

Relevant excerpts from the ARP III report and addendum regarding retaliation

[ARP III Addendum: A/HRC/44/32/Add.1](#)

Key Concepts: “Retaliation” refers to any harmful conduct undertaken in order to prevent or discourage a person from, or punish a person for, accessing, or interacting with, a non-State-based grievance mechanism. Retaliation can include physical, psychological and economic harm, can take place both online and offline and can be perpetrated by both State and non-State actors. Economic forms of retaliation can include negative actions connected with a person’s employment including demotion, disciplinary action, firing, salary reduction, job or shift reassignment, anti-union discrimination and blacklisting. The recommended action recognizes that, in addition to rights holders, retaliation may take place against “people who are associated with them”, which may include, depending on the context, family members, friends, colleagues, trade union and other representatives, human rights defenders, or any other person connected with a rights holder who may be a target for retaliation as a result of the rights holder’s actual or potential use of a mechanism. Additionally, retaliation may take place against “people who contribute to the effective functioning of [non-State-based grievance mechanisms]”, which may include, depending on the context, mechanism personnel, those providing services to a mechanism in a professional capacity (e.g. mediators, case workers, and interpreters), and others who may be called upon for assistance or information.

2. Protection from retaliation

15. Fear of retaliation poses a serious barrier to remedy. Protection from human rights abuses associated with the use of (or intended use of) non-State-based grievance mechanisms is encompassed by the State’s duty to protect human rights.

16. The recommended action highlights the importance of effective legal regimes to combat retaliation associated with the use of, or interactions with, non-State-based grievance mechanisms (2.1). For these purposes, retaliation is defined broadly, recognizing that rights holders may be deterred from interacting with non-State-based grievance mechanisms out of concern for the well-being or safety of others.

17. Robust criminal law regimes and law enforcement have a key role to play in deterring and punishing retaliatory behaviour. However, States should not neglect other potentially relevant regimes, including civil liability regimes, privacy laws, laws protecting fundamental labour rights, whistle-blower protection and freedom of expression.

18. Neither should States overlook the domestic legal regimes which may undermine rights holders’ ability to access and interact with non-State-based grievance mechanisms confidently and without fear of retaliation. Strategic lawsuits against public participation (SLAPP suits) are important to mention in this regard. A comprehensive and coherent strategy to address the risk of retaliation in this context will seek to address the tensions between different areas of law (such as may exist between laws on freedom of expression and laws on defamation) to find an accommodation that prevents the use of legal processes as a means of retaliation.

19. Human rights defenders will require additional legal protection due to the nature of their work. For instance, while safeguards to protect the identity of persons raising grievances may help to address the risk of retaliation in many contexts, this will not assist trade union representatives who work openly and in full view of employers and others.

20. Retaliatory behaviour (and the risks of the same) may not be obvious to law enforcement agencies, highlighting the need for greater institutional awareness of different forms that retaliation can take in practice (2.2). Institutional awareness can be enhanced through the establishment of specialist units, ongoing engagement with affected stakeholders (and particularly those who may be at heightened risk of vulnerability or marginalization), risk assessments and training. Such efforts should

promote a proper appreciation of the structural, sociocultural and economic issues that can underpin or exacerbate risks and the risks that arise in challenging operating contexts, such as conflict-affected areas or areas in transition from conflict.

21. Legal regimes and their enforcement (2.1), efforts to increase institutional awareness of relevant institutions (2.2) and measures to provide access to assistance and support (2.3) need to take account of the particular risks that may be faced by women and the way that entrenched social attitudes and discrimination can serve to exacerbate the physical, psychological and economic harm caused by retaliatory acts. The importance of engaging directly with, and drawing from the knowledge of, people who have experienced retaliation first hand as a result of their interactions with such grievance mechanisms cannot be over-stated.

2. Legitimacy

33. Policy objective 7 suggests ways stakeholder trust in non-State-based grievance mechanisms can be strengthened. Fostering a proper understanding among relevant stakeholders of the work of the mechanism is central to this (7.1). To this end, it is vitally important that the mechanism clearly explains what the mechanism can and cannot offer, recognizing that managing stakeholder expectations is a key aspect of gaining and retaining stakeholder trust. Developing and disseminating robust policies on safeguarding against retaliation, internal investigations and ethical matters (e.g. conflicts of interest) can also help to build stakeholder confidence in the mechanism.

38. Mechanisms should have suitably qualified personnel (7.7) who can discharge their responsibilities in a manner that fosters stakeholder trust (7.8). “Suitably qualified” is context-dependent but could mean (depending on the role in question) a knowledge of human rights and the corporate responsibility to respect human rights, expertise with respect to assessing and responding to risks of retaliation, experience with trauma counselling, and mediation and language skills. Mechanisms should invest in appropriate training to ensure that personnel keep up to date with relevant standards and best practices.

