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NATIONAL HUMAN
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INSTITUTIONS AND
ACCESS TO REMEDY
IN BUSINESS AND
HUMAN RIGHTS

PART 1: REVIEWING THE ROLE
AND PRACTICE OF NHRIS



**NATIONAL HUMAN RIGHTS INSTITUTIONS AND ACCESS TO REMEDY IN
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ABBREVIATIONS

ADR	Alternative Dispute Resolution
ARP	Accountability and Remedy Project
BHR	Business and Human Rights
CSO	Civil Society Organisation
DIHR	Danish Institute for Human Rights
GANHRI	Global Alliance of National Human Rights Institutions
NAP	National Action Plan on Business and Human Rights
NCP	National Contact Point
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
UNGPs	United Nations Guiding Principles on Business and Human Rights
UNWG	United Nations Working Group on Business and Human Rights

CHAPTER 1

1 INTRODUCTION

1.1 OVERVIEW

This two-part report examines the role of national human rights institutions (NHRIs) in facilitating access to effective remedy in the context of business and human rights (BHR). The primary objective is to identify trends and patterns in how NHRIs apply their Paris Principles mandate to access to remedy in BHR; including to identify common challenges faced by NHRIs and how these might be addressed to strengthen NHRI capacity, action and collaboration to enhance access to effective remedy for victims of business-related human rights abuses.

Part 1 of the report (“Reviewing the role and practice of NHRIs”) presents an analysis of the role and practice of NHRIs regarding access to remedy in BHR, based on analysis of 2019 survey data gathered by the United Nations Working Group on Business and Human Rights (UNWG), as well as a review of the literature relevant to the topic. Part 2 (“Four comparative case studies from Africa”) presents four NHRI case studies from the African region (Kenya, Niger, Nigeria and Uganda) and a comparative analysis examining key practice challenges and recommendations, as well as corresponding opportunities for further research. The executive summary captures key points as well as outlining 10 topic areas with concrete policy recommendations that can be implemented by states, NHRIs and other actors to strengthen the ability of NHRIs to contribute to access to effective remedy for business-related human rights abuses.

1.2 CONTEXT

NHRIs have an important role to play in supporting remedy of business-related human rights abuses. This role has been noted in key frameworks and initiatives, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs),¹ the current Action Plan of the Global Alliance of National Human Rights Institutions (GANHRI) Working Group on Business and Human Rights and the 2018 United Nations General Assembly Resolution on improving accountability and access to remedy in BHR, which calls out “the important role of national human rights institutions in supporting activities to improve accountability and access to remedy for victims of business-related human rights

abuse, including through supporting the effective implementation of the Guiding Principles on Business and Human Rights.”²

This report draws and builds on a number of key events and resources on NHRIs and remedy in BHR, including the 2015 Conference on Legal Accountability of Business for Human Rights Impacts,³ 2016 Rabat Workshop on Guaranteeing Access to Remedies for Business-related Human Rights Abuses: Role of NHRIs,⁴ 2018 Chatham House Dialogue on Access to Remedies in Business and Human Rights: The Role of National Human Rights Institutions,⁵ 2019 Berlin Workshop on the Role of NHRIs in Remedy in BHR⁶; as well as research on NHRIs in access to remedy, contributions of NHRIs to the Accountability and Remedy (ARP) Project undertaken by the Office of the United Nations High Commissioner for Human Rights⁷ and GANHRI BHR Working Group contributions to the Intergovernmental Working Group on a binding instrument on BHR.

1.3 OBJECTIVES

Effective access to remedy remains a key gap in BHR.⁸ While attention to the role of NHRIs in the field of BHR has increased substantially over the years, including in relation to the role that NHRIs can play in relation to remedy, research in this area remains limited.

