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**Annual report of the United Nations High Commissioner  
for Human Rights and reports of the Office of the  
High Commissioner and the Secretary-General**

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

## **Improving accountability and access to remedy for victims of business-related human rights abuse through non-State- based grievance mechanisms: explanatory notes**

**Report of the United Nations High Commissioner for Human Rights\***

### *Summary*

The present document accompanies the report of the United Nations High Commissioner for Human Rights to the Human Rights Council pursuant to the request by the Human Rights Council in its resolution 38/13. That report (A/HRC/44/32) makes general observations about the role of non-State-based grievance mechanisms in achieving accountability and access to remedy for business-related human rights abuses. Its annex contains a set of recommended policy objectives for States and relevant non-State actors, supported by a series of elements intended to demonstrate the different ways in which those objectives may be met in practice.

The present document has been prepared as a companion to the report and should be read alongside it. This addendum provides background, definitions, examples and contextual information with respect to the policy objectives and supporting elements found in the annex to the report, in order to enhance understanding and to aid future implementation.

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# **Improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms: explanatory notes to final report**

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## I. Introduction

1. This document accompanies the report of the High Commissioner for Human Rights on improving accountability and access to remedy for victims of business-related human rights abuse through non-State-based grievance mechanisms (the “main report”).<sup>1</sup> The main report, together with this explanatory addendum, marks the conclusion of the third phase of the Accountability and Remedy Project of the Office of the United Nations High Commissioner for Human Rights (“OHCHR”).<sup>2</sup>
2. Following the format used for previous phases of the project,<sup>3</sup> the main report comprises an opening narrative section, followed by a technical annex with “recommended action” (“the annex”) arranged in a series of policy objectives supplemented by supporting elements to show how the policy objectives can be achieved in practice.
3. This addendum explains how OHCHR research has been applied towards developing the policy objectives and supporting elements and provides further information to aid understanding and implementation.

### **Box 1: Note on terminology and numbering**

In the annex to A/HRC/44/32, the policy objectives are indicated in bold, and their supporting elements are the numbered paragraphs that follow. These supporting elements are referenced in this addendum by the same number; thus, a reference in this document to “1.1” is a reference to the first element under policy objective 1 in that annex.

## **Recognizing the diversity of non-State-based grievance mechanisms and their operating contexts**

### **Box 2: Key concepts**

“Non-State-based grievance mechanisms” have been defined for the purposes of the Accountability and Remedy Project as any routinized, non-State-based, non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.<sup>4</sup>

4. “Non-State-based grievance mechanisms”, as described in the Guiding Principles on Business and Human Rights (the “Guiding Principles”),<sup>5</sup> cover a vast array of different processes for delivering remedy for business-related human rights harms. Analysis of their roles and performance is complicated by their diversity. For instance, good practice lessons that may be drawn from experiences with dialogue-based operational-level grievance mechanisms may not be so readily applied to other types of mechanisms, such as a grievance mechanism associated with a code of conduct administered by a multi-stakeholder group. For this reason, some elements of the recommended action are expressed as being subject to caveats (e.g. that they be implemented to the extent “relevant” or “appropriate” considering the mechanism’s particular mandate, objectives and operations).
5. The Guiding Principles call on States to “consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.”<sup>6</sup> The recommended action stresses the vital role of States in creating an enabling legal and policy environment for non-State-based grievance mechanisms that is consistent with the

<sup>1</sup> A/HRC/44/32.

<sup>2</sup> See further A/HRC/44/32, paras. 1–4, 12–26.

<sup>3</sup> A/HRC/32/19, A/HRC/32/19/Add.1, A/HRC/38/20, A/HRC/38/20/Add.1.

<sup>4</sup> See further [www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf](http://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII-PoW.pdf), pp. 11, 13–17.

<sup>5</sup> A/HRC/17/31, annex.

<sup>6</sup> Guiding Principles on Business and Human Rights, principle 28.

State's international legal obligations and policy commitments and responsive to local needs.<sup>7</sup>

6. Identifying areas for improvement is a complex task, especially given the range of different areas of law and regulation that could potentially be engaged.<sup>8</sup> The recommended action suggests the use of a review process to identify priority areas for action (1.1). To assist with this, a model terms of reference for a review of the scope, functions and effectiveness of non-State-based grievance mechanisms is included in figure 1 below.

**Figure 1: Model terms of reference addressed to a suitable review body (e.g. Ministry of Justice, law commission or domestic equivalent) to enable a review of the contribution of non-State-based grievance mechanisms to the remedy of business-related human rights abuse (including in a cross-border context), and the role of the State in facilitating access to remedy through such mechanisms.**

1. The review body is requested to investigate and report on the following matters:

(a) How do non-State-based grievance mechanisms established in, or active in, the jurisdiction currently complement the effective implementation of the State's international legal obligations and policy commitments with regard to accountability and remedy for business-related human rights harm?

(b) How do non-State-based grievance mechanisms contribute to the effectiveness of domestic law and policy relevant to the corporate responsibility to respect human rights?

