



Fédération internationale des ligues des droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO,
DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

International Federation
for Human Rights

Federación Internacional
de los Derechos Humanos

الفدرالية الدولية لحقوق الإنسان

Human Rights and Business: Upholding Human Rights and Ensuring Coherence

Submission to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises

| | |
|---|----|
| INTRODUCTION..... | 2 |
| 1.States' Duties | 2 |
| 1.1.1.States' duty to respect: do no harm..... | 3 |
| 1.2. States' duty to protect individuals from non-state actors..... | 5 |
| 2. Corporate Responsibility to Respect..... | 7 |
| 2.1. Human rights due diligence process..... | 7 |
| 3. Access to Remedies: Reaffirming the Importance of Reparation Measures..... | 8 |
| 3.1. Legal justification for the right to remedy under international law..... | 8 |
| 3.2. Definition and general principles..... | 9 |
| 3.2.1. Procedural dimension: access to justice..... | 9 |
| 3.2.2. Substantive dimension: the right to reparation..... | 10 |
| 3.3. Non-judicial grievance mechanisms: gaps and weaknesses..... | 11 |
| 4. Moving Forward : Creating a Universal Quasi-Judicial Remedial Mechanism..... | 13 |
| CONCLUSION..... | 15 |

INTRODUCTION

The International Federation for Human Rights (FIDH) appreciates the opportunity provided by the multi-stakeholder consultation organised on 5, 6 October 2009 by the Office of the High Commissioner for Human Rights (OHCHR) organized in the framework of the mandate of the Special Representative of the UN Secretary-General (SRSG) on business and human rights to advance the debates surrounding business and human rights. FIDH welcomes the balanced representation in the programme of the different view points. FIDH recalls the importance to give voice to representatives of victims of corporate-related rights abuse and hopes their views will be taken into account in the interpretation and further operationalization of the “Protect, Respect, Remedy” framework. FIDH regrets that the OHCHR was not able to secure sufficient funding for the participation of community representatives and that, as a consequence, only few affected communities representatives have been able to travel to Geneva to participate in the consultation.

FIDH reiterates the necessity of engaging with all stakeholders in order to create a constructive dialogue that can lead to changes. Nevertheless, FIDH would like to stress the importance of putting human rights principles at the heart of the discussions. The primacy of human rights shall never be trumped by the search for consensus. At all times, human rights principles must remain at the centre of the analysis: they provide the legal foundations around which reflections must be concentrated.

The OHCHR consultation provides a great opportunity to further discuss the challenges and dilemmas posed by the operationalization of the three pillars of the framework proposed by the SRSG.

To this end, FIDH would like to underline the following:

1.States' Duties

FIDH welcomes the emphasis given by the Special Representative on the primary obligation of States to uphold human rights under international law. Duties of the State with regard to business and human rights include the duty of the State itself to respect human rights when conducting or facilitating business activities, as well as duties to protect from harm by non-state actors.

FIDH firmly believes that the obligation of the State with regard to human rights extends beyond its mere borders, and that it holds extra-territorial obligations..

The legal foundation for governments to consider human rights in the conduct of their commercial or financial actions has been subject to important literature by academics and NGOs. Without going into too many details, it suffices to say that such an obligation to

do no harm in other countries can be traced back to the United Nations Charter¹ and is notably grounded in States' obligation of international assistance and cooperation which is recognized in the Charter and in the Universal Declaration of Human Rights² (UDHR) and is binding for all 157 parties to the International Covenant on Economic, Social and Cultural Rights³ (ICESCR). It notably requires States not to conduct any action that could represent an obstacle to the realisation of economic, social and cultural rights in other countries. This also applies when States are making decisions as members of international organisations.⁴ Therefore, Professor Ruggie should ground his interpretation of international cooperation in international law and should go beyond "States working together through awareness-raising, capacity-building and joint problem-solving".⁵

1.1.1.States' duty to respect: do no harm

The first duty of the State is to do no harm: this applies to State-owned enterprises, support provided to businesses through export credit agencies as well as the promotion of trade and investment through the conclusion of multilateral or bilateral agreements. This is true both for home and host States. It is the obligation of States not to undermine or diminish their capacity, or the capacity of other States, to fulfil their human rights obligations when concluding such agreements.