In this context, the primary objective of this report is to identify common challenges faced by NHRIs and how these might be addressed to strengthen NHRI capacity, action and collaboration to enhance access to effective remedy for victims of business-related human rights abuses. Importantly, this includes not only considering NHRIs’ capacity in terms of complaints handling but involves examining how each of the different Paris Principles mandate areas could be most effectively applied to enhance access to remedy in BHR. In doing so, this report seeks to serve as a resource for NHRIs to strengthen their role in access to remedy in BHR; and to inform current international and national processes that address the role of NHRIs in access to remedy in BHR – such as the UNWG 2020 report to the Human Rights Council on the role of NHRIs in access to remedy,⁹ and national-level processes such as National Action Plans on BHR (NAPs).¹⁰

In sum, the key objectives of the report are to:

- **Document and consolidate examples of NHRIs working on access to remedy in the context of business-related human rights abuses to date:** With the view to identifying common themes, trends, learning and challenges that may contribute to peer learning among NHRIs and other actors.
- **Derive a set of discussion topics and policy recommendations for NHRIs and other interested actors:** To consolidate some of the key themes emerging that individual NHRIs working on BHR might consider, as well as regional

networks/GANHRI and others supporting NHRIs' role with regard to remedy in BHR.

- **Contribute to scholarly literature and debate:** By examining current practice to identify topics and trends for further scholarly investigation.

1.4 METHODOLOGY

The analysis presented in this report is primarily exploratory. The primary information base for the report includes: (1) a review of academic and grey literature¹¹ relevant to the topic (see Endnotes); (2) 32 NHRI submissions to the 2019-issued questionnaire of the UNWG exploring the role of NHRIs in supporting access to remedy in BHR (see Annex B for the questionnaire and Annex C for a summary table of the submissions, separate document); and (3) four case studies examining the role and practice of the NHRIs from Kenya, Niger, Nigeria and Uganda in supporting access to effective remedy in BHR (see Part 2 of the report).

The four case studies were written in collaboration between the respective NHRIs and the Danish Institute for Human Rights (DIHR), informed by documentary analysis of collected and publicly available information as well as interviews with select NHRI staff and relevant external stakeholders. To ensure consistency in the collection and analysis of the evidence as well as the translation of the findings into meaningful policy recommendations, the authors took the structure of the UNWG questionnaire as a reference point.

A more detailed explanation of the methodology adopted for the report, including the development of the case studies, is presented in Annexes A, B and C (see separate document).

CHAPTER 2

2 THE MANDATE AND ROLE OF NHRIS AS BHR REMEDY ACTORS

Over the last years, the specific and important role of NHRIs in the field of BHR has gained attention. Increasingly, this has included looking at the specific role of NHRIs with regard to access to remedy for business-related human rights abuses.

An NHRI is an autonomous and independent state institution, established through the constitution or through law, with the mandate to protect and promote human rights.¹² The Paris Principles (the authoritative guidance for what constitutes an NHRI), recommend certain functions for NHRIs. These include advisory functions, complaints handling, publicising its opinions and recommendations, consulting with other bodies, encouraging the adoption of international standards and promoting legal harmonisation.¹³ Forms and mandates of NHRIs vary – a key difference in NHRI mandates pertains to the possibility for NHRIs to receive individual complaints, as quasi-judicial functions are optional according to the Paris Principles.¹⁴ The significance of this function and how it relates to other Paris Principles mandate areas is discussed in further detail in Chapter 3, below.

With respect to BHR, while the Paris Principles do not directly mention business-related abuses, they specify that the NHRI mandate should be as broad as possible. As interpreted by GANHRI, this means that “the mandate should extend to the acts and omissions of both the public and private sectors.”¹⁵ The Edinburgh Declaration, adopted in 2010 by the 10th International Conference of the International Coordinating Committee (now GANHRI), addresses how NHRIs can engage with BHR issues – clarifying that their role to engage with BHR spans across all NHRI mandate areas and is not limited to the complaints and investigation functions. For example, NHRIs can engage in promoting greater protection against business-related human rights abuses and access to justice, encouraging greater business accountability and respect for human rights, and establishing multi-stakeholder approaches.¹⁶