(c) How does the State cooperate with other States (and through which bilateral, regional and multilateral initiatives) to enhance access to remedy through the use of non-State-based grievance mechanisms?

(d) Which laws, policies and processes are relevant to the establishment and effective functioning of non-State-based grievance mechanisms in different sectors and contexts?

(e) What legal reforms or other measures (e.g. the promulgation of guidance) may be needed in order to achieve a comprehensive system for the remedy of business-related human rights abuse, in which (i) administrative, legislative and other non-judicial mechanisms play an essential role in complementing and supporting judicial mechanisms; and (ii) there is policy coherence as between relevant laws, policies and processes?

2. The review body is requested to make recommendations that take into account:

(a) The Guiding Principles on Business and Human Rights;

(b) Other applicable international standards regarding accountability and access to remedy in cases of business-related human rights abuse;

(c) Where relevant, the commitments made by the State in its national action plan on business and human rights;

(d) Its findings in relation to the issues described in question 1 above;

(e) International human rights treaties and other relevant bilateral and multilateral agreements that the State is party to;

(f) Relevant recommendations made by international organizations and treaty bodies.

3. The review process will be public, open, inclusive and evidence-based and will involve:

<sup>7</sup> A/HRC/44/32, annex, part I.

<sup>8</sup> See paras. 8 and 17 below.

- (a) A review structure that will provide adequate opportunities for contribution by key stakeholders;
- (b) Proper consultation with legal professionals, parliamentarians, academics, rights holders and their representatives, national human rights institutions, human rights defenders, civil society organizations, representatives of trade unions, mediators and other practitioners of alternative dispute resolution, and developers and operators of non-State-based grievance mechanisms;
- (c) An examination of research, including other States' experiences with facilitating access to remedy for business-related human rights harms through non-State-based grievance mechanisms.

## II. Explanatory notes to the recommended action

### A. Facilitating access to effective non-State-based grievance mechanisms by strengthening domestic law and policy

#### Box 3: Key concepts

“Rights holders” refers to the intended beneficiaries of non-State-based grievance mechanisms, particularly those whose human rights have been adversely impacted (or are at risk of being adversely impacted) by business activities.

“Stakeholders” include rights holders and their representatives or other persons who have an interest in the effectiveness of non-State-based grievance mechanisms, such as trade unions, business enterprises, local communities and civil society organizations.

“Affected stakeholders” refers to people whose human rights have been adversely impacted. “Potentially affected stakeholders” refers to people whose human rights may have been, or are at risk of being, adversely impacted.

“Meaningful consultation” refers to an ongoing process of interaction and dialogue between the consulting entity and stakeholders that enables the consulting entity to hear, understand and respond to stakeholders’ interests and concerns, including through collaborative approaches.

“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.

“Dialogue-based methods” are communication processes between parties to a grievance aimed at resolving the grievance and/or fostering greater mutual understanding and trust. The outcomes of such processes can include, depending on their objectives, a mutually-agreed set of decisions and actions (as may be the case through more structured processes, such as

mediation) and/or a better understanding of the different perspectives involved (as may be the case through more open-ended approaches).

“Preventive remedies” refers to precautionary or pre-emptive action to mitigate or prevent future harm.

“Adopting a gender perspective” refers to the process of assessing the implications for women, men and others of any policies, processes and practices, and making their concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies, processes and practices so that they benefit equally and inequality is not perpetuated.<sup>9</sup> Being “gender-sensitive” means using respectful and non-discriminatory language and taking into account the different situations, needs and attributes of women, men and others, in order to make sure behaviours, mindsets or programmes respect the human rights of all persons.

## 1. The legal and policy environment for non-State-based grievance mechanisms

7. Domestic legal regimes and policies, and the manner in which they are implemented and enforced, can have a profound effect on the effectiveness of non-State-based grievance mechanisms in practice. Thus, the recommended action begins with suggestions for ways that States can work towards creating more enabling legal and policy environments for such mechanisms.<sup>10</sup>

8. Policy objective 1 envisages an open, inclusive, evidence-based process to clarify the types of non-State-based grievance mechanisms in the jurisdiction, the various contributions they can make to domestic law and policy relevant to the corporate responsibility to respect human rights, and the options that could be considered to improve policy coherence in States’ approaches to non-State-based grievance mechanisms so that such mechanisms are better able to fulfil the role envisaged for them in the Guiding Principles (1.1 and 1.2). This process could take place as part of a national action plan on business and human rights<sup>11</sup> or as part of strategies to improve access to remedy more generally. The task of identifying the laws, policies and processes that are potentially relevant to non-State-based grievance mechanisms in practice (1.1(e)) is complicated by the fact that many of these regimes will not be expressed in human rights terms. Potentially relevant regimes may include contract law, competition law, laws on recognition of arbitration awards, laws protecting fundamental labour rights, consumer law, environmental law, privacy laws, immigration law, laws on equality and anti-discrimination, laws on whistle-blower protection and laws on freedom of information. Moreover, the legal implications of establishing such mechanisms, for business enterprises in particular, may be shaped by the operation of laws of much broader application, such as those relating to civil liability.<sup>12</sup>

