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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Summary of consultations on enhancing access to remedy in the technology sector and on the enforcement of human rights due diligence

Report of the United Nations High Commissioner for Human Rights*

Summary

The present document has been compiled as part of the Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights, pursuant to the request of the Human Rights Council in its resolution 44/15. In that resolution, the Council requested the United Nations High Commissioner for Human Rights to convene two consultations involving representatives of States and other stakeholders to discuss challenges, good practices and lessons learned in enhancing access to remedy for victims of business-related human rights abuse.

The document provides details from the two multi-stakeholder consultations convened pursuant to Council resolution 44/15. The first consultation focused on access to remedy in the technology sector; the second explored the links between human rights due diligence, accountability and access to remedy.

The present document complements the report of the High Commissioner in which she provides an overview of the Accountability and Remedy Project and the activities undertaken during its fourth phase, examples of good practices in implementing the recommended actions from the project, and recommendations on how the project can contribute further to enhancing accountability and access to remedy for business-related human rights harms (A/HRC/50/45).

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I. Introduction

1. The Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights (OHCHR) aims to deliver credible and workable recommendations for enhancing accountability and access to remedy in cases of business-related human rights abuse.[1] Since 2014, the Human Rights Council has adopted four resolutions requesting OHCHR to engage in this work.[2]

2. In resolution 44/15, the Council requested the High Commissioner to convene two consultations involving representatives of States and other stakeholders to discuss challenges, good practices and lessons learned in enhancing access to remedy for victims of business-related human rights abuse. In response to that request, OHCHR convened (i) a consultation on 23-24 September 2021 focusing on enhancing access to remedy in the technology sector, and (ii) a consultation on 3-4 March 2022 exploring the links between human rights due diligence, accountability and access to remedy.

3. The present addendum provides an overview of those consultations and the discussions that took place during those events. The document complements a report that covers the Accountability and Remedy Project and the activities undertaken during its fourth phase, examples of good practices in implementing the recommended actions from the project and recommendations for how the project can further contribute to enhancing accountability and access to remedy for business-related human rights harms.[3]

II. Consultation on Enhancing Access to Remedy in the Technology Sector

4. The Guiding Principles on Business and Human Rights offer States, technology companies, investors and advocacy organizations a robust and credible framework for preventing and remedying human rights harms resulting from the use of technologies.[4] Since the launch of the OHCHR B-Tech Project in 2019,[5] the Accountability and Remedy Project team has worked closely with the B-Tech team on the need for there to be effective remedies for business-related human rights harms in relation to digital technologies. In early 2021, a series of foundational papers on access to remedy and the technology sector was released on:

(a) Basic concepts and principles;[6]

(b) The "remedy ecosystem" approach;[7]

(c) Developing and implementing effective company-based grievance mechanisms;[8]

(d) Understanding the perspectives and needs of affected people and groups.[9]

5. To further explore this area of work, and in response to the mandate in Human Rights Council resolution 44/15, OHCHR organized a consultation on 23-24 September 2021 to

[1] See A/HRC/50/45, paras. 1–4 for background on the project.
[2] See resolutions 26/22, 32/10, 38/13 and 44/15.
[3] A/HRC/50/45.
[4] For more information about the practical application of the Guiding Principles to the activities of technology companies, see A/HRC/50/56.
[5] The B-Tech Project seeks to ensure respect for human rights in the development, deployment and use of digital technologies through the uptake and implementation of the Guiding Principles by digital technology companies. See www.ohchr.org/en/business-and-human-rights/b-tech-project.
[6] www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/access-to-remedy-concepts-and-principles.pdf.
[7] www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/access-to-remedy-ecosystem-approach.pdf.
[8] www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/access-to-remedy-company-based-grievance-mechanisms.pdf.
[9] www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/access-to-remedy-perspectives-needs-affected-people.pdf.

provide an opportunity for States, experts, civil society and other stakeholders to discuss the challenges involved in seeking and delivering remedies for harms connected to the technology sector and practical ways to address them.[10] More than 40 panellists and 200 registered participants shared their insights during sessions on:

(a) Remedying adverse human rights impacts of technology companies through the courts;[11]

(b) State-based non-judicial mechanisms and their contribution to access to remedy in cases of technology-related human rights abuses;[12]

(c) Understanding the perspectives and needs of affected stakeholders when attempting to seek remedies;[13]

(d) The role of technology companies in remedying human rights harms connected to their products and services.[14]

6. This addendum provides an overview of these discussions. Further details are available in a separate summary report[15] and through the recordings of the sessions.[16]

A. Remedying adverse human rights impacts of technology companies through the courts

7. This session explored the extent to which courts have been used as a way of obtaining remedies for human rights harms arising from or connected with the activities of technology companies. The discussion was divided into three distinct parts in order to examine different relevant issues in this area.

1. Part I: Remedying adverse human rights impacts arising from digital technologies: What roles do courts currently play?

8. The first part focused on general trends, including regarding the types of cases brought to courts, where such cases were being brought, by whom, and for what sort of relief.

9. Jennifer Zerk (Consultant, OHCHR Accountability and Remedy Project) moderated the panel composed of Kebene Wodajo (Senior Research Fellow, University of St. Gallen) and Susie Alegre (Interception of Communications Commissioner for the Isle of Man).