The conclusion of multilateral trade and investment agreements within the World Trade Organization and at the bilateral level, in isolation from the human rights regime, has contributed to the fragmentation of international law. Notwithstanding the challenges

¹ Article 55 states: « With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: 1. higher standards of living, full employment, and conditions of economic and social progress and development; 2. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and 3. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Article 56. All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. These articles should be read in combination with the preamble of the Charter, which stipulates that States reaffirm their « faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small; to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom. United Nations Charter, signed 26 June 1945, entry into force: 24 October 1945.

² In its articles 22 and 28, the UDHR recognizes that international cooperation is an entitlement. Universal Declaration of Human Rights, adopted in 1948, Art. 22 and 28.

³ Five articles of the ICESCR refers to the obligation of international assistance and cooperation. See in particular Art. 2(1).

⁴ See for example, CESCR, General Comment 14, The right to the highest attainable standard of health, E/C.12/2000/4 (2000), para. 39.

⁵ John Ruggie, "Business and Human Rights: Towards operationalizing the 'protect, respect and remedy' framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises", A/HRC/11/13, para.38.

posed by such fragmentation, the international human rights law regime cannot be set aside and treated in isolation from other legal regimes. States cannot on the one hand ratify human rights treaties and, on the other hand, conclude agreements that prevent them, or other States, from fulfilling their human rights obligations. Such a schizophrenic attitude amounts to a violation of States' obligations concerning human rights, which at the very least should be treated as equal to other legal regimes. It contravenes the point and purpose of human rights treaties, but also violates any notion that the objectives of these kinds of investment agreements are intended to promote *sustainable development*.⁶ Finally, in case of conflict between different norms, human rights law should prevail.

The Special Representative highlights the need to raise awareness amongst developing country negotiators concerning the risks that such investment and trade agreements, in particular stabilization clauses, can generate on their ability to discharge their human rights obligations. FIDH believes that such agreements should systematically be assessed with regard to pre-existent human rights obligations of all parties and be consequently amended or rejected if not in conformity. FIDH hopes that the Special Representative will provide guidance to States on such situations.

The violent events that occurred in June 2009 in Bagua, Peru, in relation to legislative decrees aiming at facilitating concessions to foreign business in indigenous lands adopted within the larger context of a free trade agreement reaffirm the need to place human rights at the centre of economic discussions.

To ensure domestic policy coherence, human rights norms should be mainstreamed into governmental policy decision-making structures. This requires the adoption of a wide range of measures. For example, human rights training must be given to relevant public officials and civil servants, such as diplomats, negotiators representing ministries of finance and trade as well as employees of States' export-credit agencies. Credible human rights and environmental policies as well as monitoring mechanisms must be put in place to ensure coherence between the lender State obligations and the different projects it funds.

Finally, although ensuring such coherence lies under States' obligations, current experience shows that public interest is often left aside in these negotiations. This occurs for several reasons, such as an imbalance of powers between negotiators, the pressure exercised on vulnerable governments, powerful corporate lobbying, and corruption. It should therefore also be part of companies' obligations to ensure that their lobby positions do not prevent third parties from fulfilling their human rights obligations. Companies should therefore act with due diligence (see section below) in cases where they knew or ought to have known that their actions would generate or significantly contribute to human rights violations. This should for instance apply to controversial aspects such as intellectual property clauses jeopardizing access to medicines.

⁶ Most bilateral investment treaties (BIT) and trade agreements do specify it in their preamble.