9. The action needed to address any deficiencies identified through the review process (1.2) will vary depending on local legal structures and needs. States should consider the particular needs of, and challenges facing, small and medium-sized enterprises. In some cases, States may seek to facilitate access to non-State-based grievance mechanisms by issuing suitable guidance (1.2(c)), which could be sector-specific or responsive to specific human rights-related risks (e.g. as may exist in conflict-affected areas).<sup>13</sup>

10. Further measures (1.2(d)) need not necessarily be limited to regulatory controls, but may encompass incentives. In some cases, and particularly where there is a State-business nexus,<sup>14</sup> there may be opportunities to craft suitable incentives for business enterprises for

<sup>9</sup> See [www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderIntegration.aspx](http://www.ohchr.org/EN/Issues/Women/WRGS/Pages/GenderIntegration.aspx).

<sup>10</sup> See Guiding Principles on Business and Human Rights, principle 28.

<sup>11</sup> See [www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx](http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx).

<sup>12</sup> See further A/HRC/32/19, policy objective 14 (calling on States to take steps to ensure that “corporate liability under domestic private law regimes are properly aligned with the responsibility of companies to exercise human rights due diligence across their operations”).

<sup>13</sup> Guiding Principles on Business and Human Rights, principle 7.

<sup>14</sup> *Ibid.*, principles 4–6.

instance through (i) licences to operate certain businesses, (ii) land concession grants, (iii) grants of concessions to develop natural resources, or (iv) relevant contracts with the State, such as procurement contracts, public-private partnership arrangements, export credit and investment agreements.

11. Preserving a clear delineation between the roles and responsibilities of non-State-based grievance mechanisms and State-based mechanisms (1.3) is important for providing clarity to rights holders about the remedy pathways<sup>15</sup> that may be available to them.<sup>16</sup> There will be circumstances (for example, cases involving international crimes or serious human rights abuses), in which judicial remedy must be available. Non-State-based grievance mechanisms must not limit access by rights holders to judicial mechanisms in such cases (8.4).<sup>17</sup>

12. Awareness of the needs and preferences of rights holders, such as the reasons why they may seek to use more than one type of mechanism, may help to highlight barriers that may not be apparent when mechanisms are viewed in isolation (1.4), for instance as regards time limits for accessing State-based mechanisms that do not take account of prior efforts by rights holders to resolve grievances using non-State-based grievance mechanisms.

13. Greater attention could be given to the various ways in which information derived from non-State-based grievance mechanisms might be integrated into other processes, such as those involving law enforcement (1.5) and other State agencies (1.7), including regulators and institutions with mandates relevant to business and human rights, such as national human rights institutions.

14. Improvements in the effectiveness of non-State-based grievance mechanisms may also be achieved through greater cooperation between business enterprises themselves.<sup>18</sup> As part of efforts to create an enabling legal and policy environment for these types of mechanisms, the recommended action encourages States to address possible legal impediments to this kind of cooperation (1.6).

## 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.<sup>19</sup> However, States should not neglect other potentially relevant regimes, including civil liability regimes,<sup>20</sup> 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

<sup>15</sup> See A/HRC/38/20/Add.1, box 3.

<sup>16</sup> See section II.A.4.

<sup>17</sup> See Guiding Principles on Business and Human Rights, principle 26 commentary; A/HRC/32/19, annex, para. 1.2; A/HRC/32/19/Add.1, para. 3.

<sup>18</sup> See section II.C.

<sup>19</sup> See further A/HRC/32/19, annex, part I.

<sup>20</sup> See further *ibid.*, part II.

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,<sup>21</sup> 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.<sup>22</sup> 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 overstated.

### **3. The need for realistic and readily-identifiable pathways to an effective remedy**

22. In many cases, the remedies obtainable from non-State-based grievance mechanisms are only partial (for instance, because they can address only the future conduct of the company concerned, or because the mechanism has insufficient leverage over the company in question). In such cases, rights holders benefit from having the flexibility to pursue different remedies through different mechanisms, perhaps in combination, as part of a remedial strategy that best meets their needs.

23. State agencies can play a useful role in raising awareness of the availability and advantages of different courses of action to rights holders (3.1(a)). It may be relevant to highlight, for instance, the circumstances in which dialogue-based methods may yield better remedial outcomes than adjudicative processes (3.1(b)), whilst also noting the utility of adjudicative processes in cases where a more formal process, perhaps with binding outcomes, may be needed.

24. The most suitable providers of information and advice will vary depending on the legal structures and existing institutions of the State concerned; however, in many jurisdictions and contexts, national human rights institutions and other bodies with mandates expressed in human rights terms are likely to have an important role to play. Such bodies may be able to help address the imbalances in power that frequently exist between parties to grievances (3.1(c)).

25. In cases where there may be routes through which a remedial outcome might be legally enforced (e.g. by constructing it as a binding contract) rights holders should be made aware of this through the appropriate channels (3.1(d)). Similarly, in cases where a grievance (or aspects of a grievance) may be able to be referred to a State-based mechanism, rights-holders should have ready access to the necessary information to be able to engage with the relevant processes as easily and efficiently as possible, and in such a way as to avoid unnecessary duplication of effort (3.1(e)).