10. Based on a high-level review of cases referred to judicial mechanisms in recent years, a number of general features and trends were observed. For instance, there was an increasing diversity of jurisdictions with cases involving allegations of technology-related harms. Relatively speaking, few of those cases involved public enforcement by regulatory or law enforcement bodies; thus, the importance of providing options for private enforcement of legal standards was stressed. While there was a diversity of remedies sought by claimants, a relatively large number of claims sought preventative remedies. It was also noted that given the complexity of these types of cases, civil society organizations had been a vital source of advice and support for claimants and had been increasingly representing affected groups in legal cases.

11. Much of the discussion centered on the “patchiness” of coverage of different types of human rights in domestic legal regimes relating to the technology sector. Although regimes existed that protected the right to privacy (which accounted for a relatively high number of court cases in this field), many rights were only partially covered, not vigorously protected by the authorities, or overlooked altogether.

[10] See www.ohchr.org/sites/default/files/Documents/Issues/Business/B-Tech/a2r-tech-consultation-cn-agenda.pdf.
[11] A recording of this session is available at https://vimeo.com/654157095.
[12] A recording of this session is available at https://vimeo.com/654421760.
[13] A recording of this session is available at https://vimeo.com/654439661.
[14] A recording of this session is available at https://vimeo.com/654490551.
[15] www.ohchr.org/sites/default/files/2022-03/A2R_in_tech_consultation_report.pdf.
[16] See notes 11-14 above.

12. Several participants described the challenges that practitioners faced in identifying a cause of action that mapped sufficiently well onto the type of human rights harms that had been suffered as a result of the use of digital technologies, or the manner in which they had been designed or developed. Examples of attempts in different jurisdictions to seek remedies for adverse impacts on freedom of thought were discussed in this light. While some jurisdictions were receptive to constitutional claims in this area, a lack of clear underpinnings on the freedom of thought in other domestic legal regimes was a clear barrier to remedy.

13. Participants also discussed examples of "collective" and "societal" harm that resulted from the design or use of digital technologies, noting that these were particularly difficult to address in courts in jurisdictions where legal theories and causes of action focused on harms to individuals.

14. It was noted that although courts played a vital role in clarifying companies' legal responsibilities, there were constitutional limits to the extent that they could correct flaws and fill gaps in underlying domestic legislative regimes. Thus, participants stressed a need for more clearly-articulated legal regimes and causes of action, based on a better understanding of how digital technologies could impact the full range of human rights.

2. Part II: Defending human rights in the courts: Two case studies

15. The second part of the session focused on the experiences of legal practitioners who had worked on legal cases arising from alleged technology-related human rights harms. This discussion encompassed attempts by individuals to initiate legal actions that would result in enforcement of public law standards by judicial bodies, as well as the seeking of remedies directly from technology companies through civil claims.

16. Ana Beduschi (Associate Professor, University of Exeter and Senior Research Fellow, Geneva Academy of International Humanitarian Law and Human Rights) moderated the panel composed of Ravi Naik (Legal Director, AWO Agency), Cassie Roddy-Mullineaux (Solicitor, AWO Agency), and Solomon Okedara (Barrister and Solicitor of the Supreme Court of Nigeria and Founder, Expression Now).

17. Participants raised the related problems of technical complexity and legal uncertainty (i.e., about how the law would respond to specific instances of alleged technology-related human rights harms) as being at the root of many other barriers to remedy (particularly financial barriers). Uncertainties surrounding the geographical scope of some regimes, and their application to cross-border activities and human rights impacts, could further complicate the task of advising affected people on their legal options and deciding upon the best remediation strategies, adding to delays and legal costs. Participants also highlighted how "information gaps" between technology companies and affected individuals could be particularly acute with respect to technology-related harms. For example, affected people struggled to access information about algorithmic decision-making in order to properly analyse its relevance to the harms they had suffered, or were at a disadvantage in understanding the different ways in which personal information might have been used. Participants discussed how a lack of transparency on these issues could add substantially to financial and other risks when resorting to judicial actions (particularly in jurisdictions with the loser pays principle).

18. Participants also discussed the interrelationships that existed between the role of courts and that of regulators, including the vital role played by courts as both a reviewer and enforcer of regulatory action. However, some participants raised concerns about a lack of awareness among many regulators of the human rights principles and standards relevant to their work, which made it difficult for affected people to persuade regulators and law enforcement bodies of the need take swift action and the human rights imperatives to do so. This was held by participants to be a problem especially in contexts where there was a lack of policy coherence from the relevant State with respect to human rights issues relevant to the technology sector.

3. Part III: Courts and technology

19. In the third part of the session, participants were invited to comment on how well courts were responding in legal cases involving technology companies and advanced digital

technologies, the different factors that might constrain the ability of courts (and individual members of the judiciary) to robustly interrogate and respond to allegations of technology-related harms, and how to address those challenges.

20. Jennifer Zerk moderated the panel composed of Derya Durlu Gürzumar (Chair, Alternative and New Law Business Structures Committee, International Bar Association) and Michael Veale (Associate Professor, University College London).

21. It was noted that while gaps in understanding by judges of technical aspects of certain digital products had created challenges and inefficiencies, these were narrowing as judges became more familiar with digital technologies. Participants highlighted the positive impacts of different training and awareness raising activities but stressed that greater investment and support was needed, particularly in jurisdictions where judges faced a chronic shortage of resources.

22. Participants also discussed some emerging concerns relevant to judicial confidence and the implications of a growing trend in favor of outsourcing certain regulatory and security functions to technology companies. Some participants suggested that this might affect the way that courts weighed up their options to intervene in the future, likely causing them to favor more conservative options because of the desire to avoid creating lacunae in what could be regarded as essential (and in many cases cross-border) infrastructure. It was suggested that, given the level of reliance by society on digital technologies, such judicial interventions (e.g., enforcement action requiring restructuring or closure of operations) might have human rights implications that would need to be carefully weighed.