3. Accessibility

48. Mechanisms should act responsibly to address rights holder concerns about the possibility of retaliation, and to reduce risks of harm (8.9). Where confidentiality has been requested by a rights holder, or the circumstances of a case would otherwise make it necessary or appropriate, policies and processes should be in place to guard against disclosures of personal information (and any information which may be used to identify a person) without the relevant person’s explicit consent (ensuring that such consent will not be deemed to have been given unless the relevant person has been fully informed of the risks to themselves). In some cases, and especially where there are risks of retaliation, the need for accessibility may be best served by providing for the possibility of anonymous complaints, provided due process concerns are properly addressed.

49. The strategies needed to address the risks of retaliation (8.9(b)) will be context dependent, though could comprise suitable organizational policies (e.g. “zero tolerance” policies), case-specific risk assessment and mitigation plans, and providing advice as to steps people may take for their own personal safety.

4. Predictability

50. The need for clarity as to procedures and relevant timeframes is addressed in a series of elements under policy objective 9 (9.1 and 9.2). The methods for communicating such information will depend on the mechanism but may include both offline and online resources, disseminated through the communication channels mentioned above, and should be in the languages of relevant rights holders.

Information should be sufficiently detailed for rights holders to understand the grievance process and make an informed assessment of the mechanism's capacity to respond to the issues at hand (9.2(a) and 9.2(b)). In doing so it is important that such information is accurate and avoids overpromising with respect to the types and likelihood of remedies that might be delivered.

51. There may be circumstances where a mechanism seeks to cooperate with another mechanism (whether State-based or non-State-based) or a State agency. It is important for rights holders to be informed of the circumstances in which this might take place, when and how they will be consulted, and their rights (if any) to object (9.4(a)). The mechanism should take account of risks of retaliation from both State and non-State actors (9.4(b)) as a result of any such cooperation (see also 12.4).

52. Publishing information about, or databases including, past cases (e.g. types of claims, along with remedial outcomes and time frames) can enhance predictability of grievance processes (9.5). However, mechanisms will be subject to legal and other constraints, including with respect to protecting people from the risk of retaliation (see also 8.9).

6. Transparency

60. The mechanism's communications with the public (11.2) should aim for the maximum degree of transparency regarding its performance that is consistent with protecting rights holders and others from any risks to themselves (particularly from retaliation), and respecting commitments as regards confidentiality (including with respect to legitimate requirements of commercial confidentiality).

7. Rights-compatibility

67. The recommended action highlights the importance of building in systems for accountability of mechanisms for their remedial outcomes as an important aspect of rights-compatibility (12.3). If the mechanism engages with State agencies, precautions should be taken to avoid increasing the risk of retaliation against rights holders and others (12.4; see also 9.4). In this regard, there is a particular need for clear, considered and suitably robust policies and practice as regards actions taken in areas of weak governance, such as conflict-affected areas or areas in transition from conflict.

ARP III Report: A/HRC/44/32, Annex

Policy objective 1: States establish and maintain an enabling legal and policy environment for non-State-based grievance mechanisms dealing with business-related human rights harms.

1.7 State agencies responsible for regulating business activities make appropriate use of information from relevant non-State-based grievance mechanisms for the purposes of identifying, in consultation with relevant stakeholders and other entities:

- (a) Regulatory or compliance challenges in specific sectors or operating contexts, including challenges involving systemic or market-related issues;
- (b) Instances of retaliation taken in connection with the use of such mechanisms;
- (c) The legal or policy interventions and reforms that may be needed in response.

Policy objective 2: Domestic legal regimes and policy operate in such a way that rights holders can access non-State-based grievance mechanisms without fear of retaliation against themselves, people who are associated with them and people who contribute to the effective functioning of such mechanisms.

2.1 The State has adopted and implemented the necessary laws, policies and processes to ensure that there is effective deterrence from, investigations of allegations of, and appropriate legal redress in the event of, conduct that may amount to retaliation against rights holders, people who are associated with them and people who contribute to the effective functioning of non-State-based grievance mechanisms as a result of the use of, or interaction with, such mechanisms.

2.2 Relevant State agencies have taken steps to increase their institutional awareness of, and their ability to respond quickly and effectively to, the different forms of retaliation that people may face as a result of the use of, or interaction with, non-State-based grievance mechanisms.

2.3 The State has adopted and implemented the necessary laws, policies and processes to ensure that people affected by, or who may be at risk of, retaliation as a result of the use of, or interaction with, non-State-based grievance mechanisms have access to appropriate assistance and support, including medical assistance, counselling, legal advice and other advisory services.

Policy objective 7: Non-State-based grievance mechanisms are legitimate.

7.1 The mechanism publishes and proactively disseminates information necessary for a proper understanding by rights holders and other relevant stakeholders of its mandate, objectives and operations.

7.8 The mechanism adopts and implements the policies and processes needed to ensure that personnel engaged in the handling of grievances:

(a) Are cognizant of (i) the rights and needs of the people for whom the mechanism is intended (including through adopting a gender perspective and paying special attention to those at heightened risk of vulnerability or marginalization), (ii) the social, economic, structural and cultural issues that can affect the ability of the mechanism to meet those needs, and (iii) the manner in which different sources of discrimination can combine to exacerbate inequalities in society;

(b) Relate to rights holders in a culturally appropriate and sensitive manner.