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<sup>21</sup> See A/HRC/32/19, annex, policy objective 6.

<sup>22</sup> See A/HRC/41/43, paras. 11–21.

#### 4. The concept of “effective remedies” and the contribution of non-State-based grievance mechanisms

26. Policy objective 4 focuses on the substantive aspects of remedy (as opposed to the procedural ones). Although States will not generally be in a position to prescribe the remedial outcomes of non-State-based grievance processes, and while specific mechanisms may be individually limited in what they can provide by way of remedy in any event,<sup>23</sup> to the extent that the State is able to influence the work of such mechanisms (individually and in general), this should be aligned with applicable international standards (4.1(a)), drawing appropriately from all relevant categories of remedy (4.1(b)) and appropriately responsive to the context, particularly the needs and perspectives of affected stakeholders (4.1(c)).

#### 5. International cooperation

27. The use of non-State-based mechanisms for dealing with business related human rights harms has been discussed in bilateral, regional and multilateral settings.<sup>24</sup> States have also participated in multi-stakeholder initiatives which have led to the creation of sector-specific mechanisms.<sup>25</sup> States should build on these efforts and identify areas where non-State-based grievance mechanisms may help to address business-related human rights risks, including in a cross-border context (5.1(a) and 5.1(b)).

28. The recommended action highlights the potential value of such mechanisms as a source of information for regulators (5.1(c) and 5.1(d)), particularly as regards issues that may require collaborative action (e.g. as between State parties to trading agreements).

29. Embassies and consular services can play a role as a source of advice and assistance for rights holders, business enterprises, and other relevant stakeholders (5.2). This type of assistance can be particularly important where there are social and economic challenges that may undermine the effectiveness of remedial mechanisms (whether State-based or non-State-based), including with regard to lack of respect for the rule of law, lack of resources for and capacity of key institutions, or in conflict-affected areas. In the latter context, embassies and consular services have a particularly important role to play in disseminating information on the security risks that may be faced by rights holders, which can be drawn upon to help inform risk assessments and risk management strategies, for instance in relation to retaliation.

### B. Improving the effectiveness of non-State-based grievance mechanisms

#### Box 4: Key concepts

“Effectiveness criteria” means the criteria applicable to non-judicial grievance mechanisms found in Guiding Principle 31.

“Remedial outcome” refers to the outcome reached at the conclusion of a grievance process or series of parallel, overlapping or consecutive processes.

#### 1. General comments about effectiveness

30. The effectiveness criteria found in Guiding Principle 31 provide the benchmark for assessing the effectiveness of non-State-based grievance mechanisms dealing with business-related human rights harms (6.2).

31. OHCHR has gathered information from non-State-based grievance mechanisms operating in a wide range of jurisdictions (representing different geographic regions,

<sup>23</sup> See para. 22 above.

<sup>24</sup> See e.g., Council of Europe, Recommendation CM/Rec(2016)3; ILO, Promoting the Strategic Use of International Instruments for Trade Union Actions (2019).

<sup>25</sup> See e.g., the International Code of Conduct Association.

domestic legal structures and traditions) about how they meet different aspects of the effectiveness criteria in practice. The recommended action under policy objectives 7 to 14 encapsulates the insights gained from that research.

32. Non-State-based grievance mechanisms will not be effective mechanisms for dealing with business-related human rights harms if they are not themselves aligned with internationally recognized human rights (6.1). This is a natural extension of the corporate responsibility to respect human rights.<sup>26</sup> Developers and operators of grievance mechanisms<sup>27</sup> should have regard to relevant internationally recognized human rights standards<sup>28</sup> and the statements of international human rights bodies. Thus, for instance, mechanisms designed for rights holders that include indigenous peoples should respect the right to self-identify as indigenous peoples, in line with international standards and consistent with the right to self-determination.<sup>29</sup>

## 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.

34. Meaningful consultation with rights holders, as an ongoing endeavour,<sup>30</sup> is fundamental to the legitimacy of the mechanism in general and gaining and retaining stakeholder trust in particular (7.2). The extent to which stakeholder consultation is possible, and the form it should take, will depend on the type of mechanism and its scope of activities. In some cases, such as where prospective users are geographically widely spread, difficult to identify or locate, or otherwise difficult to reach, it may be necessary to consider reasonable alternatives, such as consulting civil society organizations, trade unions or other advocates. In some contexts, and particularly where the intended users of mechanisms are readily identifiable, close at hand and willing to assist, developers and operators may benefit from highly interactive “user-centred” and “co-design” models of engagement to better understand needs and priorities of different rights holders.<sup>31</sup> Whatever format the consultation takes, developers and operators should seek out, in particular, people with lived experience of the human rights harms the mechanism seeks to address, and ensure that the content of relevant international standards is appropriately reflected.<sup>32</sup>

35. Where suitable opportunities present themselves, developers and operators should be open to discussing and participating in grievance mechanisms that originate from rights holders themselves (7.3), such as “worker-driven” mechanisms (as have been gaining traction in the agricultural sector) and “community-driven” models (in which potentially affected communities take on responsibility for at least the initial design of grievance mechanisms).<sup>33</sup>

36. Legitimate mechanisms address the needs of rights holders who may be at heightened risk of vulnerability or marginalization (7.4), and mechanisms should draw from relevant international standards with respect to addressing the needs of particular groups where

<sup>26</sup> Guiding Principles on Business and Human Rights, principles 11–24.