B. State-based non-judicial mechanisms and their contribution to access to remedy in cases of technology-related human rights abuses

23. This session addressed the role that State-based non-judicial grievance mechanisms could play in complementing and supplementing judicial mechanisms in addressing technology-related human rights abuse. The session was split into two parts, one focusing on national human rights institutions, and one focusing on national contact points under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.

1. Part I: The role and contributions of national human rights institutions to access to remedy

24. The first part of the session focused on strengthening the competencies and capacities of national human rights institutions such that they could play a meaningful role in access to remedy for abuses relating to technology companies.

25. Deniz Utlu (Chair, Business and human rights working group of the Global Alliance for National Human Rights Institutions) moderated the panel composed of Surya Deva (Chair, Working Group on business and human rights), Zoe Paleologos (Senior Policy Adviser, Australian Human Rights Commission), Khalid Ramli (Acting Director on Cooperation and International Relations, National Human Rights Institute of Morocco), Sebastian Smart (Regional Director, National Human Rights Institute of Chile), Line Gamrath Rasmussen (Special Advisor on Good eGovernance, Danish Institute for Human Rights), and Maximilian Spohr (E-Government & Public Sector Digitalization Expert, Berlin Data Protection Authority).

26. Participants acknowledged that there was a need for greater awareness by national human rights institutions of the specific challenges posed by the conduct of technology companies in relation to human rights, including in relation to cross-border cases. While limited resources and/or capacity constraints often made it difficult to enhance such awareness, there were a number of promising practices. For instance, the national human rights institutions of Australia and Morocco shared recent initiatives focusing on human rights and technology, including in relation to artificial intelligence and the role of technology in elections.

27. Participants also discussed raising awareness about the ways in which rights-holders could seek remedy through State-based non-judicial mechanisms. Within this context, the importance of confidentiality and data protection was stressed. The national human rights institution of Chile shared work being undertaken in this regard, which would pave the way for safer access to remedy.

28. Discussions also centered around different ways in which capacity building and cooperation could take place. The Danish Institute for Business and Human Rights shared efforts done internally to develop a strategy on business and human rights in the technology space. Participants also highlighted the ways in which national human rights institutions could work with other entities, such as data protection authorities, to leverage different institutional strengths. For instance, combining the human rights expertise of national human rights institutions with the enforcement powers of data protection authorities could enhance efforts in addressing privacy-related human rights harms. Additionally, participants highlighted the usefulness of greater exchange among national human rights institutions, which could be facilitated through the Global Alliance for National Human Rights Institutions.

2. Part II: The challenges and opportunities national contact points face in facilitating access to remedy

29. The second part of the session looked specifically at the role of the national contact point system under the OECD Guidelines for Multinational Enterprises.

30. Nicolas Hachez (Manager, OECD Centre for Responsible Business Conduct) moderated a panel composed of Rosie Sharpe (Campaigner, Global Witness), Joris Oldenziel (Member, Dutch National Contact Point), and John Southalan (Independent Examiner, Australian National Contact Point).

31. Participants discussed advantages and limitations to seeking remedy through national contact points, mechanisms set up in countries adhering to the OECD Guidelines whose role included contributing to the resolution of issues that might arise from the alleged non-observance of the guidelines in specific instances. It was noted that national contact points across different jurisdictions had seen increases in cases relating to digital technologies. Participants highlighted that specific instances could be initiated by any interested party, such as consumer groups and other civil society organizations; this helped overcome a common barrier to remedy in technology-related cases given the difficulties in some cases with identifying individuals harmed. Participants also noted the ability of national contact points to address cross-border cases (common in certain technology-related harms), as specific instances could be initiated in home States regardless of where impacts might have occurred. While limitations in the mandates and powers of certain mechanisms could raise challenges in certain jurisdictions, it was highlighted that remedial strategies that made linkages to and engaged multiple mechanisms could lead to better outcomes for rights-holders.

3. Key takeaways

32. Following the two parts of this session, Serge Biggoer (Researcher and PhD Candidate, University of Zurich) and Jennifer Zerk shared their key takeaways and conclusions from the discussions.

33. It was noted that, even if State-based non-judicial mechanisms did not have the powers or mandates to deliver fully effective remedies in all cases, mechanisms still could do a lot to contribute to the broader remedy ecosystem in practice. Participants highlighted that national human rights institutions had carried out research about the human rights impacts of digital technologies, informed policy discussions, helped influence regulatory design, facilitated collaboration amongst many relevant actors, and raised public awareness about harms stemming from the use of digital technologies. It was also highlighted that OECD national contact points had offered a highly flexible and adaptable system for raising complaints about technology-related human rights harms, which could be invoked in addition to, or instead of, more formal legal enforcement processes.

C. Understanding the perspectives and needs of affected stakeholders when attempting to seek remedies

34. The third session of the consultation was devoted entirely to the experiences of affected stakeholders when attempting to seek remedies for human rights harms arising from technology products and services. It was divided into two parts. The first part focused on global and regional trends and patterns, whereas the second part explored a number of case studies.

1. Part I: Global and regional perspectives, trends and patterns

35. The first part of the session focused on the types of harms and barriers to remedy faced by affected stakeholders in different parts of the world.