Four regional action plans have subsequently been adopted by the different networks of NHRIs – Africa, the Americas, Asia-Pacific and Europe. Notably, many of these address NHRIs’ role with regard to access to remedy. For example, the regional action plans of the networks of NHRIs of Africa and the Americas both discuss the need for NHRIs to strengthen their legal mandates to be able to have clear jurisdiction to act on BHR issues.¹⁷ The Asia-Pacific regional action plan encourages NHRIs to work with states to revise NAPs to ensure that these promote effective remedy for cases of human rights abuses by businesses.¹⁸ Interestingly, the Asia-Pacific regional action plan notes that the majority of institutions in the region are already undertaking (either directly and indirectly) common remedy functions including: complaints handling (including conciliation and mediation of complaints); conducting national inquiries; and intervening in judicial proceedings, as both a friend of the court or an intervenor.¹⁹ The European Network of NHRIs shared similar goals for remedy processes, explicitly noting that institutions should increase complaints handling, inquiries, and education and outreach with stakeholders (including businesses) about access to effective remedies relating to human rights abuses involving business actors.²⁰

Various international BHR frameworks have also pointed to the important role that NHRIs can play regarding access to remedy. The UNGPs, for instance, outline the different roles that NHRIs can play within each type of remedy mechanism (state-based judicial, state-based non-judicial and non-state-based non-judicial). For example, UNGP 25 discusses how state-based remedy mechanisms may be administered by the state or by an independent body in which those affected seek remedy or an intermediary seeks remedy on their behalf. Here, NHRIs and ombudsperson offices are referenced as examples of these independent bodies.²¹ UNGP 27, on state-based non-judicial mechanisms, states that “national human rights institutions have a particularly important role to play.”²² In the 2017 report by the UNWG, elaborating what constitutes an effective remedy in BHR, civil society organisations (CSOs) and human rights defenders (which in the report includes NHRIs) are described as “justice enablers” due to their ability, inter alia to “raise awareness of rights and available remedies, build the capacity of rights holders, address power imbalances, advocate pro-human rights reforms, contribute to human rights impact assessment processes, assist in documenting harm and collecting evidence, develop standards, highlight abuses, undertake fact-finding, provide counselling to victims, assist in litigation and monitor compliance with remedial orders.”²³ Along similar lines, the ARP II study on state-based non-judicial grievance mechanisms undertaken by the Office of the United Nations High Commissioner for Human Rights, noted that NHRIs have a unique role to play when it comes to contributing to access to remedy for BHR issues.²⁴

CHAPTER 3

3 THEMES AND PATTERNS IN NHRI ENGAGEMENT ON ACCESS TO REMEDY IN BHR

This part of the report presents observations on themes and patterns in NHRI engagement on access to remedy in BHR. The discussion is based on desktop review of the literature, focusing especially on documented examples of NHRI practice to identify how the formal NHRI mandate translates into practice when facilitating access to remedy for business-related human rights abuses. In particular, the discussion includes an analysis of the responses of 32 NHRIs to the UNWG questionnaire, drawing out common themes and patterns, as well as pointing to noteworthy divergences.

Recognising the interlinkages between the different themes, for the purpose of discussion, these have been grouped here as follows: (1) mandate, capacity and resources to address BHR; (2) complaints-handling function; (3) alternative dispute resolution; (4) enforceability of remedies; (5) gender-responsiveness and accessibility for vulnerable rights-holders; (6) investigations; (7) public inquiries; (8) indirect facilitation of access to remedy; (9) collaboration with other actors and mechanisms; (10) extraterritoriality and cross-border cases.