<sup>27</sup> See box 5 below.

<sup>28</sup> Guiding Principles on Business and Human Rights, principle 12 and commentary.

<sup>29</sup> See United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295); ILO Convention 169, art. 1(2).

<sup>30</sup> See para. 73 below.

<sup>31</sup> See [www.ohchr.org/Documents/Issues/Business/ARP/ARPIII\\_Discussion\\_Paper\\_Nov2019.pdf](http://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII_Discussion_Paper_Nov2019.pdf), pp. 12–13.

<sup>32</sup> E.g. ILO Recommendation 130, art. 6.

<sup>33</sup> See [www.ohchr.org/Documents/Issues/Business/ARP/ARPIII\\_Discussion\\_Paper\\_Nov2019.pdf](http://www.ohchr.org/Documents/Issues/Business/ARP/ARPIII_Discussion_Paper_Nov2019.pdf), p. 13.

relevant.<sup>34</sup> Further, mechanisms should adopt a gender perspective in order to understand and address the structural, sociocultural and economic barriers that may prevent women from participating in grievance processes on an equal basis with men.

37. Non-State-based grievance mechanisms vary greatly in terms of their proximity to the business activities they address. The extent to which a mechanism must be independent from relevant business activities in order to be legitimate will depend on that mechanism's mandate and objectives. Various structural, institutional, administrative and resourcing issues may need to be addressed to ensure that the mechanism is able to discharge its functions fairly (7.5 and 7.6). Independence from the relevant business activities and/or enterprises is particularly important for mechanisms that make use of adjudication (as opposed to dialogue-based methods).<sup>35</sup> Strategies for a mechanism to enhance independence can include transparent hiring processes and appropriate reporting lines, control over a predictable budget, autonomy over policies and procedures, the ability to accept and handle grievances independently of management and the use of an independent, multi-stakeholder advisory panel, that is gender-balanced and properly representative of anticipated user groups and interests. Strategies for addressing conflicts of interest include open and competitive recruitment; restrictions on movements of personnel from the mechanism to relevant business operations (and vice versa); rotation of personnel; declaring and responding to conflicts of interest in specific cases; and delegation of dispute resolution and decision-making to legitimate, independent third-party mechanisms in appropriate cases.

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

39. Policy objective 8 sets out suggestions as to practical steps that can be taken to improve accessibility of non-State-based grievance mechanisms.

40. As part of raising awareness of its existence and procedures (8.1), the mechanism may need to inform stakeholders as to what their rights are and the role of the mechanism in helping to realise them. Any outreach (or other training) needs to be based on a proper appreciation of the structural, sociocultural and economic barriers that may exist to seeking remedies for business-related human rights harm, especially in settings where human rights abuses may have become entrenched.

41. Effective awareness-raising activities will vary depending on the type of mechanism and context. However, many mechanisms have drawn attention to the importance and usefulness, in various contexts, of face-to-face engagement (e.g. meetings and discussion groups); leaflets; prominently-displayed notices (offline and online); social media; and education sessions delivered in a culturally- and gender-sensitive manner, and by people to whom rights holders can readily relate (e.g. peers, union representatives or community members).

42. The accessibility of mechanisms is often marred by overly restrictive or complicated eligibility criteria (8.2). Although mechanisms may need to balance a number of competing considerations relating to eligibility, criteria should always be properly disseminated<sup>36</sup> and consistently applied. Time limits for accessing the mechanism should be flexible enough to take account of the length of time that abuses may take to become apparent, or for the rights holders to become aware of the mechanism, as well as other barriers that may be faced by

<sup>34</sup> E.g. CRC/C/GC/12 (regarding children).

<sup>35</sup> See Guiding Principles on Business and Human Rights, principle 31(h) and commentary.

<sup>36</sup> See section II.B.4.

affected stakeholders in practice. To help overcome these problems, some mechanisms have the flexibility to commence investigations on their own initiative.

43. Ways that the “user-friendliness” of grievance handling processes (8.3(a)) can be enhanced include providing templates and model submissions, ensuring that these and other documents are available in the languages spoken by potentially affected stakeholders, and allowing rights holders to engage with the mechanism in their own languages. Procedures are unlikely to be user friendly, however, without meaningful consultation with rights holders about their needs and preferences. Mechanisms that are intended to benefit specific communities should be informed by an understanding of local methods of decision-making, and should be designed to work in a manner that is complementary to established practices, wherever possible.

