

TO: Margaret Satterthwaite, United Nations Special Rapporteur on the independence of judges and lawyers

FROM: EarthRights International and Just Ground (point of contact: Shauna Curphey, shauna@justground.org)

DATE: May 5, 2023

RE: Call for input to IJL Legal Empowerment report

We welcome this opportunity to provide input on the upcoming thematic report on legal empowerment and other people-centered methods for achieving access to justice. [EarthRights International](#) is a global team of activists, campaigners, and legal strategists supporting frontline communities seeking to hold corporations accountable for the harms they impose on people and the planet. [Just Ground](#) is a research and advocacy project that seeks to advance the visions of communities working to address corporate activity that threatens or violates their human rights.

We write to address several of the questions presented in the call for input, particularly as they relate to our work in the field of business and human rights. Specifically, this submission:

1. Describes shortcomings of existing judicial and non-judicial systems in providing access to remedy when corporations have committed human rights abuses;
2. Explains community-driven operational grievance mechanisms (CD-OGMs) as an example of a legal empowerment modality that we are working together to advance in collaboration with rights holders; and
3. Discusses challenges in seeking to advance and implement this legal empowerment approach.

1. Barriers to Access to Remedy for Corporate Human Rights Abuses

The [United Nations Guiding Principles on Business and Human Rights](#) (UNGPs), which serve as the leading international framework for corporations' responsibility to respect human rights, recognizes that governments have a legal duty to ensure that when "abuses occur within their territory and/or jurisdiction those affected have

access to effective remedy.”¹ Yet, ten years after the endorsement of the UNGPs, rights holders “still face diverse systemic or procedural obstacles to accessing effective judicial remedies.”² Given the transnational nature of many corporate abuses and jurisdictional and procedural barriers to suing companies abroad, often the only available avenues for judicial remedy that rights holders have are those provided under the laws of the country where the harm occurred. However, courts in host countries can be inefficient, corrupt or reluctant to interfere with corporate activities. This “reflects fundamental problems regarding the rule of law, and the global trend does not support optimism. Reducing barriers to access to judicial remedy and access to justice remain an urgent need.”³

The UNGPs also recognize that, while effective judicial mechanisms are “at the core of ensuring access to remedy,” non-judicial mechanisms can also play an important role, and “may offer speed, reduced costs and/or transnational reach.”⁴ In particular, Principle 29 of the UNGPs requires that businesses “establish or participate in effective operational-level grievance mechanisms [OGMs] for individuals and communities who may be adversely impacted” by their activities.⁵ In practice, OGMs are often the only available or feasible means for rights holders to seek remedy.

The UNGPs also set forth eight “effectiveness criteria” for OGMs, including that they should be rights-compatible and based on engagement and dialogue.⁶ More recently, the UN Working Group on Business and Human Rights also emphasized that, “rights holders should be central to the entire remedy process,” and [recommended](#) that operational level mechanisms “should be at the service of rights holders, who should be consulted meaningfully in creating, designing, reforming and operating such mechanisms.”⁷

Corporations have in large part not followed this guidance, and the general consensus is that OGMs are failing to deliver rights-compatible remedies.⁸ The UN

¹ John Ruggie (Special Rep. of the Secretary-General. on the Issue of Hum. Rts and Transnat'l Corp. and Other Bus. Enter.), [Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework](#), Human Rights Council, ¶ 25 U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter UNGPs].

² UN General Assembly, Rep. of the Working Group on the Issue of Hum. Rts. and Transn'l Corp. and Other Bus. Enter., [Guiding Principles on Business and Human Rights at 10: taking stock of the first decade](#), ¶ 97, 19, U.N. Doc. A/HRC/47/39 (April 22, 2021).

³ U.N. Working Group on Bus. & Hum. Rts., [UNGPs 10+ A Roadmap for the Next Decade of Business and Human Rights](#) (2021), at 30 [hereinafter UNGPs 10+ Roadmap].

⁴ *Id.*

⁵ UNGPs, *supra*, note 1 at ¶ 29.

⁶ UNGPs *supra*, note 1 at ¶ 31.