3.1 MANDATE, CAPACITY AND RESOURCES TO ADDRESS BHR

Different NHRIs have different abilities within their mandate that can also affect their ability to handle BHR issues. Some NHRIs have argued that the lack of an explicit mandate to monitor the activities of businesses makes it difficult to protect against business-related human rights abuses and seek remedy for them.²⁵ The mandate of some NHRIs explicitly prevents jurisdiction on business-related issues. A broad mandate that covers both civil and political rights as well as economic, social and cultural allows NHRIs to more effectively handle business-related human rights abuses.²⁶

Narrowly-defined mandates can be overcome by NHRIs dynamically interpreting their legal basis to address BHR issues. In 2018, for example, the NHRI of the Philippines conducted a public inquiry on the impact of major fossil fuel

companies on climate change and human rights, creatively utilising its implicit legal mandate to encompass this type of investigation. The inquiry was the first of its kind in the world and shows how NHRIs can assert their jurisdiction by implementing their mandates with flexibility.²⁷

In addition to issues associated with the formal mandate of NHRIs, many institutions face significant resource constraints, which inhibits their ability to address business-related matters. Furthermore, while NHRIs are increasingly building their internal capacity on BHR, it is still a new topic and working area for many NHRIs.

Analysis of the UNWG questionnaire responses: mandate, capacity and resources to address BHR

Many NHRIs commented on issues associated with overall mandate to address BHR, and associated capacity and resource issues, despite the UNWG questionnaire not posing specific questions on these topics. Limited institutional BHR capacity and resources, for instance, were noted by most respondents as significant challenges posed to stronger engagement on access to remedy for business-related human right abuses.

Seven respondents specifically pointed to the challenges posed by BHR being a relatively new topic for NHRIs, with correspondingly low capacity of NHRI staff on the topic and the need for more capacity building, including on the topic of access to remedy. Furthermore, two NHRIs pointed to the divergence in capacity in regional offices, including by noting that lack of regional reach (within a country) of an NHRI has significant implications for their ability to contribute to remedy for business-related human rights abuses. Several respondents therefore noted the need to further develop the BHR and access to remedy knowledge and capacity of their institutions, including, for example, through dedicated staff and resources on BHR.

Relatedly, lack of financial resources to work on BHR was explicitly noted by eight NHRI respondents. Some commented on this by pointing to a general lack of financial resources, while others pointed to specific financial resource gaps for the topic of BHR and access to remedy. In addition, respondents noted that addressing BHR remedy matters can be very resource intensive, for example, complaints resolution or public inquiries. One respondent made the specific link between the need for increased capacity building and resources, noting that capacity building was not possible due to financial constraints.

3.2 COMPLAINTS-HANDLING FUNCTION

In the Paris Principles, granting complaints-handling functions to NHRIs is left optional.²⁸ Despite its optional status, this feature is one of the most hotly contested issues in the design of NHRIs. Those in favour argue that complaints handling should be mandatory, given that this is an important mechanism for NHRIs to provide accessible and effective remedies, especially for the most vulnerable rights-holders. In addition, it allows NHRIs to uncover structural or systemic human rights violations and facilitate complaints by third parties on behalf of vulnerable groups, which is particularly important “where state structures are widely viewed as ineffective, dysfunctional and inaccessible.”²⁹ Further, complaints-handling powers have been linked to organisational effectiveness in a broad range of settings and they allow NHRIs to build broad bases of support.³⁰

However, a focus on individual complaints can also overwhelm an NHRI with capacity constraints and the institution can lose its strategic vision for larger, more systemic human rights violations.³¹ Complaints handling can be especially resource intensive and resources that go towards individual complaints handling may divert capacity away from monitoring of national agencies and government operations that could contribute to addressing widespread human rights abuses.³² For example, the Ugandan NHRI has been criticised for pursuing individual complaints instead of addressing more urgent human rights issues affecting the country as a whole.³³ In addition, although responding to complaints may be important, this function can be ignored altogether if the NHRI is established by a more authoritarian and less committed state.³⁴

NHRIs have different mandates for the types of complaints they can address, meaning some cannot deal with business-related complaints.³⁵ For example, some NHRIs have broad mandates to investigate all kinds of human rights abuse (e.g., Colombia, Philippines, South Africa and Nigeria). Others can only apply their complaints-handling mandate to a more limited range of human rights abuses (e.g., Canada and Australia). In some countries, this may be because there are other agencies that are set up and deemed more competent to investigate specific types of business-related complaints; for example, institutions set up specifically to deal with disputes related to land, labour or environment. On the other hand, some NHRIs, such as the German, Slovak and Scottish NHRIs, do not have the mandate to handle complaints of any type.³⁶