44. In many cases, accessibility is best served by providing rights holders with a variety of communication options (8.3(a)), which could include the use of toll-free telephone lines, electronic or regular mail, and other online and in-person communication methods. Adopting a gender perspective will help mechanisms identify specific barriers that are faced by women (8.3(a) and 8.6), which may be cultural in nature, and/or related to physical security, job security, costs of arranging childcare and the times of day that they can participate. Grievance mechanisms should not overlook the economic barriers faced by people who may need to take time off to defend their rights and seek remedies for harm (e.g. in the form of lost wages).

45. Non-State-based grievance mechanisms must not be used to impede rights holders’ access to judicial mechanisms or relevant State-based non-judicial mechanisms. Thus, non-State-based grievance mechanisms should never demand that rights holders give up their rights to seek remedies elsewhere as a condition of accessing or participating in grievance processes (8.4). On the contrary, the mechanism should anticipate and respond appropriately to the possibility of parallel, overlapping or consecutive proceedings, especially in cases where the mechanism may provide only a partial remedy.<sup>37</sup>

46. Providing for collective action by rights holders can be an important way to enhance accessibility, for instance by allowing them to share costs and representation (8.5).

47. Mechanisms should take steps to reduce financial barriers that may be associated with their use (8.7). Examples include making available, free of charge, appropriate advisory and support services (e.g. through helplines or designated case workers), offline and online resources (e.g. pamphlets and videos), and assistance with translation of documents and other information. Furthermore, appropriate adjustments should be made to enhance access to different groups of rights holders (8.8), e.g., through the provision of resources in braille and audio formats.

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.<sup>38</sup>

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.

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<sup>37</sup> See section II.A.3.

<sup>38</sup> See para. 55 below.

#### 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,<sup>39</sup> 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).

#### 5. Equitability

53. Policy objective 10 highlights the importance of access to information, advice and assistance to enable rights holders to participate fairly and confidently in grievance processes.

54. In many cases, rights holders will likely need some form of advisory or financial support to help raise a grievance (10.1(a)). Cases where rights holders have experienced serious injury or trauma need particularly careful handling (10.1(b)), and it can be helpful for them to have access to specialist "navigators" with first-hand experience of the harm and/or relevant grievance process who can help them find their way through the remediation process and provide necessary support along the way.

55. The recommended action makes suggestions for the observance of due process, highlighting the importance of adequate and timely provision of information (10.2), opportunities to verify and comment on information before material decisions are made (10.3), a proper record of the process, outcomes and reasons for any decisions made, and information as to next steps, including options for reviewing or challenging processes or outcomes (10.4).

56. It is of particular importance that rights holders have access to reports that have been created for the purpose of the grievance process (e.g. investigation reports) or which may be personal to them, such as medical reports.

57. The recommended action takes account of the growing use of new technologies in connection with grievance processes, for instance with respect to helping document abuse, receiving or communicating information, and case management (10.7). Such technologies can help empower rights holders, enhance the accessibility of mechanisms, enable more efficient grievance processes, and help developers and operators of mechanisms analyse trends and patterns in complaints with a view to identifying systemic problems that require addressing in order to prevent future harm (see 13.2). However, such technologies have limitations, as they may be inappropriate in certain cases (e.g. in complex or nuanced situations where specialist, personal interaction and support is required), may exacerbate inequalities with respect to access to remedy for those with low digital literacy levels, and may present serious risks as regards privacy, data protection and digital security. Thus,

<sup>39</sup> See para. 44 above.

mechanisms should take certain measures to ensure that technologies are used responsibly (10.7(a) and 10.7(b)).

58. While it is often conducive to access to remedy (and equitability in particular) for mechanisms to adopt a flexible approach to representation, mechanisms should not overlook the risk of coercion and manipulation of rights holders in some cases. The recommended action calls on mechanisms to seek the views of relevant rights holders if in doubt of the legitimacy of a claim to representation (10.8), recognizing that rights holders should ultimately decide who will represent them, not the mechanism or another party.

## **6. Transparency**

59. Policy objective 11 is concerned with promoting transparency towards parties to grievances and the public. This policy objective and its supporting elements have numerous links with other parts of the recommended action.<sup>40</sup> With respect to ongoing grievances, mechanisms should ensure continuous and proactive engagement with the parties to inform them about each step of the process, making use of communication methods referred to above<sup>41</sup> (11.1).

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).

61. The recommended action recognizes that there may be cases in which confidentiality of the dialogue between parties may be most conducive to achieving a successful remedial outcome (11.3). In such cases, mechanisms should consider presenting information in redacted or aggregated formats, such as anonymized case summaries. Whatever solution is adopted, it is important that stakeholder input is sought and properly taken into account.

62. The mechanism's website will likely be an essential means of communication with the public and should be regularly updated; however, other, offline, methods of communication should be used to ensure effective outreach (e.g. annual reports and public meetings).<sup>42</sup> It is important that the information has sufficient detail to provide relevant stakeholders with a sound understanding of the mechanism's functioning and performance.

## **7. Rights-compatibility**

63. Policy objective 12 recognizes that, in many cases, remedial outcomes of non-State-based grievance mechanisms may only contribute to effective remedies rather than constitute effective remedies on their own.<sup>43</sup> Nevertheless, mechanisms should take whatever steps are needed to ensure that the outcomes and remedies of its grievance processes, even if these serve as part of a wider remedy, make a positive contribution in human rights terms.