1.2. States' duty to protect individuals from non-state actors

The second duty of States relates to the obligation to protect individuals from human rights abuses by corporate actors. Again, this duty applies to both home and host States who have the ability to exercise control over their corporations operating at home and abroad. In effect, States' duty to protect loses practically all its significance and importance if deprived of the extra-territorial dimension. If there is a need to discuss business and human rights issues, it is mostly because of the governance gaps identified by Professor Ruggie. One of the biggest gaps relates to the inability or unwillingness of host States to apply labour and human rights standards comprised in their national legal systems. For this reason, it is crucial that home States be entitled to exercise extra-territorial jurisdiction over acts committed abroad by companies incorporated under their jurisdiction, as noted by the SRSG.⁷ In this regard, the SRSG remains vague, affirming that "current guidance suggests that States are not required to regulate or adjudicate extraterritorial activities of businesses incorporated in their jurisdiction, but nor are they generally prohibited from doing so, as long as there is a recognised jurisdictional basis and an overall reasonableness test is met."⁸ FIDH invites the SRSG to take a firm stand on the extraterritorial dimension of States' duty to protect, which is key to the operationalization of his framework. Failing to clearly recognize the extraterritorial dimension of State duty to protect would greatly diminish the usefulness of the SRSG framework and would bring us back to the starting point; that is the acknowledgement that there are governance gaps which currently renders the application of human rights standards by host States very difficult or even impossible.

Finally, States' obligation to protect under international human rights law also requires them to provide access to remedies to victims of abuses committed by corporations. Remedies may take diverse forms and can be rendered by judicial instances and under some circumstances by different competent mechanisms such as administrative bodies, quasi-judicial bodies and national human rights institutions (NHRIs). FIDH believes that it is paramount for different instances to embody principles of justice and have the capacity to provide effective remedies for victims (cf. section 3. on access to remedies).

States should also promote amongst its businesses, corporate cultures respectful of human rights standards. To this end, volunteer measures are neither sufficient, nor desirable for companies in search of clarity on what they are expected to do. While fostering corporate cultures which are respectful of human rights can be done in many different ways such as through human rights education, it should also be coupled with the adaptation of national

⁷ "...international law provides that States have a duty to protect against human rights abuses by non-State actors, including business, affecting persons within their territory or jurisdiction. in John Ruggie, "Protect, Respect and Remedy: a Framework for Business and Human Rights », A/HRC/8/5, 7 April 2008, para.19.

⁸ John Ruggie, « Addendum: States obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions », A/HRC, 11/13, Add.1, 15 May 2009, p.3.

corporate legislations. FIDH embraces the Special Representative's corporate law tools project and hopes that the conclusions of this project will lead to concrete proposals for legal reforms, such as ways to incorporate the following into national law: due diligence obligations, how to overcome difficulties faced in determining legal personality of corporations and director's duties.⁹ The complexity of corporate structures renders very difficult, or often impossible, for States to exercise extra-territorial jurisdiction over companies which are registered under their own jurisdiction.

Guidance is greatly needed from international and regional bodies on how States should exercise their duty to protect vis-à-vis the activities of globalized corporations. Guidance is also needed with regard to States' respective obligations according to the varying degrees of territorial relationship they may have with a corporation involved in human rights abuses. Another difficulty arising in cases of corporate abuses is linked to the determination of the so-called "home State". Indeed, as revealed clearly by the *Trafigura* case, companies often have links to a number of States and guidance is needed to establish the duties of the respective States in particular to adjudicate activities of corporations. FIDH believes that the work carried out by the SRSG will be an important step forwards for a better understanding of States' duties to respect and protect human rights, in particular for people living outside their borders.

Through its General Comments, the Committee on Economic, Social and Cultural Rights has already provided some key guidance on how States should exercise their duty to protect extra-territorially.¹⁰ The work of the Committee on the Elimination of All Forms of Racial Discrimination is most informative on this issue. In its 2007 concluding observations for Canada, the Committee highlighted how the Canadian government is falling short of its obligations by not ensuring that the companies operating outside their territory are respecting the rights of indigenous peoples. The "Committee encourages the State party to take appropriate legislative or administrative measures to **prevent** acts of transnational corporations registered in Canada which negatively impact on the enjoyment of rights of indigenous peoples **in territories outside Canada**. In particular, the Committee recommends that the State party **explore ways to hold transnational corporations registered in Canada accountable**."¹¹

Finally, it is also States' duty to ensure that individuals can freely express their views, including disagreements with business projects. FIDH is concerned by the current trend of criminalization of social protest in various countries.

⁹ In this regard, the European Coalition for Corporate Justice (ECCJ), of which FIDH is a member, has developed interesting legal demands. <http://www.corporatejustice.org/>

¹⁰ See for example CESCR, General Comment 17, "The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author", E/C/12/GC/17, 12 January 2006, General Comment 19 on the right to social security", E/C.12/GC/19 (2008).