Policy objective 8: Non-State-based grievance mechanisms are accessible.

8.9 The mechanism adopts and implements policies and processes appropriate to its mandate, objectives and operations:

(a) To preserve an appropriate degree of confidentiality as regards the identity of the person raising a grievance and the grievance process itself, taking into account the particular needs of people who may be at heightened risk of vulnerability or marginalization;

(b) To ensure that risks of retaliation against rights holders, people who are associated with them and people who contribute to the effective functioning of the mechanism as a result of the use of, or interaction with, the mechanism are properly assessed and addressed.

Policy objective 9: Non-State-based grievance mechanisms are predictable.

9.2 The mechanism publishes accurate and realistic information, through a range of user-friendly formats and multiple channels of communication, sufficient to foster a clear understanding among rights holders and other relevant stakeholders as to:

(f) The extent to which the mechanism can assist rights holders in cases where there may be a risk of retaliation, and the form such assistance may take.

9.4 The mechanism adopts, implements and appropriately communicates clear policies and processes as regards the circumstances in which and the terms upon which the mechanism may seek to cooperate with other non-State-based grievance mechanisms, State-based mechanisms, and/or State agencies with respect to a grievance (or the subject matter of a grievance), which clearly set out:

(a) When and how prior consent will first be sought from affected stakeholders;

(b) Appropriate safeguards relating to protecting people from the risk of retaliation.

9.5 To the extent appropriate in light of its mandate and functions (and with due regard for applicable laws and appropriate safeguards relating to protecting people from the risk of retaliation, as well as for legitimate requirements of commercial confidentiality), the mechanism publishes readily-understandable information relating to grievances received by the mechanism and their outcomes for the purposes of enhancing understanding by rights holders of the operation and performance of the mechanism in practice.

Policy objective 10: Non-State-based grievance mechanisms are equitable.

10.2 To the extent appropriate in light of its mandate and functions (and with due regard for applicable laws and appropriate safeguards relating to protecting people from the risk of retaliation, as well as for legitimate requirements of commercial confidentiality), the mechanism seeks to ensure that parties to a grievance can obtain, in a timely fashion:

(a) Copies of information submitted to or obtained by the mechanism in connection with, or which is relevant to, such grievance;

(b) Information concerning the outcomes of any investigation.

Policy objective 11: Non-State-based grievance mechanisms are transparent.

11.2 To the extent appropriate in light of its mandate and functions (and with due regard for applicable laws and appropriate safeguards relating to protecting people from the risk of retaliation, as well as for legitimate requirements of commercial confidentiality), the mechanism regularly communicates, through a range of different channels, statistics, case studies and/or other detailed information relevant to the mechanism's performance with a view to providing readily accessible information to the public on matters such as:

Policy objective 12: Non-State-based grievance mechanisms are rights-compatible.

12.3 The mechanism has made appropriate arrangements to address non-implementation of, or non-compliance with the terms of, remedial outcomes, which may include (depending on the mandate and functions of the mechanism concerned):

(c) Referral of the grievance to another mechanism (whether State-based or non-State-based) in accordance with applicable rules, policies and agreements as regards confidentiality and consent.

12.4 The mechanism has adopted and implemented the policies and processes needed to ensure that engagement with State agencies with respect to matters raised or information obtained in the course of a grievance process is undertaken in a manner:

(c) Best calculated to reduce the risk of retaliation against the relevant rights holders, people who are associated with them and people who contribute to the effective functioning of the mechanism, informed by a thorough risk assessment;

(d) Which complies with policies, and commitments or undertakings given to the relevant rights holders, with respect to confidentiality and protection of the personal safety and well-being of the rights holders concerned.

Policy objective 13: Non-State-based grievance mechanisms are a source of continuous learning.

13.2 The mechanism contributes to the prevention of future business-related human rights grievances and harms, as appropriate in light of the mandate and functions of the relevant mechanism, and with due regard for applicable laws and appropriate safeguards relating to protecting people from the risk of retaliation, as well as for legitimate requirements of commercial confidentiality, by:

(a) Contributing to and influencing the human rights due diligence activities of relevant business enterprises by acting as an authoritative and credible source of expertise as to (i) the nature of adverse human rights impacts that such business enterprises may cause or contribute to through their own activities, or which may be directly linked to their respective operations, products or services by their business relationships, (ii) how such impacts affect different groups in society, adopting a gender perspective and paying special attention to people who may be at heightened risk of vulnerability or marginalization, and (iii) the appropriate action to take in response, including the steps needed to subsequently verify whether risks of adverse human rights impacts are being properly addressed;

(b) Collating and disseminating information in aggregated formats (including through industry, multi-stakeholder and other collaborative initiatives) relating to (i) the nature and patterns of grievances that may tend to reveal the possibility of sector-specific or systemic issues which may contribute to or exacerbate business-related human rights harms, (ii) the human rights implications of these issues for different groups in society, adopting a gender perspective and paying special attention to people who may be at heightened risk of vulnerability or marginalization, and (iii) examples of good practices which can be adopted by business enterprises to enhance existing human rights due diligence processes.