

CONCLUSION

As illustrated throughout the different sections of this guide, the range of mechanisms that are available to victims of corporate-related abuses is diverse. From invoking States' responsibilities before the international human rights protection system and corporations' liability before domestic courts, to initiating mediation processes with ombudsmen or OECD National Contact Points instances, recourse mechanisms may take various forms and result in different types of outcomes. However, the real question remains: can they effectively bring justice to victims? Do they fulfil victims' right to an effective remedy? Do they offer adequate sanction to change corporate behaviour and help deter future violations?

This guide, although highlighting potential avenues, also reminds us that to date, none of the existing mechanisms can truly live up to the meaning of an effective remedy.

Enshrined in international human rights law, the right to an effective remedy entails both a procedural and substantive dimension. Put simply, victims should not only have access to justice, but they are also entitled to reparation measures. These may take different forms such as restitution, rehabilitation, compensation, satisfaction and/or guarantees of non-repetition.

The obstacles faced by victims and their legal representatives in holding companies liable and seeking to invoke extraterritorial obligations of States, as illustrated in the section dealing with civil and criminal liability, remain numerous, complex and should not be underestimated. Some pieces of legislation such as in Canada, the US and Europe do indeed provide for opportunities to initiate legal proceedings to obtain civil or criminal sanctions for damages caused by or with the complicity of companies. Yet they should not be seen as a panacea.

Simply obtaining the judge's acceptance to even consider a case can represent years of litigation with lawyers having to deal with reluctant judges and where the probabilities of dismissal are high (mainly due obstacles such as the *forum non conveniens* doctrine). Other legal hurdles such as proving the involvement of the parent company in the behaviour of its subsidiary ("piercing the corporate veil") require access to information that lawyers often do not have and which is further impeded by legal strategies used by corporations to avoid liability. Economic obstacles caused by the inequality of arms between the parties remain one – if not the most- important obstacle. On the one hand, corporations will most often not hesitate to invest millions of dollars in legal counsel and use every possible strategy to discredit experts, witnesses and even judges, even more so if the case bears the

potential to create a precedent. On the other hand, affected individuals and peoples, in vast majority, can be marginalized, vulnerable, poor people with very limited financial means. Legal representatives willing to take on their case with all the risks it entails (including risk to their physical security and risk of bankruptcy) are hard to find. The fact that, under certain jurisdictions, victims may have to bear the costs of a lawsuit if they lose the case certainly presents an insurmountable obstacle. In the end, lawsuits against corporations often end up in out-of-court settlements, whose conformity with human rights standards is questionable and which in turn impede the development of a much needed jurisprudence.

Access to non-judicial and voluntary mechanisms, is undoubtedly easier than to judicial mechanisms. Yet, not only are they often characterised by lengthy procedures, but they also tend to present inherent flaws that prevent them from offering adequate reparation.

Quasi-judicial intergovernmental mechanisms established by the International Labour Organisation, the United Nations or the regional bodies are both legitimate and competent in addressing a range of complex human rights issues. They can, in some instances, represent the only mechanism that victims seeking justice can turn to. Yet, the means with which these bodies operate remain absurdly low. Their lack of human and financial resources is coupled with the lack of power to ensure their decisions and recommendations are enforced. To date, they remain ill-equipped to directly address the responsibility of non-state actors. It is hoped that the current intergovernmental process towards the establishment of an international binding instrument on human rights, multinational corporations and other business enterprises will contribute to clarify and further codify existing obligations and ensure redress for corporate-related human rights abuses.