36. Isabel Ebert (Consultant, OHCHR B-Tech Project) and Nathalie Stadelmann (Human Rights Officer, Business and Human Rights Unit, OHCHR) co-moderated a panel composed of Marianela Milanes (Project Manager, Asociación por los derechos civiles), Bárbara Simão (Head of Privacy and Vigilance, Internet Lab), Wahyudi Djafar (Executive Director, Institute for Policy Research and Advocacy (ELSAM)), Ioannis Kouvakas (Legal Officer, Privacy International), Bochra Belhaj Hmida (Chair, Association tunisienne des femmes démocrates), Henry Peck (Technology and Human Rights Researcher, Business & Human Rights Resource Centre), Natalia Krapiva (Tech Legal Counsel, Access Now), and Janine Moussa (Co-director, The Due Diligence Project).

37. Participants discussed a number of human rights issues arising in relation to digital technologies. For instance, the use of facial recognition, together with algorithmic decision-making, in policing had led to instances of false positive identifications, resulting in arbitrary deprivations of liberty. The surveillance capabilities of such technologies had also impacted on the rights to privacy, assembly and expression.

38. Participants also highlighted the different and sometimes disproportionate impacts experienced by different groups, and particularly those at heightened risk of vulnerability or marginalization. It was noted that certain populations (e.g., migrants) faced heightened risks from the irresponsible use of facial recognition by governments. An example was shared where the use of online tools to determine eligibility of social benefits had disproportionately impacted indigenous peoples who did not speak the official language of the State and did not have sufficient access to the internet. Participants also discussed the various issues faced by women and girls, particularly in relation to online violence.

39. The online threats facing civil society organizations were also considered, such as harassment, surveillance, censorship, account compromises, malware, and distributed denial-of-service attacks. Such actions had shrunk civic space, and it was highlighted that civil society organizations often lacked the resources or technical expertise to address such threats.

40. Meeting participants shared their experiences seeking remedy for the above harms and the various barriers they faced. Sometimes, it was difficult for rights-holders to even know their rights were undermined (for instance, when personal data had been leaked). Even when rights-holders were aware that they were harmed, the complexity of and lack of transparency in the technology sector often made it difficult to identify who was responsible for the harm. And even if a harm and responsible party were identified, rights-holders often struggled to know which remedy avenues were available, as relevant mechanisms were hard to identify and/or the transnational nature of harms made certain mechanisms reluctant to address the issues. Given the complexity of such cases, remedial processes were often lengthy, and rights-holders lacked the resources needed to see a case to the end. All of this contributed to a lack of trust in judicial and other remedial mechanisms.

41. Participants noted that some barriers could be addressed through greater clarity in legal regimes (aligned with international human rights standards), greater clarity as to the avenues open to remedy seekers and how to use them, capacity building of regulatory and enforcement bodies and judges (e.g., to enhance understanding of complex technology-related issues), increased cooperation among law enforcement as well as civil society, and

enhanced understanding of the gendered aspects of technology-related human rights harms and access to remedy.

2. Part II: Case studies

42. The second part of the session was an open discussion among all meeting participants about different hypothetical case studies.[17]

43. The session was moderated by Richard Wingfield (Head of Legal, Global Partners Digital).

44. The first case study concerned the use of artificial intelligence and automated decision-making in the criminal justice system. Participants highlighted the need to be conscious of gender and racial bias in such technologies, as well as the benefits of involving (potentially) affected groups in the design of such systems. Certain access to remedy challenges could be addressed if there were more transparency as regards how the technologies had been used and the contracts between governments and companies.

45. The second case study concerned a sensitive data leak putting lesbian, gay, bisexual, transgender, and intersex people at risk. Companies were urged to better understand how their products might ultimately harm users – for instance, sharing sensitive personal data with third parties, or not properly securing such data, could lead to serious risks for certain people in repressive States. It was stressed that user-friendly, accessible mechanisms could help address issues early.

46. The third case study concerned online gender-based violence. Participants highlighted the importance of removing harmful online content immediately and suggested borrowing approaches from other more-developed areas, such as counter-terrorism. While increased legal protections would be helpful, participants noted this was not sufficient; there was also a need for increased political will and preventative measures to address online harassment and violence against women and girls.

D. The role of technology companies in remedying human rights harms connected to their products and services

47. The final session of the consultation focused on the role that technology companies could and should play in remedying harms to human rights that were connected to their products and services. The discussion was divided into two parts. The first part framed the issue and presented the objectives of the session. The second part covered the experiences of practitioners within and outside of companies.

1. Part I: Welcome, Framing and Objectives

48. The first part of the session was led by Mark Hodge (Consultant, OHCHR B-Tech Project) and Sabrina Rau (Senior Research Officer, Human Rights, Big Data and Technology Project, University of Essex). In this framing session, participants were reminded of the expectations enshrined in the Guiding Principles regarding the responsibilities of companies to actively engage in remediation when they identified that they had caused or contributed to harm. Establishing or participating in company-based grievance mechanisms was an important way in which technology companies could play their part in delivering remedies to people and communities adversely affected by their products and services, and companies could look to the guidance from the Accountability and Remedy Project as to how to ensure their mechanisms were effective.[18] However, it was also stressed that meaningful outcomes for rights-holders could sometimes be better achieved through remedy processes that were not company-based, and companies were reminded of their responsibility to cooperate with legitimate remediation processes (both judicial and non-judicial).

[17] The case studies are available at www.ohchr.org/Documents/Issues/Business/a2r-tech-consultation-session-3-case-studies.pdf.

[18] See www.ohchr.org/sites/default/files/2022-01/arp-note-meeting-effectiveness-criteria.pdf.