¹¹ CERD, « Concluding Observations of CERD: Canada », CERD/C/CAN/CO/18, 25 May 2007, para.17.

2. Corporate Responsibility to Respect

2.1. Human rights due diligence process

Concerning the corporate responsibility to respect, FIDH welcomes the acknowledgement by Professor Ruggie that corporations do indeed have the responsibility to respect all human rights at all times. FIDH also believes that further analysis is needed regarding corporations' responsibilities to go beyond respect for human rights in specific situations, such as when companies perform public functions.

FIDH advocates for the need to embed due diligence into national legislations. While companies already willing to apply due diligence within their operations are in need of guidance, they remain currently disadvantaged on the market; whereas companies not acting with due diligence continue to act with impunity without facing any legal or economic sanctions. The inclusion into national legislations of due diligence processes as a legal obligation could be inspired by what is already being done in other spheres of law, such as anti-corruption laws.

When defining the notion of due diligence, FIDH would like to insist on the need to ensure **transparency** both relating to the manner in which due diligence processes are conducted within the companies and to the results of such processes. Companies cannot, on the one hand, be transparent concerning the corporate social responsibility initiatives they undertake while acting with opacity when it comes to detailing their due diligence processes, such as the results of human rights impact assessments undertaken. Rather than increasing the risk of litigation for companies, they can benefit from due diligence processes which help to identify potential risks, as Professor Ruggie rightly highlighted.¹² Emphasis should therefore be put on **disclosure**, which ultimately also ties up with individuals' **right to access to information**.

Another essential element of due diligence relates to **participation**. Not only should stakeholders be consulted, but individuals who can be directly affected by the company's activities should, by obligation on the company, actively participate in discussions with the company prior and during its operations. Companies, most often with the support of local governments, regularly engage in dialogue with communities once the project is already designed and financed. Communities are therefore deprived of the possibility to influence the *modus operandi* of the business project. This creates frustrations, often leads to community division and does not take into consideration individuals' right to participation in projects affecting them. Participation mechanisms must be inclusive and non-discriminatory. In essence, the input of people potentially affected by a corporation's operations must be mainstreamed into every aspect of the projects design and implementation and particular attention must be given to vulnerable groups such as indigenous peoples and minorities.

¹² John Ruggie, "Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework", A/HRC/11/13, 22 April 2009, para.83.

Finally, in specific cases, such as in cases where indigenous peoples can potentially be affected by a project, companies' due diligence obligation should require them to obtain **free, prior and informed consent**, particularly in cases where States fail to ensure such mechanisms are in place.

FIDH welcomes the inclusion by the Special Representative of the notion of “entire life cycle” of a project or business activity into the understanding of due diligence. Essential to ensure the avoidance and mitigation of risks and human rights impacts, this requirement presupposes that the company considers, amongst other things, the impacts on the environment and communities' ability to preserve their livelihoods and the pursuit of their way of life. Such considerations are particularly crucial for business activities in the extractive industry, considering that the rights of affected indigenous peoples are almost systematically violated when it comes to foreign direct investment projects.

With regard to the importance to act with due diligence in the supply chain, FIDH would like to insist on the need to look at sourcing practices, as they represent a major leverage to address human rights conditions in the supply chain. FIDH invites the SRGS to undertake a critical assessment of current global sourcing practices by multinational corporations. This should include both efforts to improve labour conditions and business practices, with a view to determine what a due diligence process should involve concerning the supply chain. To support the SRSG in this endeavour, FIDH would be pleased to share its experience of working with global retail companies on supply chain issues.

Finally, it is important to recognize due diligence as only one dimension of corporations' duty to respect human rights standards. The obligation to undertake due diligence should not prevent companies from being held accountable.

3. Access to Remedies: Reaffirming the Importance of Reparation Measures

Regarding the 3rd pillar of the SRSG framework, FIDH insists that the fundamental principles of the right to a remedy under international law should serve as guidelines when assessing remedial mechanisms and should look at improving/and or establishing new ones in the context of Professor Ruggie's mandate.