For their part, mediation mechanisms are currently attracting a lot of attention. The OECD Guidelines now include language on human rights (including in the supply chain) and there is a strong push from civil society calling to reform the National Contact Points to ensure greater independence and efficiency. However, even if rendered more efficient, they would still lack enforcement powers, in addition to being questions as legitimate bodies to deal with cases of human rights violations. Mediation mechanisms should be improved by drawing from victims' perspective and human rights principles. As for National Human Rights Institutions, we are witnessing an increased interest on their part to consider corporate-related cases as part of their mandate. Such developments could serve to reinforce and build on the work of the UN Treaty Bodies and Special Procedures and to further clarify the respective responsibilities of States and companies. Yet, NHRIs face the same obstacles as intergovernmental mechanisms and most of them are still not vested with the mandate to receive individual communications on these issues.

Financial institutions' mechanisms such as the World Bank Inspection Panel and regional development banks complaint mechanisms can eventually represent interesting avenues for victims affected by mega-projects funded by these institutions. In these cases, access to complaint mechanisms turn out to be hampered not by heavy procedural requirements, but rather because they remain largely unknown by groups that qualify as claimants. In addition, they have faced wide criticism for their apparent lack of good faith (notably characterized by the lack of resources and relevant expertise) and their inability or unwillingness to consider indirect and long-term damages caused by the projects they support. Access to information, awareness-raising and the monitoring of corrective action plans remain areas where critical improvement is required. Nevertheless, and as a result of public pressure, most of them are going through reform processes. Affected groups should seize these opportunities to demand greater accountability from these institutions. As far as private banks are concerned, means of influence for civil society remain weak and limited to the bank that have agreed to the Equator Principles..

Finally, mechanisms voluntarily set up by States and companies present potential to contribute to the prevention of future violations by looking to change corporate behaviour and address human rights issues companies face in particular concerning purchasing practices and procurement policies. However, they remain limited in scope and, if not coupled with legal incentives and structural reforms at the State level, they may only lead to short-term insufficient or inadequate results.

Last but not least, the scenario set out in this guide relates to human rights violations caused directly or indirectly by the operations of multinational corporations mostly based in the OECD countries and operating in third countries. Yet, economic actors from emerging countries are playing an increasingly important role in the global economy, be they State-owned enterprises or multinational corporations heavily involved in developing countries in sensitive industrial sectors including mining and infrastructure development. This represents an additional challenge to those seeking justice, particularly where both home and host governments collude with the company. This raises serious concerns as to how adapted (or rather ill-adapted) current recourse mechanisms are, and reinforces the need for adequate universal mechanisms guaranteeing that all economic actors may be held accountable.

The current process taking place within the United Nations regarding the adoption of a binding instrument on human rights, multinational corporations and other business enterprises intends to address some of these challenges. The adoption of such instrument would build on the achievements of the former UN Secretary-General Special Representative on Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, notably the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs should be effectively implemented and be accompanied by the reinforcement of existing standards and enforcement mechanisms. The June 2014 Human Rights Council resolution establishing an intergovernmental working group mandated to elaborate a binding instrument on

human rights and businesses echoed a global call from hundreds of civil society organisations and social movements around the world. These organisations, many of which remain active through the Treaty Alliance, will have a crucial role to play to continue pushing for the elaboration of a robust instrument providing adequate protection and reparation to victims of corporate abuse, as well as to monitor its effective implementation.

Other recent interesting developments include the adoption in March 2016 of a non-binding instrument on business and human rights by the Council of Europe, which contains decisive recommendations on access to justice for victims of corporate human rights abuse. In this case as well, one of the critical challenges remains the adequate implementation of the Recommendation by the Council of Europe's 47 member States.

In our view, addressing the well-recognised challenges linked to corporate accountability calls for the necessity to go beyond the existing mechanisms.

There continues to be an urgent need to acknowledge the current state of affairs and the huge barriers victims still face in accessing and obtaining justice for violations and damages suffered; recognising the inherent tensions between the search for profit and the respect for human rights; and finally, admitting that governance gaps are and will most probably remain a reality in most cases.

Faced with such a situation and in the absence of effective legal remedies, victims and NGOs have had to find ways to claim their rights, such as by setting up their own Peoples' Tribunals. By being judge and jury of the multinational corporations, victims are sending a strong and symbolic message: the lack of justice when it comes to protecting individuals against corporate-related violations and the urgency for the international community to act.