⁷ UN General Assembly, Rep. of the Working Group on the Issue of Hum. Rts. and Transn'l Corp. and Other Bus. Enter., ¶ 21, U.N. Doc. [A/72/162](#) (July 18, 2017).

⁸ See, e.g., Katherine McDonnell, Morvarid Bagheri & Shauna Curphey, [Addressing Corporate Activity That Negatively Impacts Natural Resources: Community-Led Engagement as a Path to Rights Compatible Remedies](#), 49 Amer. Bar Assoc. Int'l L. News, 1 (Fall 2021); Mariëtte van

Working Group on Business and Human Rights has attributed this to “challenges relating to lack of trust and effectiveness in design, including in building gender-sensitive and culturally appropriate mechanisms, and to challenges of effective transparency and monitoring.”⁹

To these we would add, based on our experience with OGMs, the following additional challenges:

- *Imbalances in bargaining power.* Filing a complaint with an OGM can require significant time, resources, and trade-offs for rights holders, particularly where serious abuses have occurred and multiple actors have contributed to the harm. Companies have significantly more money, access to information, and negotiation experience, while rights holders tend to have little leverage and more at stake.
- *Exclusion of rights holders in the design.* Despite an increasing emphasis on centering rights holders in the entire remedy process, OGMs continue to primarily be created and operated by companies.
- *Limited scope and mandates of OGMs.* Not all OGMs perceive provision of remedy as their function or purpose and instead focus on dialogue or mediation. When a mechanism does not clarify its limitations, it can cause confusion, frustration and material loss for rights holders.
- *Poor institutional design.* OGMs are almost always non-binding, and they allow the company – the party responsible for the harms – to control the OGM without oversight. This provides little incentive for companies to follow through on remedies even in instances where they promise to provide them.
- *Contested perceptions of value.* The effectiveness of a remedy should be judged by the perspective of the rights holder, but the failure, or refusal, of a company to understand that perspective undermines the possibility of effective remedy. This is particularly relevant in the context of natural resource-related harms, where calculations must include the social and cultural value attached to the area and the effects on livelihoods and generational losses.

Huijstee & Joseph Wilde-Ramsing, [Remedy Is the Reason: Non-judicial Grievance Mechanisms and Access to Remedy](#), at 485 in Research Handbook on Human Rights and Business (Surya Deva & David Birchall eds., 2020); May Miller-Dawkins, Kate Macdonald & Shelley Marshall, [Beyond Effectiveness Criteria: The Possibilities and Limits of Transnational Non-Judicial Redress Mechanisms](#) 6 (2016); Joanne Bauer et al., [What is Remedy for Corporate Human Rights Abuses? Listening to Community Voices, A Field Report](#) 47, 49 (2015).

⁹ UNGPs 10+ Roadmap, *supra* note 3, at 30.

Despite these flaws, OGMs are nonetheless becoming a permanent part of the remedy landscape in business and human rights. And in some situations, as explained above, they may be the only viable option for seeking remedy. In response to these challenges, in addition to the UN Working Group on Business and Human Rights, there are increasing calls for centering rights holders in the context of remedy.¹⁰

2. Community-Driven Operational Grievance Mechanisms (CD-OGMs)

In 2014, EarthRights International began developing a model for CD-OGMs. The model is informed in large part by working alongside community leaders in Myanmar as they designed and advocated for a CD-OGM. The CD-OGM model seeks to confront and upend the existing structures and exercises of power that top-down OGMs create and reinforce. It is premised on the fact that rights holders – those who will use the OGM – are best-placed to identify what the OGM they will use should look like, and are entitled to have that input taken seriously.

Rather than rely on top-down, one-off engagement or other limited avenues for rights holders to provide input, in the CD-OGM model the community drives the process by deciding:

- What the OGM should look like – proposing the scope of harms it will cover and the remedies available, the process steps, and the parties who will run it;
- What measures should be in place to provide oversight and ensure actual provision of remedy;
- The type and extent of engagement with the company and the level of their own involvement in the OGM itself;
- How information on the CD-OGM will be shared with, and feedback collected from, complainants who use the OGM, potentially impacted rights holders who may use it in the future, and other relevant parties.