3.1. Legal justification for the right to remedy under international law

FIDH welcomes the submission of an addendum to the SRSG's interim report¹³ which expressly focuses on the scope of States obligations to provide access to remedy for third-party abuses. FIDH remains concerned that the current reflection on an individual right to

¹³ John Ruggie, « Addendum: States obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions », A/HRC, 11/13, Add.1, 15 May 2009.

an effective remedy seems to be limited to gross human rights violations. In his report, Professor Ruggie emphasises that “[...] an individual right to remedy has been affirmed *for the category of acts covered* by the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (emphasis added).¹⁴ Indeed, such affirmation could imply that the individual right to remedy only exists for gross and serious violations of human rights. Without entering into detail on the issue of the international personality of individuals under international law, it suffices to say that the most common view clearly recognizes individuals as direct subjects of international law. The human rights regime is one such example that inherently confers rights directly upon individuals. As for the right to remedy, it has been recognized as a fundamental principle of international law¹⁵. The former UN Special Rapporteur on the Right to Reparation to Victims of Gross Violations of Human Rights, Theo Van Boven confirmed that a violation of *any* human right gives rise to the right to reparation for victims. (emphasis added).¹⁶ This right can not be constrained uniquely to gross and serious human rights violations and must be clearly reaffirmed in Professor Ruggie’s subsequent reports.

3.2. Definition and general principles

3.2.1. Procedural dimension: access to justice

The Special Representative refers to minimum principles that non-judicial mechanisms should comply with. These six principles are legitimacy, accessibility, predictability, equitability, rights-compatibility and transparency.¹⁷

According to international law, the first and fundamental aspect of the right to an effective remedy is access to justice. Not limited to judicial instances, remedies may take diverse forms and can be rendered by other competent mechanisms such as administrative bodies, quasi-judicial bodies, NHRIs or Ombudsmen. FIDH believes that

¹⁴ John Ruggie, « Addendum: States obligations to provide access to remedy for human rights abuses by third parties, including business: an overview of international and regional provisions, commentary and decisions », A/HRC, 11/13, Add.1, 15 May 2009, p.4.

¹⁵ See in particular the UN International Covenant on Civil and Political Rights, Article 2(3)(1): « To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; to ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy... ».

¹⁶ Commission on Human Rights, “Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Final Report Submitted by Mr. Theo van Boven, Special Rapporteur”, UN Doc. E/CN.4/Sub.2/1993/9 (2 July 1998), para. 13.

¹⁷ With a 7th principle for company-based mechanism being dialogue and mediation.

what matters most, is the incorporation of principles of justice and the capacity to provide effective remedies for victims into different remedial instances.

Under international law, the right to remedy is referred to as: the right to have equal and effective access to justice, an adequate, effective and prompt reparation for the harm suffered and finally, access to relevant information concerning violations (or the right to know or to truth) and reparation mechanisms.¹⁸ In other words, remedies provided must be **accessible, adequate, effective and prompt**.¹⁹

When the SRSG refers to the question of legitimacy and transparency, the issue of the independence of remedial mechanisms should be raised. While only referring to “sufficient independent governance structures”, the SRSG should emphasise the fundamental **notion of independence**. Remedial mechanisms should be both **available and accessible**. In his interim report, Professor Ruggie rightly highlights the need to remove economic and social obstacles in order to ensure access to remedial mechanisms.²⁰ As for Ruggie's predictability principle, it should be associated with the Van Boven / Bassiouni principles which refer to “**access to relevant information concerning violations and reparation mechanisms**”. Finally, the SRSG talks about the notion of rights-compatible as the outcomes and remedies that should be in line with internationally recognized human rights standards.

3.2.2. Substantive dimension: the right to reparation

FIDH applauds the attention given to the issue of reparation and its recognition as part of the right to an effective remedy in his addendum. Yet, debates around remedial mechanisms for victims of corporate abuses have so far largely focused on the question of *access* to remedies. However, beyond this issue lies a second and fundamental dimension of the right to remedy: the victims' right to reparation.

¹⁸ Theo Van Boven / Chérif Bassiouni, « Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law », Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, principle VII., Diane Orentlicher, “Updated set of principles for the protection of human rights through action to combat impunity”, 8 February 2005, E/CN.4/2005/102/Add.1.