Various proposals have been made to suggest the creation of an international court with adjudicative powers over crimes committed by companies. Others have suggested the modification of the Rome Statute of the International Criminal Court with a view to incorporating in the Court's jurisdiction crimes committed by legal persons. Others insist on the need to – at a very minimum- apply the actual provisions of the Rome Statute to individuals suspected of crimes of complicity committed on behalf of a company. Various NGOs raised the need for a UN body (such as the UN Working Group on business and human rights for example) tasked with ensuring the implementation of the UNGPs as well as to receive and examine communications from victims of alleged violations. This mechanism appears essential to contribute to both closing the accountability gap and establishing principles on a case-by-case basis. In addition, the mechanism would contribute to interpreting standards and developing jurisprudence which would allow both States and corporations to better understand the scope of their respective legal responsibilities.

These are not idealistic aspirations: they are legitimate demands grounded in reality. They represent credible claims that could be seen as complementary to reforms that are either underway, contemplated or proposed regarding the use of direct extraterritorial jurisdiction. They also relate to legal and political domestic measures with extraterritorial dimensions in different areas such as anti-corruption, securities law and environmental law. They represent proposals that are in line with the challenges posed by economic globalization and the harm victims suffer. The guide should be seen as a tool to fuel discussions around these proposals. It is meant to be a foundation upon which victims can rely to claim their rights and ask for greater justice.

The overall portrait this guide draws of available recourse mechanisms does not necessarily depict a hopeful picture for victims. Yet it is a call for action. As rightly evoked by Olivier De Schutter, it is an invitation to make use of these mechanisms in order to render them more effective and to obtain results for those affected. It is also a call for environmental NGOs, human rights defenders, social activists, trade unionists, public interest lawyers or attorneys working pro-bono to work hand in hand in the best interest of the victims in order to not only challenge the current paradigm, but to bring about change.

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GLOSSARY

ACHPR.....	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ADB	Asian Development Bank
AfDB.....	African Development Bank
AGM	Annual General Meeting
AMU.....	Arab-Maghreb Union
ATCA.....	Alien Tort Claim Act
AU.....	African Union
BIAC.....	Business and Industry Advisory Committee
BIT	Bilateral Investment Treaty
CAO.....	Compliance Advisor Ombudsman
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment
CCPR	Committee on Civil and Political Rights
CEDAW	Convention on the Elimination of Discrimination Against Women / Committee on the Elimination of Discrimination Against Women
CEN-SAD.....	Community of Sahel-Saharan States
CEO.....	Chief Executive Officer
CERD	Committee on the Elimination of all form of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
CFA	Committee on Freedom of Association
CIME.....	Committee on International Investment and Multinational Enterprises
CMW	Committee on Migrant Workers
COE.....	Council of Europe
COFACE	Compagnie Française d'Assurance pour le Commerce Extérieur
COMESA	Common Market of Eastern and Southern Africa
COP.....	Communication on Progress
CRC.....	Convention on the Rights of the Child / Committee on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities / Committee on the Rights of Persons with Disabilities
CSR.....	Corporate Social responsibility
EAC.....	East African Community
EBRD.....	European bank for Reconstruction and Development
EC.....	European Community
ECA(s)	Export Credit Agency(-ies)
ECCAS	Economic Community of Central African States
ECGD	Export Credit Guarantee Department
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC.....	Economic and Social Council
ECOWAS	Economic Community of West African States