64. To ensure this, remedies should align with international human rights standards (12.1). While noting various types of remedies that could be relevant, the recommended action recognizes that "adequate" and "effective" remedies are more likely with the active input of all affected stakeholders as to the appropriate remedy and its manner of delivery (12.2(a)).<sup>44</sup>

65. Processes that empower rights holders are an important part of remedy (12.2(b)) and also help engender trust.<sup>45</sup> The steps needed to ensure that a process is empowering are context dependent, though proper stakeholder consultation can help mechanisms identify and

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<sup>40</sup> E.g. A/HRC/44/32, annex, paras. 7.1, 8.1, 8.8, 8.9, 9.2, 9.4, 9.5, 10.2, 10.4, 13.2, 15.1 and 16.1.

<sup>41</sup> See paras. 44 and 50 above.

<sup>42</sup> See para. 44 above.

<sup>43</sup> See A/72/162, paras. 38–54.

<sup>44</sup> See paras. 26 and 34 above.

<sup>45</sup> See section II.B.2.

correct aspects of grievance processes which may be patronizing, culturally insensitive, or otherwise not sufficiently respectful of rights holder needs. In contexts where there are pre-existing structures for decision-making, mechanisms should work with rights holders to identify ways to appropriately and respectfully reflect those structures in grievance processes, rather than seeking to impose unfamiliar and potentially disempowering alternatives.

66. Poor design of remedies can worsen human rights outcomes for rights holders, for example by exacerbating community tensions (e.g. as between younger people and older people), further entrenching inequalities in society (e.g. as between men and women) or contributing to a loss of autonomy and dignity. It is important for the human rights implications of remedies to be properly assessed and addressed (12.2(c)) so that the mechanism does not contribute to further harm. This requires a thorough understanding of the sociocultural and economic context within which remedial outcomes will be implemented, including an understanding of legacy issues (e.g. past human rights violations by State actors, such as in the context of forcible removals of people from land) and problems of entrenched gender or other forms of discrimination. Critically evaluating the effectiveness of remedial outcomes in practice (12.2(d)) can help mechanisms capture and properly implement “lessons learned” about ensuring rights-compatibility of remedial outcomes.<sup>46</sup>

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.

## 8. Continuous learning

68. Policy objective 13 begins by focusing on the steps that can be taken to ensure that lessons learned from a mechanism’s activities are applied to continuously improve the mechanism itself (13.1). The recommended action also draws attention to the possible need for mechanisms to consider questions of interoperability with other grievance mechanisms (such as the extent to which there should or could be referrals or arrangements for escalations between mechanisms) as part of efforts towards continuous learning (13.1(a)).<sup>47</sup>

69. Keeping meticulous records about grievances referred to the mechanism should support the necessary analytical work (13.1(b)). Provided appropriate safeguards are in place (see 10.7), technological solutions to manage this large amount of data can help reduce associated administrative burdens.<sup>48</sup>

70. Mechanisms should consider suitable arrangements for drawing from external sources of expertise (e.g. independent advisory panels, civil society organizations, trade unions or national human rights institutions) (13.1(e)) to ensure that the activities envisaged in 13.1 are methodologically rigorous from a human rights perspective and are implemented correctly.

71. The second part of policy objective 13 focuses on the various ways in which lessons learned from specific grievances handled by the mechanism can be used to inform human rights due diligence processes of business enterprises (including, though not necessarily limited to, the business enterprises whose activities have been the subject of grievance processes) (13.2). The routes that will be used to convey the necessary information to the companies concerned will vary depending on the type of mechanism. For instance, a company-based mechanism might have a direct line of communication with relevant management bodies, and ultimately the board, with respect to adverse impacts with which the company may be involved either through its own activities or as a result of its business relationships. A mechanism operated by an industry, multi-stakeholder or other collaborative initiative, on the other hand, will have its own routes for communicating with business

<sup>46</sup> See section II.B.8.

<sup>47</sup> See further section II.C.

<sup>48</sup> See para. 57 above.

enterprises associated with the initiative, for instance via meetings, guidance, online resources or reports. In addition to providing recommendations with respect to specific business enterprises, such a mechanism should be in a position to provide information relevant to human rights due diligence more broadly, such as through sector-specific guidance (13.2(b)).

## 9. Operational-level mechanisms based on engagement and dialogue

72. Policy objective 14 shows how operational-level grievance mechanisms can implement Guiding Principle 31(h) in practice. While this effectiveness criterion is concerned with operational-level grievance mechanisms, many of the elements under this policy objective have broader relevance, and could usefully be drawn upon by other types of non-State-based grievance mechanisms.