¹⁹ «[...] States shall, as required under international law, ensure that their domestic law is consistent with their international legal obligations by: Adopting appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice; (c) Making available adequate, effective, prompt and appropriate remedies, including reparation, as defined below [...]”, Theo Van Boven / Chérif Bassiouni, « Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law », Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, principle I.1.2 b) and c).

²⁰ The Special Representative might want to refer to studies undertaken in relation to economic, social and cultural rights such as the Inter-American Commission on Human Rights Inter-American Commission on Human Rights, “Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights”, OAS Official Records Series, OEA/Ser.L/V/II (7 September 2007).

Sometimes perceived as distinct from the right to a remedy, the right to reparation – also referred to as redress - can be considered as the substantive dimension of the right to a remedy. In his interim report, Professor Ruggie only briefly refers to States' obligation to provide adequate reparation to victims. As for the right to reparation is an essential aspect of the right to remedy, it is considered that “without reparation, the obligation to provide an effective remedy [...] is not discharged”.²¹ Such reparation measures are not intended to be punitive in character but rather victim-oriented and proportionate with regards to the gravity and damage caused by the violation²². Reparation measures may take different forms such as **restitution, rehabilitation, compensation, satisfaction and/or guarantees of non-repetition**, and therefore go far beyond financial compensation.

Thus beyond the question of access to justice, the right to a remedy also encompasses the right to an adequate form of reparation.

3.3. Non-judicial grievance mechanisms: gaps and weaknesses

As a general rule, non-judicial grievance mechanisms should never presume to replace judicial mechanisms. Without entering into details about the different non-judicial mechanisms looked at by Professor Ruggie in his reports, nevertheless a few points deserve mention.

With regard to National Contact Points (NCPs), positive developments have unfortunately not been accompanied by concrete changes on the ground.²³ Besides the lack of enforcement, NCPs present numerous limitations that jeopardize their potential and that do not meet essential conditions to fulfil principles of the right to remedy. Amongst them are: the fact that NCPs are not universal and often inactive or non-existent even in OECD countries; the absence of a guarantee that NCPs members examining complaints are independent and competent to address human rights issues, the lack of common guidelines and coherence between NCPs to accept, treat and follow-up on complaints, their absence of quasi-judicial powers²⁴ and the lack of implementation of recommendations made. Moreover, it must also be noted that the OECD NCP system is one of mediation and consensus building between parties on appropriate resolution of an incident. Likewise the findings of the NCP are in no way binding on the company and neither can involvement of a company in the process be guaranteed. This form of remedy

²¹ Human Rights Committee, Nature of the General Legal Obligation on States Parties to the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), para.16.

²² « Reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed », Permanent Court of International Justice, Chorzow Factory Case, Merits, 1928, P.C.I.J., Sr.A, N°17 (September 13), at 47.

²³ For instance, NGOs have reported that Afrimex is still pursuing its trading activities in the DRC See OECD Watch, Global Witness vs. Afrimex, http://oecdwatch.org/cases/Case_114/?searchterm=afrimex [consulted 9 September 2009]

²⁴ Acting only as a forum for mediation, NCPs do not have, unlike bodies like the UN human rights committee, powers that resemble those of a court and that can remedy a situation by ordering measures.

may often be unsuitable – particularly where company and victim cannot agree on the elements of alleged abuses.

As to NHRIs, although not yet fully engaged in business and human rights issues, they have the potential to be an additional and powerful lever available to victims. However, several problems identified with regard to NHRIs are observed and should not be overlooked. Still today, many NHRIs do not have the ability to receive individual complaints. In practice, many of them do not fully abide by the Paris principles and many still do not possess the mandate to consider business and human rights issues.²⁵ In addition, it remains unclear how and if they can address the responsibility of mother companies as opposed to local subsidiaries as well as the responsibility of home countries to monitor corporations acting abroad. FIDH will nevertheless follow the work of the International Coordinating Committee on NHRIs and hopes that some of these limitations can be addressed within this forum.

Finally, with respect to company-based grievance mechanisms, FIDH agrees with the Special Representative that they can play a preventive role in identifying recurrent problems and adapting practices before violations occur. Such mechanisms, if designed to ensure meaningful participation from stakeholders in particular communities, may represent interesting mechanisms to monitor and assess respect for human rights. They should be designed in accordance with due diligence requirements. However, no matter how essential they can be in preventing human rights abuses, they carry, by their very nature, inherent flaws such as their lack of independence. This requires us to look at other options to ensure victims ultimately have access to independent remedial mechanisms when a violation has taken place.