The range of topics of business-related complaints received by an NHRI varies drastically based on factors such as the mandate of the NHRI, the location of the institution, the activities of businesses within the country and the existence of other relevant grievance mechanisms. For example, the Nigerian NHRI has

reported that the majority of business-related complaints that it receives relate to environmental pollution and degradation caused by oil companies in the region; whereas the Moroccan NHRI has reported that complaints received frequently related to domestic work, child work and the environment; and most complaints received by the Zambian NHRI reportedly relate to large-scale land acquisition.³⁷ Overall, however, data on business-related complaints received by NHRIs is scarce and not systematically collected or analysed, pointing to an important area for further development in both NHRI practice and scholarly research.

Analysis of the UNWG questionnaire responses: complaints-handling function

From the 32 responses to the UNWG questionnaire, 23 NHRIs indicated having a mandate to handle complaints concerning BHR. These mandates vary substantially between the different institutions. While some pointed to having an explicit mandate concerning specific human rights abuses committed by private institutions, as for instance in the case of the Australian NHRI under its national anti-discrimination laws, other NHRIs, such as the NHRI of the Philippines, have interpreted their mandate to encompass BHR by virtue of being able to address a wide range of human rights matters, rather than due to explicit references to business actors in their mandate. NHRIs that noted a more implicit mandate to address BHR-related complaints usually did so by describing their mandate as broad, allowing the NHRIs to include business-related human rights complaints. Some NHRIs outlined various limitations within their mandate. For example, the NHRIs of Albania and Poland indicated that they can only take actions in the case of human rights abuses committed by public entities.

Furthermore, the responses show that some NHRIs interpret their mandate widely in order to overcome limitations. In the case of the NHRI of Slovenia, the mandate is interpreted broadly to not only include violations committed by public entities but also by private companies providing public goods and services. However, the Slovene NHRI emphasised that this approach causes occasional objections. Further examples of NHRIs with a broad interpretation of their mandate are Bangladesh and the Philippines.

On the other hand, seven NHRIs stated that they are not provided with a mandate to handle complaints concerning alleged business-related human rights abuses. These are, namely, the NHRIs of Azerbaijan, Denmark, Germany, Luxembourg, Serbia, Slovakia and Spain.

In terms of challenges, in addition to mandate issues, resource constraints were also noted, as well as challenges associated with accessing the necessary information from businesses and other actors in order to effectively address complaints received.

Regarding the different geographical regions, certain overall trends can be identified. According to the provided responses, the NHRIs in Africa, the Americas and Asia-Pacific all have complaints-handling mandates. The majority of the NHRIs in Africa and the Americas described their mandate as explicit, broad or comprehensive, whereas several NHRIs in the Asia-Pacific region indicated having a more limited mandate. In Europe, half of the NHRIs that responded to the questionnaire do not have a mandate to handle complaints related to BHR. Some of these, for example, the NHRIs of Germany or Luxembourg, emphasised that they do not have a complaints-handling mandate at all. However, not all respondents clearly differentiated between not having a complaints-handling mandate and having a complaint-handling mandate but not applying this to BHR. Other NHRIs highlighted the limitations they face within their mandate more generally. Notably, many NHRIs in Europe underlined their role as a national equality body that enables them to act on discrimination cases in the field of BHR.