2. Part II: The role of technology companies in remedy: Practices and challenges

49. The second part of the session was devoted to how technology companies had been involved in remedy efforts in practice.

50. Mark Hodge moderated the panel composed of Pamela Wood (Manager, Human Rights and Social Responsibility, Hewlett Packard Enterprise), Lorna McGregor (Director, Human Rights, Big Data and Technology Project, University of Essex), Isedua Oribhabor (Business and Human Rights Lead, Access Now), David Kovick (Senior Advisor, Shift), Jason Pielemeier (Policy & Strategy Director, Global Network Initiative), and Sarah Altschuller (Business and Human Rights Counsel, Verizon).

51. Participants noted that technology companies faced many of the same issues and challenges as companies in other sectors and stressed that all human rights could be harmed by technology companies, not just rights regarding privacy and freedom of expression (which tended to get disproportionate focus). At the same time, there were certain novel aspects of the technology sector given its specialization and far-reaching products, which could lead to a very diverse range of potentially affected stakeholders.

52. Several company participants acknowledged the challenges regarding the scope of harms and potential stakeholders, as well as the complexity of relevant remedy ecosystems in which they operated. Those participants shared that they consequently administered a wide set of company-based grievance mechanisms to address different types of complaints from different types of affected stakeholders. The importance of ensuring that there was real human engagement at some point within the grievance system was noted, as well as the benefits of having a proactive approach to grievance mechanisms which involved engagement with potentially affected stakeholders.

53. Building on this last point, participants highlighted the value of companies preparing for remedy, as opposed to scrambling for solutions once negative impacts had occurred. While a robust human rights due diligence process would be unable to avoid all negative impacts, it should equip companies and their stakeholders to know what the likely harms might be that would need to be remedied. Thus, companies would benefit from preparing for how to address (at least) the more severe harms, including by building leverage with relevant partners (e.g., through contractual and other types of commitments) to encourage them to remediate harms with which they might be subsequently involved. In short, it was suggested that companies have a playbook about how to pursue remedy in relation to their most salient human rights issues and high-risk partners.

III. Consultation Exploring the Links between Human Rights Due Diligence, Accountability and Access to Remedy

54. Recent years have seen an increasing number of legislative regimes adopted and proposals put forward on the subject of human rights due diligence.[19] Through the Accountability and Remedy Project, OHCHR has contributed to this rapidly evolving policy debate in various ways. In 2018, it published a report examining the relationship between human rights due diligence (as described in the Guiding Principles) and determinations of corporate liability, which outlined various ways in which the exercise of such due diligence could be relevant in judicial decision-making.[20] Since then, OHCHR has produced several papers designed to help policymakers navigate the many complex policy choices and trade-offs that could arise in designing legal regimes of this nature.[21]

55. Following up on this work, and in response to the mandate in Human Rights Council resolution 44/15, OHCHR organized a consultation to explore the links between human rights

[19] See, e.g., www.business-humanrights.org/en/big-issues/mandatory-due-diligence/national-regional-developments-on-mhrdd/; https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

[20] A/HRC/38/20/Add.2.

[21] See www.ohchr.org/en/business/ohchr-accountability-and-remedy-project/phase4-accessibility-dissemination-implementation#documents.

due diligence, accountability and access to remedy, which took place on 3-4 March 2022.[22] The aim of the consultation was to hear from diverse stakeholders about the various ways in which human rights due diligence regimes could enhance accountability and access to remedy for business-related human rights harms around the world and to clarify emerging areas of challenge and concern. Over the course of two days, more than 30 panellists participated in four sessions, which examined:

(a) Global developments and trends;

(b) The role of courts;

(c) The role of administrative supervision;

(d) Human rights due diligence regimes and private grievance mechanisms.[23]

56. Nearly 300 people registered for the event, representing States, civil society, business and other relevant stakeholders. Additionally, the public had an opportunity to feed into the consultation through a call for input released ahead of the event.[24]

A. Global developments and trends

57. The first session of the consultation provided some "scene-setting" for the subsequent sessions by examining the key drivers for human rights due diligence regimes, developments at the international, regional, and domestic levels, and the impact of those regimes on the wider remedy ecosystem.

58. Lene Wendland (Chief, Business and Human Rights Unit, OHCHR) moderated a panel composed of Jennifer Zerk (Consultant, OHCHR Accountability and Remedy Project), Ambassador Emilio Rafael Izquierdo Miño (Permanent Representative of Ecuador to the United Nations Office at Geneva and Chair-Rapporteur of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights), Lara Wolters (Member of European Parliament and Vice-Chair of the Committee on Legal Affairs), Lissa Bettzieche (Senior Legal Advisor, German Institute for Human Rights), Phil Bloomer (Executive Director, Business & Human Rights Resource Centre), Matthias Thorns (Deputy Secretary-General, International Organisation of Employers), Kalpona Akter (Founding Member and Executive Director, Bangladesh Centre for Worker Solidarity), Arnold Kwesiga (Manager Business and Human Rights, Centre for Human Rights, University of Pretoria), and Surya Deva (Member, Working Group on business and human rights).

59. Participants noted the many strategic, legal, structural and resource-related factors that needed to be taken into account when designing human rights due diligence regimes and the consequent differences in regulatory approaches observed thus far. Details were shared about the draft legally binding instrument being negotiated at the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights (at the international level),[25] the European Commission's proposal for a draft directive on corporate sustainability due diligence (at the regional level),[26] and the German Act on Corporate Due Diligence Obligations for the Prevention of Human Rights Violations in Supply Chains (at the national level).[27] Participants discussed some strengths of those initiatives and the benefits of developing standards at the multilateral level (e.g., as it could lead to greater legal certainty and consistency across jurisdictions). Shortcomings were also

[22] See www.ohchr.org/sites/default/files/2022-01/consultation-arp-hrdd-cn-agenda.pdf.