Company-level mechanisms, alike other administrative bodies, must always be considered as a complementary means and will remain insufficient, alone, to ensure the respect of victim's right to a remedy.²⁶

It is known that host States often do not have the ability (or the willingness) to fulfil their obligation to protect and therefore to apply human rights standards. In light of this gap identified by Professor Ruggie and home States' obligation to ensure companies headquartered on their territory do not violate human rights when operating abroad, home States play a crucial role in providing access to remedies. In this regard, FIDH looks forward to the work of the Special Representative and his team on legal obstacles, in particular recommendations for stronger legislation in home States, especially including through extraterritorial jurisdiction.

²⁵ See the extensive survey undertaken by Professor Ruggie and his team. It highlights the important differences amongst NHRIs. At that time, 10 out of the 43 NHRIs who responded could address complaints related to any kind of company for all rights. *Business and Human Rights: A Survey of NHRIs Practices*.

²⁶ The Human Rights Committee has recognized that purely administrative remedies have not been considered sufficient to provide effective remedies and thus to discharge States' obligations under Article 2.3 of the ICCPR. See notably *Bautista v. Colombia*.

Finally, more and more lawsuits faced by companies in home states are settled by out-of-court agreements. It would be useful if Professor Ruggie could provide guidance on criteria such agreements should fulfil to uphold victims' right to reparation. In order to do so, FIDH invites the SRSG to undertake an analysis of the recent out-of-court agreements from the perspective of the right to reparation. According to FIDH, such criteria should notably: ensure victims' participation in the negotiation of compensation measures in order to ensure well-informed consent from victims;; not ban other jurisdictions from adjudicating cases; not preclude other victims not part of the agreement to undertake legal actions; comprise accountability mechanisms with independent supervision; and include corrective measures to avoid repetition. Finally such out-of-court settlements should preserve victims' rights to undertake judicial action should there be criminal responsibilities involved, in particular international crimes. International criminal law does not allow for any exceptions when it comes to international crimes whatever the legal personality of the suspected author of the crime including individuals representing transnational corporations. Such fundamental principles should be further stressed in the SRSG's report.²⁷

4. Moving Forward : Creating a Universal Quasi-Judicial Remedial Mechanism

In his interim report, Professor Ruggie enumerates suggestions made for a new international institution such as a clearing house, a capacity-building entity, an expert body and international grievance mechanism. While favourably receiving the first three options, Professor Ruggie is of the opinion that an international mandatory, non-judicial but adjudicative mechanism would not be properly equipped to deal with complex issues. He also suggests that it would be unlikely to meet “basic standards of fairness and rigour” and hence, would not render satisfying prospects of remedies. On this point and prior to examining his proposal for an international mediation body, a few nuances deserve mention.

Agreeing with such argument would amount to discrediting the work of the UN treaty bodies. While they certainly present important shortcomings notably due to their lack of resources, they nevertheless represent universal quasi-judicial bodies that have proven to be competent in addressing a range of human rights issues based on written submissions, regardless of the complexity of the cases. Treaty bodies and to a certain extent some special procedures have the legitimacy to be mandated by the international community and are grounded in international human rights law. They provide authoritative interpretation on the content of the rights enshrined in international instruments and on the scope of States' obligations. They have developed important jurisprudence. In many instances, they have proven to be the only mechanisms victims in search for justice can turn to. The rejection of an international quasi-judicial body should not be based on the

²⁷ For further details on victims' rights, see the FIDH « Guide on Victims' Rights before the International Criminal Court », Chapter I – The Evolution of Victims' Access to Justice, May 2007, available at: <http://www.fidh.org/Victims-Rights-Before-the>

basis that such a body would face important challenges, be they practical, financial or political.

As an alternative to an international quasi-judicial mechanism, Professor Ruggie suggests using an international existing body or network that could offer mediation of disputes – and eventually arbitration. While presenting very interesting elements, FIDH believes that currently no body fulfils existing gaps that victims face when seeking justice.