3.3 ALTERNATIVE DISPUTE RESOLUTION

In terms of the style of remedial procedures, NHRIs often apply a mediation or conciliation role, rather than an adversarial one.³⁸

Mediation can be especially effective as a non-judicial mechanism and aligns with UNGP 27.³⁹ Overall, NHRIs begin with finding the facts of the case and then can choose to commence an investigation if they find there is a human rights issue involved.⁴⁰ In the case of the Canadian NHRI, for example, the establishing mandate promotes mediation and conciliation by allowing for any party to resolve their complaint at any point between filing and the start of a tribunal hearing; and the NHRI advertises this to the involved parties throughout the process.⁴¹ The Mongolian NHRI has found a method to involve the government in the mediation process. It first builds evidence of human rights violations and then convenes businesses, government and international organisations to advance compliance.⁴² The Ugandan NHRI has reported that it mostly uses mediation to resolve labour complaints. This process involves signing a memorandum of understanding between the parties. Potential remedies may include compensation, apology and re-instatement to work. In some cases, complaints are also referred to other bodies such as the Labour Office. The Commission follows up to verify if the terms decided in the memorandum of

understanding were implemented, as well as following up on complaints that are referred out of the Commission.⁴³

However, mediation, conciliation and other forms of alternative dispute resolution (ADR) should be approached with care in terms of their normative appropriateness with human rights standards and desirability for victims. A recent review of NHRIs' potential to embrace ADR alerts about the pitfalls that may be associated with such practices.⁴⁴ For one, mediation and conciliation must not undermine the state's duty to investigate allegations of serious violations of human rights.

Another challenge is that ADR may tend to focus on the interests of the parties only, while disregarding attention to the root causes of the violation and paying attention to guarantees of non-repetition. A compounding factor is that often, settlements reached through ADR are confidential – which also means that it is difficult to measure if the solution is based on international human rights law, or to ensure that the case-load developed via such procedures contributes to the development of more broadly applicable standards. Last, “while [ADR] may have particular attributes, such as creativity in remedies, where it is the only real avenue for a person to pursue a complaint in practice, these features may be diminished. [Such avenues] may then be viewed as the cheaper, but lesser dispute resolution option thereby appearing to create a two-tier system based on affordability.”⁴⁵

A number of solutions are suggested to overcome these issues: ADR should remain voluntary and add to protection avenues rather than condition, e.g., access to courts; in any settlement, conciliation or mediation agreement, human rights norms must be respected and the public interest should be reflected;⁴⁶ transparency should be ensured – in case where settlements are confidential, an anonymised case register could still be publicised, e.g., as the Australian NHRI does;⁴⁷ a reflexive approach should be adopted by which the NHRIs assess their own practices and carry out “detailed and forward-looking impact assessment” to determine the effects of ADR processes “on the wider access to justice landscape and to ascertain whether [they are] normatively desirable.”⁴⁸

Analysis of the UNWG questionnaire responses: alternative dispute resolution

In terms of the methods used to resolve complaints, the majority of the NHRIs that provided a response to the UNWG questionnaire indicated the use of mediation or conciliation in the first instance, followed by investigation in the case that the complaint could not be successfully resolved. More precisely,

half of the NHRIs indicated that they engage in mediation processes and one third mentioned conciliation as a possible approach. However, these approaches are not mutually exclusive, rather, NHRIs assess which approach is likely to be most promising in the respective case. Further approaches that were mentioned included, for instance, reconciliation or arbitration.

For example, the Kenyan NHRI decided to act as a mediator when they were approached with a complaint related to water pollution allegedly caused by a company. Both parties were invited to have a dialogue that resulted in a mutual agreement. The Commission indicated that mediation can be an effective approach, as it is inexpensive, based on mutual consent and builds trust and cooperation among the different parties. On the contrary, the experiences of the NHRI of Malawi show that mediation does not always lead to a successful resolution of the conflict. After engaging in a mediation process on the matter of oil and other waste spills, the involved company did not implement the previously agreed-upon recommendations. As a consequence, the case was taken to court, eventually resulting in the closure of the company due to failure to adhere to the recommendations made.