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 ADB.....Asian Development Bank
 AfDB.....African Development Bank
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 AMU.....Arab-Maghreb Union
 ATCA.....Alien Tort Claim Act
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 BIAC.....Business and Industry Advisory Committee
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 of Persons with Disabilities
 CSR.....Corporate Social responsibility
 EAC.....East African Community
 EBRD.....European bank for Reconstruction and Development
 EC.....European Community
 ECA(s).....Export Credit Agency(-ies)
 ECCAS.....Economic Community of Central African States
 ECGD.....Export Credit Guarantee Department
 ECHR.....European Court of Human Rights
 ECJ.....European Court of Justice
 ECOSOC.....Economic and Social Council
 ECOWAS.....Economic Community of West African States
 ECSR.....European Committee on Social Rights
 EDC.....Export Development Canada
 EIB.....European Investment Bank
 EITI.....Extractive Industries Transparency Initiative
 EPFI.....Equator Principles Financial Institutions

ESC.....European Social Charter
 ESG.....Environmental Social and Governance issues
 ETIEthical Trading Initiative
 ETUCEuropean Union Trade Confederation
 FIDH.....International Federation for Human Rights
 FLAFair Labour Association
 FLOFair Trade Labeling Organisation
 FSIAForeign Sovereignty immunities Act
 FTCA.....Federal Tort Claim Act
 FWFFair Wear Foundation
 GFA(s)Global Framework Agreement(s)
 GONGO(s)....Governmental Non Governmental Organisation(s)
 GRIGlobal Reporting Initiative
 GUFGlobal Union Federation
 HRCHuman Rights Council
 IACHRInteramerican Commission on Human Rights
 I/A Court H.R. .Interamerican Court of Human Rights
 IBRD.....International Bank for Reconstruction and Development
 IC.....Investment Committee
 ICCPR.....International Covenant on Civil and Political Rights
 ICERDInternational Convention on the Elimination of all form of Racial Discrimination
 ICESCR.....International Covenant on Social and Cultural Rights
 ICJ.....International Court of Justice
 ICMCInternational Council on Mining and Metals
 ICRMWInternational Convention on the Protection of the Rights of all Migrants
 Workers and their families
 ICSIDInternational Center for Settlement of Investment Disputes
 IDAInternational Development Association
 IDBInter-American Development Bank
 IFA(s)International Framework Agreement(s)
 IFCInternational Finance Corporation
 IFI(s).....International Financial institution(s)
 IGAG.....Intergovernmental Authority for Development
 ILOInternational Labour Organisation
 IMFInternational Monetary Fund
 INGO(s).....International Non Governmental Organisation(s)
 IOEInternational Organisation of Employers
 ISOInternational Organisation for Standardization
 KNHRCKenyan National Human Rights Commission
 KPCS.....Kimberley Process Certification Scheme
 MIGAMultilateral Investment Guarantee Agency
 MNE(s)Multinational Enterprise(s)
 NCP(s)National Contact Point(s)
 NEPAD.....New Partnership for Africa's Development
 NGO(s).....Non Governmental Organisation(s)

NHRI(s) National Human Rights Institution(s)
 OAS Organisation of American States
 OAU Organisation of the African Unity
 OECD Organisation for Economic Co-operation and Development
 OHCHR Office of the High Commissioner for Human Rights
 OPIC Overseas Private Investment Corporation
 PRI United Nations Principles for Responsible Investment
 PS Performance Standards
 REC Regional Economic Communities
 RICO Racketeer Influenced and Corrupt Organisations
 SADC Southern Africa Development Community
 SAHRC South African Human Rights Commission
 SAI Social Accountability International
 SRI Socially Responsible Investment
 TNC(s) Transnational Corporations
 TUAC Trade Union Advisory Committee
 TVPA Torture Victim Protection Act
 UDHR Universal Declaration of Human Rights
 UN United Nations
 UNESCO United Nations Organisation for Education Science and Culture
 UNGC / GC United Nations Global Compact
 UNICE Union of Industrial and Employers' Confederations of Europe
 UNSC United Nations Security Council
 UPR Universal Periodic Review
 VPs Voluntary Principles
 WB World Bank
 WRC Worker Rights Consortium

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