73. To ensure that operational-level grievance mechanisms are based on engagement, it is important for stakeholder needs and perspectives to be understood and incorporated into the design of the mechanism (14.1). Seeking to build upon any relevant decision-making structures to which people are already accustomed (e.g. indigenous institutional and decision-making processes) can serve to increase a mechanism's legitimacy, as well as provide a basis for more equitable processes. When appropriate, relevant sources of local expertise (e.g. trade unions or civil society organizations) should be drawn upon for advice as to the most effective and appropriate ways to engage with rights holders. Developers and operators should draw from relevant international standards as regards stakeholder engagement processes (see 14.1(b) and 14.1(c)).<sup>49</sup> The types of design-related issues on which it will be important to consult will typically include the scope of the mechanism, methods of communication, methods of raising grievances, language, locations of and timings of meetings, and involvement of independent mediators or adjudicators.

74. The elements relating to dialogue begin by recognizing the importance of mediation techniques (14.2(a)) and joint problem solving (14.2(b)) for resolving grievances through operational-level grievance mechanisms. Mechanisms should invest in training and advisory support to ensure that personnel keep pace with developments in mediation best practice in the context of business and human rights grievances (14.2(c)). The recommended action recognizes that, while dialogue-based processes may be an appropriate way of resolving grievances in many cases, situations may arise (e.g. complex cases, or cases where the dispute is entrenched) where adjudication by independent third parties may be necessary (14.2(d)).

## C. Enhancing access to effective remedy using non-State-based grievance mechanisms through greater cooperation and coordination

### Box 5: Key concepts

“Developers and operators of non-State-based grievance mechanisms” include entities or organizations that create, design, or host non-State-based grievance mechanisms (such as business enterprises or development finance institutions), non-State-based grievance mechanisms themselves and their personnel.

“Peers”, among developers and operators of non-State-based grievance mechanisms, refers to people, entities or organizations with similar functions or objectives in relation to similar mechanisms. For instance, for company-based mechanisms, it includes those responsible for developing or operating other company-based mechanisms (whether within the same business enterprise or from other businesses). For multi-stakeholder initiatives, it encompasses individuals and organizations responsible for developing and operating mechanisms with similar structures and objectives. For an independent accountability mechanism, peers would include independent accountability mechanisms associated with different development finance institutions.

<sup>49</sup> See paras. 34–36 above.

75. Policy objectives 15 and 16 highlight the different ways in which access to remedy through non-State-based grievance mechanisms may be enhanced through greater cooperation and coordination. This part of the recommended action focuses on many different types of cooperation among developers and operators of non-State-based grievance mechanisms, which include cooperation among mechanisms themselves, but also cooperation among entities responsible for creating non-State-based grievance mechanisms (such as multi-stakeholder initiatives or business enterprises) and cooperation among these various actors.

76. Policy objective 15 sets out the areas in which, and the reasons why, cooperation between the developers and operators of non-State-based grievance mechanisms may prove beneficial from the perspective of raising standards and promoting good practice generally.

77. Forms of cooperation will vary depending on the mechanism concerned, but could include sharing of lessons learned, for instance as a source of collective continuous learning or for fostering a common understanding of the components of effective remedies in different cases and contexts (15.1(a)). Developers and operators of mechanisms are encouraged to work together to promote complementarity between different mechanisms that may be relevant to the same grievance (e.g. by developing a means of referring grievances from a site-level mechanism of a supplying factory to a brand-level mechanism of a buyer, or vice versa) (15.1(c)). Additionally, there may be opportunities for business enterprises to enhance their leverage with respect to other entities,<sup>50</sup> and thus contribute to the mitigation of harm, by working collaboratively on grievance mechanisms and processes (e.g. where multiple business enterprises purchase goods from a single site (15.1(d)).

78. Policy objective 16 is directed towards cooperation with a view to creating more coherent systems of remedy for rights holders, including in a cross-border context. It recognizes the vital importance of collaborating with partners, such as civil society organizations, trade unions and others for the purpose of enhancing outreach (16.1(a)).<sup>51</sup> In recognition of the challenges that may be faced by small and medium-sized enterprises in particular, the recommended action highlights the potential benefits of pooling resources in order to better deliver services to rights holders (16.1(b)).<sup>52</sup> Often, it is advantageous for such cooperative arrangements to be formally recorded, for instance through a memorandum of understanding.

79. In order to provide more streamlined processes and services for rights holders (16.1(d)), developers and operators of mechanisms can consider shared outsourced service centres providing triage assistance, information hubs, or jointly-operated, site-specific mechanisms.<sup>53</sup> The recommended action also highlights the possible value of cooperation as a way of increasing access to specialist expertise in specific cases (16.1(f)), which in this context could include assistance with translation or interpretation, and identifying suitable independent facilitators of dialogue-based processes. Further, different organizations and mechanisms are encouraged to work together to provide more useful and less-fragmented information to rights holders as to the options that may be open to them (16.1(g)), for instance by pooling and disseminating information regarding the various non-State-based grievance mechanisms that may be relevant in different cases (and the relevant advantages and disadvantages of different courses of action).

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<sup>50</sup> See Guiding Principles on Business and Human Rights, principle 19 commentary.

<sup>51</sup> See paras. 40–41 above.

<sup>52</sup> See paras. 47, 54 and 74 above.

<sup>53</sup> See further para. 51 above.