3.4 ENFORCEABILITY OF REMEDIES

Enforcement prerogatives are rare and they usually are a characteristic of particularly strong NHRI mandates, such as those of the NHRIs of Ghana, Kenya, Uganda and Sierra Leone, which all have court-like powers in some form.⁴⁹ For instance, in Ghana, the NHRI is able to enforce compliance with the majority of its recommendations because if a party is not compliant, the case can be brought before the court.⁵⁰ Similarly, the Nigerian NHRI can make awards that are legally binding; once registered with the court, the awards have the same effect as an order from the High Court. NHRIs like those in Malaysia, Indonesia, Australia, Azerbaijan and South Africa can facilitate a mediation process in which the parties themselves come to an agreement and then the agreement becomes legally binding.⁵¹

However, most NHRIs can only offer non-legally binding remedies, posing significant limitations. One obvious risk of unenforceable remedies is that rights-holders are subject to a less timely, more drawn out remedy process that could be ineffective in the end. While there are many other avenues for NHRIs to provide remedy (including recommendations to the government, provision of legal aid, settlement, release of public statements, etc.), most remedies that depend on recommendations alone may limit actual or perceived access to effective remedies. Parties may also be discouraged from seeking redress

through NHRIs; India and Georgia are examples in which weak power to enforce recommendations may have deterred future parties from seeking assistance.⁵²

While this might lead some to conclude that NHRIs should be granted more extensive enforcement powers, a direct correlation between enforcement powers in the NHRI mandate and the effectiveness of the NHRI as a remedy actor in BHR should not be presumed. In some situations, it may be the case, for instance, that extensive enforcement powers lead to rigid and complicated procedural requirements that inhibit the NHRIs' ability to act. The dynamics between enforcement powers and NHRI effectiveness to contribute to remedy in BHR therefore poses a critical area for further research.

Analysis of the UNWG questionnaire responses: enforceability of remedies

The responses to the UNWG questionnaire reflect that enforceable remedies by NHRIs are not the norm but rather an exception. In terms of challenges noted, 11 NHRIs pointed specifically to the inability to enforce remedies as a major challenge. NHRIs pointed to this by referring to the absence of quasi-judicial power, more general limitations in the mandate, or legal and jurisdictional constraints.

Overwhelmingly, NHRIs responded that they can only provide non-legally binding remedies in cases of business-related human rights abuses. One of the most frequently mentioned type of remedy was recommendations to various actors, including the government, state institutions or directly to businesses. In this context, a number of the NHRI respondents highlighted that remedies are only effective if implemented by the respective actor, for example, the government. Some also pointed out that in case of non-compliance, there is a high risk that the process has no outcome at all. Others, however, painted a more positive picture, indicating that the process of developing recommendations, in some cases with the involvement of the relevant parties, has some value in and of itself in terms of raising awareness and thereby contributing to remediation and non-recurrence of human rights abuses.

NHRIs engaging in mediation often indicated that the process is concluded with an agreement signed by both parties. In this agreement, the parties commit themselves to various actions, such as a public and/or private apology, offering financial and non-financial compensation as well as reinstatements, paying outstanding costs or guaranteeing the non-recurrence of an action. However, numerous respondents also pointed out that these agreements can frequently be breached with ease and that implementation largely depends on the intentions and willingness of the parties. While enforcement of some types of ADR agreements may be pursued through the courts, respondents

commented on the lengthy and drawn out nature of such processes, if pursued.

3.5 GENDER-RESPONSIVENESS AND ACCESSIBILITY FOR VULNERABLE RIGHTS-HOLDERS

Many NHRIs have taken steps to make their remedy processes accessible to rights-holders. In terms of accessibility for vulnerable or marginalised groups, one common strategy is having multiple offices in different regions, so that the NHRIs can be in contact with rights-holders who may live in remote areas. Reportedly, the NHRIs of Canada, Australia, South Africa and Nigeria have all taken additional steps to reach out to marginalised rights-holders. In Canada, for instance, the NHRI prioritises complaints from people in vulnerable circumstances. In Australia, complainants can make their complaints in their first language and they will be translated. Moreover, information on the complaints process is available in multiple languages. In South Africa, there are roadshows to access people in rural areas, offices that are child-friendly and social workers to assist complainants. In Nigeria, the NHRI has thematic areas, whereby people with disabilities and HIV & AIDS can get special support.⁵³ Furthermore, complaints processes and services offered by NHRIs are usually free of charge, to accommodate groups with limited financial resources.