This community-driven approach to OGMs can help counter many of the shortcomings of existing OGMs. In the CD-OGM model, rights holders can make it clear that the purpose of an OGM is to provide remedy, insist on a process that

¹⁰ See, e.g., UNGPs 10+ Roadmap, *supra* note 3, at 31; Int'l Comm'n Of Jurists, [Effective Operational-level Grievance Mechanisms](#) (2019); Int'l Council On Mining And Metals, [Handling and Resolving Local-Level Concerns and Grievances](#) 16 (2019); Rep. of the UN High Comm'r Hum. Rts., [Improving Accountability And Access To Remedy For Victims Of Business-Related Human Rights Abuse Through Non-State-Based Grievance Mechanisms](#), 11, U.N. Doc. A/44/32, (May 19, 2017).

reflects that, and demand respect within the remedy-seeking process. This has the potential to drive institutional changes.

Even in situations where companies do not embrace a CD-OGM in full, the process of designing and advocating for a CD-OGM may also help communities to:

- Improve an existing but flawed, top-down OGM;
- Establish an OGM where one did not exist before, that includes at least the key priorities identified by the community in the CD-OGM;
- Identify processes, remedies, implementation measures and oversight and monitoring procedures that may inform a community's position in mediation as a part of other alternative dispute resolution or accountability mechanisms, and improve their negotiating power in those dialogues;
- Establish evidence of a company's failure to implement an adequate OGM, which may be used in other accountability mechanisms, litigation or public campaigns for remediation.

This model captures the spirit of community-led human rights advocacy and it embodies the UN Working Group's advice on centering rights holders. The rights-holders themselves play the leading role in developing a new route to accessing remedy. It is a two-way exchange of knowledge in which rights holders and practitioners work together to strategize, but the decisions are always made by the rights holders.

The role of the supporting legal empowerment practitioner is to help facilitate, share examples, and assist in translating the knowledge that the rights holders have into a framing that companies understand.

3. Challenges in Seeking To Implement the CD-OGM Model

The CD-OGM model has significant potential to improve access to remedy, but rights holders and supporting practitioners seeking to implement this approach face several challenges. These include, but are not limited to:

- *Lack of Company Willingness to Participate.* A major limitation to implementing a CD-OGM is that the company has to agree to participate in, or at least abide by, the CD-OGM if it is to provide remedy. When companies are reticent, communities may have to campaign to exert external pressure, which can be challenging and time-consuming, particularly in scenarios where there are limited points of leverage over the company.

- *Epistemic Injustice.* Even when company representatives are willing to negotiate, they may be unable or unwilling to understand and take seriously rights holder perspectives and expertise.
- *Lack of Good Faith.* Companies may negotiate with rights holders with a focus on risks to business, rather than providing rights-compatible remedy. They may employ tactics such as introducing or exacerbating divisions within the community; employing a take-it-or-leave-it approach; or otherwise engaging solely to legitimize decisions they have already made. These may wear down community resolve while at the same time making the company seem, at least outwardly, as if they are taking action to address the harm.
- *Risks of Reprisal.* If there are reprisal risks to rights holders, especially those whose anonymity may be hard to maintain if they are involved in the design or implementation of a CD-OGM, the environment may not be safe enough to pursue one.
- *Time and Resources.* The community-led process of designing an OGM can entail a significant time commitment, for workshops and meetings, outreach, and the accompanying efforts to be inclusive – such as holding multiple meetings to ensure that everyone, including traditionally marginalized groups, are able to participate. Negotiation with the company can also take time, depending on how collaborative the company is willing to be. If the company is not willing to negotiate, then advocacy efforts to gain more leverage can be time consuming as well. Finally, the CD-OGM requires financial resources both to run it and to fund financial compensation or other forms of remedy that entail costs.

While these challenges are daunting, we hope that by continuing to promote CD-OGMs, more rights holders will assert their right to remedy through CD-OGMs and more companies will be aware of and open to this approach, with the result that rights holders will be able to access meaningful remedy. Toward that end, we are grateful for this opportunity to share the CD-OGM model as an input to the upcoming report on legal empowerment.