[23] A recording of the event is available at https://vimeo.com/showcase/9339013.

[24] A compilation of inputs received in relation to the consultation is available at www.ohchr.org/sites/default/files/2022-05/consultation-arp-hrdd-cfi-responses.pdf.

[25] www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.

[26] On 23 February 2022, the European Commission released its proposal for a directive on Corporate Sustainability Due Diligence. https://ec.europa.eu/info/business-economy-euro/doing-business-eu/corporate-sustainability-due-diligence_en.

[27] www.bmas.de/SharedDocs/Downloads/DE/Internationales/act-corporate-due-diligence-obligations-supply-chains.pdf.

discussed; for instance, some participants argued the European draft directive could strengthen its approach to stakeholder consultation.

60. It was highlighted that while efforts within the European Union (regionally and nationally) were important, there were noteworthy initiatives relating to human rights due diligence (mandatory and otherwise) in many regions of the world, including in China, Colombia, India, Japan, Kenya, Mexico, Thailand, Uganda, and the United States of America.

61. Participants highlighted the need for such laws and initiatives, in particular to address the vulnerable situation that many workers and communities faced around the world, and to help achieve the smart mix of measures called for in the Guiding Principles. While it was acknowledged that human rights due diligence would never be a panacea, such initiatives could help transform business models so as to ensure better respect for the environment and the rights of workers and communities. They could also lead to greater access to remedy, as they would facilitate the identification of more impacts in need of remediation, help improve and strengthen company-based grievance mechanisms, and provide additional avenues to accountability and remedy through State-based mechanisms.

62. At the same time, participants acknowledged that merely having mandatory human rights due diligence laws in place would not be sufficient to address all the issues relating to human rights in the context of business activities, particularly if the regimes led to compliance-based mind sets and one-off tick-box exercises by companies. In the view of some of the participants, the benefits of some of the regimes discussed had been overstated as their narrow scope, failure to address power imbalances and common barriers to remedy, and lack of incentives for good corporate behaviour would be likely to undermine their impact in practice. Further, it was noted that despite good intentions, some regimes might have unintended consequences (one participant noted that overly-broad provisions on civil liability could lead to companies pulling out of and refusing to work in risky operating contexts, which could ultimately harm workers in those areas). Participants encouraged policymakers and civil society to not reduce efforts to strengthen judicial systems and to address root causes of human rights harms simply because new laws were being adopted.

63. Participants shared their views as to how to ensure human rights due diligence regimes could better achieve the benefits and avoid the pitfalls identified. Policy coherence and alignment with international human rights standards, and the Guiding Principles in particular, would be key. Participants also highlighted the importance of human rights due diligence frameworks being grounded in meaningful, continuous stakeholder engagement, including with workers throughout supply chains. To ensure such regimes would improve access to remedy, it was crucial that State institutions be strong enough to implement regulations and properly address cross-border cases. It was also suggested that companies receive support to better understand how to conduct human rights due diligence and establish effective grievance mechanisms.

64. Participants also discussed certain concrete issues, such as regarding how to ensure stakeholder engagement was done in a human rights-friendly way, safe harbour provisions in due diligence legislation, company and community-driven mechanisms, and the impact of due diligence regimes in conflict-affected areas.

B. The role of courts

65. The second session focused on the role of courts in ensuring that human rights due diligence standards were met, and that people received a remedy for harm when something had gone wrong.

66. The session was moderated by Jennifer Zerk. Following an introduction by Ben Shea (Associate Human Rights Officer, Business and Human Rights Unit, OHCHR) a panel discussion took place with Samantha Rowe (Partner, London and Paris, Debevoise & Plimpton), Humberto Cantú Rivera (Director of the Human Rights and Business Institute, University of Monterrey), Gabrielle Holly (Senior Adviser, Human Rights and Business, Danish Institute for Human Rights), Sarah Ellington (Legal Director, DLA Piper), Briseida

Aragón (Senior Lawyer, ProDESC), and Lalla Touré (Legal Coordinator, Advocates for Community Alternatives).

67. Panellists discussed the different ways in which human rights due diligence concepts might be relevant in courts.[28] For instance, legal regimes could make it possible for liability to result from not conducting human rights due diligence properly, or in cases where harm occurred as a result of failures of due diligence. Human rights due diligence might be a possible defence to legal liability in certain cases, or it could help establish that a company was not complicit in human rights harms. And even if legal liability were established, the extent to which human rights due diligence was conducted could have a bearing on the determination of appropriate sanctions and remedies.

68. Panellists shared the extent to which these ideas, and the Guiding Principles more broadly, were seen in court cases in practice. A report was shared that examined the impact of the Guiding Principles on judicial mechanisms.[29] It was noted that despite an apparent increase in plaintiffs' framing their claims based on the Guiding Principles, there were limited examples of the Guiding Principles being explicitly relied upon in judicial decisions. Most judgments using the Guiding Principles came from courts in Latin America. Colombian courts were the most active in this regard, though there had also been relevant decisions in Argentina, Mexico and Peru. It was highlighted that no laws existed in this region that mandated human rights due diligence as conceived of in the Guiding Principles; rather, judges had been relying on ordinary tort principles, certain laws requiring the prevention of harm, and the State's duty to protect human rights.

