PP6) Upholding the right of every person to have effective and equal access to justice and remedy in case of violations and abuses of international human rights law or international humanitarian law, including the rights to non-discrimination, participation and inclusion;

(PP13) Recognizing the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, people of African descent, older persons, migrants and refugees, and other persons who may be at heightened risk of vulnerability or marginalization~~in vulnerable situation~~, as well as the need for a business and human rights perspective that takes into account the specific circumstances ~~and vulnerabilities~~ of different rights-holders and the structural obstacles for obtaining remedies for these persons;

b. Mandatory Human Rights Due Diligence (Articles 6 and 8)

Article 6 of the Third Revised Draft LBI obliges States parties to adopt measures needed to ensure that human rights due diligence activities are undertaken by business enterprises, and sets out the key components of such activities. Parts of Article 8 elaborate on how the exercise of human rights due diligence would affect the legal liability of legal or natural persons conducting business activities.

In [OHCHR's 2020 submission to the IGWG](#), several important insights were raised that had emerged from ARP work and subsequent follow-up activities undertaken by OHCHR. These follow-up activities involved [a report on the relevance of human rights due diligence to determinations of corporate liability](#) and a [technical issues paper](#) which unpacks some of the main choices that policy-makers will be confronted with (and the (dis)advantages of each) when considering whether and how to establish mandatory human rights due diligence (mHRDD) regimes. These resources and insights continue to be highly relevant to the substance of both Article 6 (Prevention) and Article 8 (Legal Liability).

Additionally, over the course of 2021, OHCHR produced more work pertinent to the IGWG regarding the connections between human rights due diligence and access to remedy.

In July 2021, OHCHR published a [note containing recommendations on mHRDD for the European Commission](#), which includes certain points that are relevant to the IGWG discussions. For instance, the note recalls the importance of the concept of “leverage” in helping to define the different opportunities and responsibilities a business may have to address potential and actual harms.⁵ However, beside a brief mention of ways to increase leverage in Art. 6.4(f), the latest draft of the LBI does not seem to properly reflect the importance of leverage. **OHCHR recommends that regimes addressing mHRDD incentivize companies to proactively seek out ways to enhance their leverage, and then to deploy it effectively, as part of a comprehensive human rights risk mitigation strategy.**

Other parts of the July 2021 note that may be of particular interest to the IGWG include the sections on stakeholder engagement, corporate accountability and legal liability, and the relevance of non-State-based grievance mechanisms in relation to mHRDD regimes.⁶

OHCHR has also explored different methods of enforcing mHRDD duties. Particularly following up on ARP II work, and together with [Shift](#), OHCHR has co-organized a series of consultations on the role that administrative supervision may play as a complement to civil liability for harms. A paper is forthcoming that will share key design considerations for administrative supervision of mHRDD; however, a few insights can be highlighted now for the benefit of the IGWG:

- **It is crucial that regulatory authorities are trusted by both civil society and business.** Stakeholders from our consultations have emphasized that appropriate transparency by the relevant authority is fundamental to confidence in effective administrative supervision, for instance in relation to the scope of companies covered, the approach to enforcement, pathways for complainants, existence of investigations, and penalties imposed.
- **Administrative supervision should aim to drive up understanding of better quality due diligence processes over time.** Assessments of corporate due diligence efforts that merely look to the “observable basics” of what a company has in place (e.g., the existence of a human rights policy, or the number of human rights trainings conducted) risk leading to tick box compliance. Thus, regimes should be structured in a way such that it is possible to evaluate (at scale) the seriousness of a company's efforts.

⁵ OHCHR, [EU Mandatory Human Rights Due Diligence Directive: Recommendations to the European Commission](#), p. 4 (2021).

⁶ *Id.* at pp. 3-4, 5-7.

- **Regime “carrots and sticks” need to be aligned with its regulatory objectives.** The regime and the manner of its implementation should incentivize desirable conduct (e.g., thorough evaluation of risks prior to entering into relationships and at appropriate stages thereafter; transparency towards affected stakeholder groups and the public at large; and the proactive and creative use of leverage to prevent or mitigate adverse impacts of third parties, ensuring that when it becomes necessary to exit business relationships, this is done in a responsible way). Additionally, administrative supervision bodies should be aware of, and should have the ability to impose, a range of sanctions beyond merely issuing fines, depending on what is most likely to achieve the ultimate goals of remedying existing harm and preventing harm in the future.
- **Authorities’ decisions should take appropriate account of stakeholder perspectives.** Such perspectives will be essential for ensuring that authorities’ thematic and sectoral priorities (including enforcement priorities) are properly focused on the most severe risks to people. Additionally, seeking stakeholder perspectives will be useful for understanding actual conditions on the ground, including in third countries.
- **Policy makers should consider the different ways in which administrative bodies may be able to contribute to remedy through their core activities.** To the extent that administrative authorities have the competence to address complaints of business-related human rights abuse, States should draw upon the recommended actions found in the [ARP II report’s annex](#) and [addendum](#). Regardless, regimes should take into account the different potential interrelationships that authorities can have with other remedial mechanisms (e.g., courts).
- **Cooperation between relevant authorities, both domestically and internationally, should be encouraged.** Such cooperation can be important to better ensure policy coherence, the efficient use of resources, and regulatory and investigative effectiveness. Potential ways of institutionalizing regulatory cooperation could be through technical assistance and capacity building, obligations to share information with other agencies, specific requirements for handling information relating to possible criminal wrongdoing, or participation in national or cross-border networks and initiatives.

In order to ensure that the regime envisaged by the LBI in Articles 6 and 8 is effective and properly enforced, we recommend that the IGWG consider ways to incorporate the points above in the next draft.

3. Conclusion

OHCHR’s Accountability and Remedy Project is relevant and can be of assistance to those negotiating the Third Revised Draft LBI. The ARP work was the result of an evidence-based, consultative process and has been welcomed by the Human Rights Council. OHCHR offers this work to the IGWG to support the discussions on the latest draft.