FIDH fully shares Professor Ruggie's concerns for ensuring the effectiveness of remedial mechanisms and avoiding the duplication of mechanisms by using existent initiatives. FIDH recognizes that the most desirable solution for victims is to have access to effective remedial mechanisms at the national level (local, municipal, provincial ...). In this sense and as highlighted above, FIDH hopes that the work of the Special Representative will lead to concrete recommendations to strengthen national legislations and enable victims to resort to effective remedial mechanisms at the domestic level.

However, due to well-known obstacles to justice in home States, the ineffectiveness of most judicial remedies (especially in weak governance zones) further justifies the need for a universal mechanism. FIDH therefore wishes to insist on the need to discuss the question of remedies in a victim-oriented approach and to ensure that ultimately, victims have access to mechanisms that live up to the basic and fundamental principles of justice.

FIDH fully agrees with the Special Representative on the importance that remedies «hold promise of practicable, achievable benefits»²⁸. Yet, such pragmatic reflection on the effectiveness of remedial mechanisms should not be made at the expense of the need for justice and the fundamental principles at the heart of the right to remedy. The question of reparations, including the right to truth, is of utmost importance for redress for individual victims and a pre-condition for ensuring justice. Acknowledgement of responsibilities and violations committed, and apologies to victims, although symbolic, can be fundamental for them. The sole recognition of victims' right to justice should not be undervalued. Such redress can not be obtained solely via mediation. For this reason, FIDH advocates for an international body vested with the powers to determine both States and corporations' responsibilities. FIDH supports the proposal of the establishment of a World Court on Human Rights made recently by the Special Rapporteur on Human Rights and Counter-Terrorism, Professor Scheinin. FIDH is conscious that such a world court will not exist overnight, and that in the meantime, victims of human rights violations in particular of human rights violations involving business will continue to suffer from the violation of their right to an effective remedy.

A quasi-judicial body could therefore take the form of a working group mandated by the Human Rights Council comprised of independent experts. The body should be

²⁸ John Ruggie, “Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises”, A/HRC/11/13, 22 April 2009, para.110.

complementary to and articulated with existing networks and interact with international, regional and national bodies whenever possible and/or desirable. Designed on a flexible structure, the body could collaborate with instances such as the UN Global Compact, the Office of the High Commissioner for Human Rights, the ILO mechanisms and the NHRIs. It should have the ability to receive communications and to undertake country visits, including to corporations, as already done by certain special procedures.²⁹ Yet, it would not lose its fundamental and unique features: its legitimacy, universality and ability to adjudicate on both States and corporations' responsibilities. FIDH would be available to work with the SRSG and his team to further determine the modalities such a body could take.

CONCLUSION

FIDH is of the view that the work of the SRSG has the potential to significantly contribute to changing behaviours of States and corporations and ultimately benefit those who suffer from human rights violations involving business. The shared view put forward by the Special Representative that States have the duty to protect, that corporations have the responsibility to respect human rights and that victims have the right to an effective remedy should ultimately be embedded in an international legal instrument.

The establishment of a quasi-judicial mechanism should not be delayed as a matter of principle as this mechanism is essential to contribute to both closing the accountability gap and establishing principles on a case-by-case basis.

Ultimately, such a mechanism can potentially benefit all stakeholders by contributing to a better understanding of what respecting human rights means for businesses by applying to specific contexts the definitions of difficult concepts such as the concept of due diligence. In addition, the mechanism would contribute to interpreting standards and developing jurisprudence which in turn would allow both home and host States to better capture the scope of their respective obligations on business and human rights issues. Such a mechanism could play a determinant role in the concrete operationalization of the “Protect, Respect and Remedy” framework proposed by the SRSG and in avoiding recurrence of human rights abuses in the context of corporate activities.

International Federation for Human Rights
17 Passage de la Main d’Or, 75011, Paris, France,
TEL. : +33(0)1 43 55 25 18, FAX :+33 (0)1 43 55 18 80
E-mail : fidh@fidh.org / <http://www.fidh.org>

²⁹ See notably a visit to a pharmaceutical company undertaken by former Special Rapporteur on the Right to Health, Paul Hunt during a mission. Paul Hunt, “Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, A/63/263, 11 August 2009.