69. Some participants shared their experiences litigating on behalf of rights-holders for companies' failures to conduct human rights due diligence with respect to development and extraction projects. The power imbalances faced by those communities made it very difficult to litigate the cases on fair and equal terms. It was highlighted that, in those cases, communities faced large companies with massive resources which were used to hire teams of lawyers who utilized procedural tactics to delay cases from being heard. Further, in the cases discussed, plaintiffs faced many difficulties obtaining documents and evidence held by the companies and State agencies that had granted permits. The lack of legal regimes addressing such barriers to remedy had made it difficult to protect communities' rights and lands.

70. Participants discussed a range of other barriers to remedy, such as in relation to unfair burdens of proof, lack of access to lawyers, the costs of litigation, and the inability to use opt-out class action lawsuits. It was queried whether the mandatory human rights due diligence regimes that were being developed were addressing or could address such barriers sufficiently. It was noted that the proposed European Union directive did not include any provisions for reversing the burden of proof in civil cases. Participants pointed out that member States could still provide for reversing the burden of proof in domestic legislation implementing the directive. Some participants also highlighted that, as the proposed directive would considerably enhance company disclosures regarding their value chains, human rights risks and the measures taken in response to such risks, there was perhaps less of a need for provisions regarding the burden of proof. Further, it was suggested that due diligence laws could help alleviate certain barriers stemming from the hesitancy of legal practitioners to take on these cases, as plaintiffs' lawyers would be more likely to represent clients, and judges would be more confident to engage with these issues, when there were clearer legal regimes in place.

71. Participants also discussed a number of other relevant issues, such as potential unintended consequences of human rights due diligence legislation, the extent to which such legislation could address lengthy and costly court proceedings, and the main contributions such laws could give in relation to accountability and access to remedy.

[28] See A/HRC/38/20/Add.2.

[29] www.ohchr.org/sites/default/files/Documents/Issues/Business/UNGPsBHRnext10/debevoise.pdf.

C. The role of administrative supervision

72. The third session examined the role that administrative supervisory bodies (or regulators) could play in ensuring that companies were held accountable for the quality of their human rights due diligence and providing a potential means through which affected people might raise concerns about non-compliance by companies with human rights due diligence standards. The session took place in two parts.

1. Part I: Administrative supervision generally

73. The first part explored existing approaches to administrative supervision in multiple areas, as well as how such practice could inform the European Union approach.

74. Lene Wendland moderated a panel composed of Gilles Goedhart (Team Leader – Mandatory Due Diligence, International Responsible Business Conduct Unit, Ministry of Foreign Affairs, the Netherlands), Bart Devos (Senior Director of Public Policy and European Affairs, Responsible Business Alliance), Paapa Danquah (Legal Officer, International Trade Union Confederation), and Miriam Saage-Maass (Legal Director and Program Director Business and Human Rights, European Center for Constitutional and Human Rights).

75. Participants discussed their views on the complementarity between administrative supervision and judicial processes (in particular, regarding civil liability).[30] Robust regulatory bodies were seen as key to overseeing the practical implementation of regimes relevant to business and human rights. It was noted that such bodies could potentially open up new pathways to remedy, expand the types of remedies available to rights holders, and help ensure course correction before company practices resulted in major harms. Participants also highlighted ways in which such bodies could contribute to accountability and access to remedy more indirectly. For instance, they could help legislatures identify gaps in law and practice to help strengthen regulation, help improve corporate transparency, and be key in producing information needed to establish certain claims.

76. Participants shared good practices they had observed which they considered crucial to the success of regulatory bodies. For instance, it was considered very important for such bodies to maintain a certain level of independence from other government institutions and to regularly engage with civil society and with companies. It was key to have good working relationships with such parties, and this was easier to achieve when staff of the bodies had high levels of professionalism and expertise on the matters being regulated. As regards the bodies' approach to business and human rights issues, it was noted that it was impossible to check all companies at the same time, and prioritization of action should be made based on risk. It was also important to establish proper incentives, supporting companies for making good faith efforts at conducting human rights due diligence, and discouraging cut and run behaviour.

77. With respect to the powers such bodies should have, participants argued that the ability to investigate corporate misconduct was key. This should be able to be triggered based on complaints by affected stakeholders and other interested parties. Given that fears of retaliation often suppressed complaints from being made, it was also important that such bodies could trigger investigations and conduct unannounced, on-the-spot inspections on their own accord. Participants agreed that regulators should at least be able to impose dissuasive sanctions for failures to meet basic standards. Ideally, the bodies should also have the ability to address issues early and impose preventative remedial actions. Participants also highlighted the importance of regulators offering an educational function, particularly to provide technical information and advice to companies. The development of sector- or issue-specific guidance, as well as dialogue with companies about procedures and human rights issues, would help companies better understand what was expected of them.

78. Participants also discussed a number of challenges in the area of administrative supervision. Particularly for regional initiatives (such as European Union regulations),

[30] See OHCHR & Shift, *Enforcement of Mandatory Due Diligence: Key Design Considerations for Administrative Supervision* (2021).

participants representing companies highlighted the need to ensure harmonization of approaches across jurisdictions, both on the requirements companies would face as well as the approaches to enforcement. Participants also noted challenges specific to cross-border cases, where it was sometimes difficult to conduct investigations or engage with complainants in appropriate languages. To help address this, civil society and unions could help support efforts for accountability and remedy.

79. The importance of coordination and cooperation between different State agencies was an important underlying theme of the session. In a cross-border context, participants thought it important that there be some form of cooperation between regulators in different countries to obtain information and to ensure that sanctions (e.g., trade-related sanctions) were effective. A number of participants also highlighted the importance of cooperation between regulators and border agencies to ensure traceability of products.

2. Part II: Regulatory approaches to forced labour

80. The second part focused on two specific models of administrative regulation to address the use of forced labour in company operations and supply chains.

81. Lene Wendland moderated a panel composed of Mr. Mansur (Director of Fishing Vessels and Gears, Ministry of Marine Affairs and Fisheries, Indonesia), Anasuya Syam (Human Rights and Trade Policy Advisor, Human Trafficking Legal Center), and Rosey Hurst (Founder and Director, Impactt).

82. Participants shared details about the background and operation of Indonesia's certification system to address forced labour in the fisheries sector, as well as the use of withhold release orders by the United States of America to detain imported goods suspected of being made with forced labour, forced child labour, and prison labour. Participants discussed the ways in which those regimes could help facilitate remedies for affected stakeholders. It was suggested that those regimes were effective in changing corporate behaviour because they could ultimately impact companies' bottom lines; companies needed to demonstrate good performance as regards forced labour to stay competitive. Participants also discussed the limitations of national responses, and the need for international cooperation, to address global problems such as forced labour.

D. Human rights due diligence regimes and private grievance mechanisms

83. The final session of the consultation examined the connections between human rights due diligence and non-State-based grievance mechanisms, as well as the effectiveness of different types of regimes that encouraged or mandated such mechanisms. The session was divided into two parts to address these different angles.

1. Part I: Interconnections between grievance mechanism and human rights due diligence processes

84. The first part of the session focused on the connections between grievance mechanism and human rights due diligence processes in theory and practice.

85. Jennifer Zerk moderated a panel composed of Fernanda Hopenhaym (Vice-chair, Working Group on business and human rights), Lisa Laplante (Director, Center for International Law and Policy, New England Law | Boston), and Chris Buckley (Director, Social & Environmental Affairs, adidas).

86. Participants discussed the different ways in which grievance mechanism processes could inform human rights due diligence and vice versa. For instance, the commentary to Guiding Principle 29 emphasized that operational-level grievance mechanisms "support the identification of adverse human rights impacts as a part of an enterprise's ongoing human rights due diligence." At the same time, the risk assessments done through human rights due diligence could help inform what grievance mechanisms should be focusing on. Participants also highlighted the ways in which grievance mechanisms helped companies track the effectiveness of their responses to identified risks, and how transparent mechanisms related to the responsibility of companies to communicate about how they addressed their impacts.

87. Participants addressed the extent to which those interconnections were actually observed in practice. It was noted that, with some exceptions, those issues were rarely explicitly addressed in scholarship, voluntary codes of conduct, regulatory standards, national action plans on business and human rights, and company disclosures. However, a participant representing a company shared that, in his experience, those connections were taken into account. He highlighted the benefits to companies of hearing directly from (potentially) affected stakeholders about risks, how to address such risks, and the extent to which those stakeholders were satisfied with the resolution of grievances. It was also noted that grievance mechanisms available for harms in the supply chain were useful for tracking the different issues involved in business relationships and how best to address them.

2. Part II: Regimes and initiatives that aim to establish effective grievance mechanisms

88. The second part of the session examined regimes or initiatives that required or encouraged the development of company-based grievance mechanisms and what was done to ensure the effectiveness of those mechanisms.

89. Jennifer Zerk moderated a panel composed of Anna Triponel (Business and Human Rights Advisor, Triponel Consulting), Toby Hewitt (Group General Counsel and Company Secretary, Gemfields Group Ltd.), Joris Oldenziel (Member, Dutch National Contact Point), Lalanath De Silva (Head, Independent Redress Mechanism, Green Climate Fund), and Christy Hoffman (General Secretary, UNI Global Union).

90. Participants shared examples of mechanisms developed as a result of a judicial settlement, a national contact point process, a condition of receiving development finance, and agreements reached between companies and trade unions. In some cases, companies were required to develop grievance mechanisms from scratch or ensure that existing mechanisms met certain standards; in other cases, companies were merely encouraged to develop effective mechanisms. It was noted that there was a strong business case for having effective grievance mechanisms in place, as business-related conflicts were costly, and mechanisms could help address issues early and avoid judicial and various non-judicial complaints.

91. Participants also shared various ways in which they helped boost the capacities of mechanisms, for instance through issuing recommendations or guidance, providing trainings to mechanism personnel, securing external human rights expertise and advice, and through administering communities of practice.

92. Participants discussed different aspects that they considered to be important to ensure such mechanisms worked well in practice. Stakeholder trust was paramount, and it was noted that meaningful engagement with stakeholders on the design and performance of mechanisms (which ultimately resulted in changes to how mechanisms functioned) brought many benefits. Ensuring certain levels of independence was also key, and participants shared ways in which they demonstrated independence; for instance, through the use of external monitors or appeals processes.

93. Participants debated the extent to which human rights due diligence legislation could incorporate those and other aspects relating to effectiveness in provisions on company complaints procedures. Given the diverse contexts in which mechanisms operated, and the variation between company capacities and resources, it was suggested that prescribing legislative standards for effectiveness in advance might be difficult. Care would be needed to avoid discouraging innovation. Some participants recommended that if legislators were to include requirements, the requirements should relate to involving (potentially) affected stakeholders in the design and operation of grievance mechanisms, ensuring independent oversight in complaints processes, protecting anonymity if needed, and making sure any outcomes were respected and implemented.