The Tanzanian NHRI is an example of an NHRI actively trying to make their complaints-handling mechanism more accessible and better able to address BHR-related abuses. The Commission is implementing a project to build capacity for improved reporting, fact-finding, monitoring and follow-up of business-related human rights abuses.⁵⁴ However, NHRIs typically do not have their own mechanisms to protect people who are at risk of threats and/or intimidation because of their complaints. Canada and Australia both do have legislation to protect complainants, but the NHRIs themselves are limited to contacting law enforcement agencies to protect complainants in the case of their persecution.⁵⁵

Analysis of the UNWG questionnaire responses: gender-responsiveness and accessibility for vulnerable rights-holders

The majority of NHRIs that participated in the UNWG survey indicated that they pay particular attention to facilitate access to their complaint mechanism for vulnerable or marginalised groups by offering a variety of options to file a complaint. The NHRI of India, for example, enables complainants to not only present their case in person, but also remotely by email, hotline, post, their online complaint filing system or the Common Service Centre Portal of the Indian government. In addition, the NHRI collaborates closely with local non-

governmental organisations (NGOs) to raise awareness about and promote the usage of the NHRI's mechanism.

Other NHRIs, including the ones in Albania, Georgia, Honduras, Poland and Venezuela, highlighted the importance of establishing regional offices across the country to ensure that people living in remote areas can easily access and benefit from their services. In addition, some NHRIs reported that they choose to proactively approach vulnerable or marginalised groups. For instance, the NHRI of Slovenia stated that it regularly visits Roma settlements and care facilities and the NHRI of Venezuela organises street workshops in parks and public places to engage with local communities.

Furthermore, many NHRIs, for example those of Malaysia, Poland or Portugal, make sure that their complaint mechanism is free of charge to guarantee that everyone irrespective of their financial resources can file a complaint. In order to avoid language barriers, the NHRIs of Australia, Slovakia and Slovenia emphasise the importance of ensuring that information materials as well as means to file a complaint are available in different languages.

Gender discrimination can be a factor contributing to vulnerability and discrimination. For instance, the NHRI of Malawi underlines that the majority of complaints received are lodged by women. The NHRI of Armenia similarly stresses the importance of a gender perspective and utilising gender-sensitive approaches when monitoring, raising awareness about rights and remedial mechanisms or developing guidance. As another example, the NHRI of Georgia noted that it organises information meetings with different groups, including LGBTI+ communities, to raise awareness about complaints mechanisms and existing remedies.

3.6 INVESTIGATIONS

An investigation undertaken by an NHRI allows the institution to uncover rights violations and address complaints to find an effective remedy.⁵⁶ These investigations differ from a public inquiry, as a public inquiry is not focused on individual complaints, but rather widespread and systemic human rights abuses.⁵⁷ Some NHRIs must be prompted by either a complaint or the state to begin an investigation or an inquiry, while some NHRIs have the power to launch investigations on their own accord.⁵⁸

The power to launch investigations ex officio can lead NHRIs to have great political power that judicial actors do not have, as judicial actors must be reactive instead of proactive.⁵⁹ For example, the Irish Commission investigated privatised

healthcare services and found negative human rights consequences to some budget cuts. This inquiry report led to further legislative changes. NHRI investigations can also rely on advocacy tools such as human rights assessments to put pressure on governments.⁶⁰ As such, the power to undertake investigations, including own motion investigations, is a significant tool for NHRIs in the realm of contributing to access to remedy in BHR.

Safeguards in the NHRI mandate that have been noted to contribute to the effectiveness of investigations include the following:

- **The ability to compel evidence or testimony:**⁶¹ Some NHRIs can also have specific powers to obtain information and documents or compel witness testimony.⁶² While NHRIs often have broad power to order discovery, many prefer to obtain materials voluntarily, rather than applying for a court order to obtain the information.⁶³
- **The ability to refer complaints:** These powers can facilitate access to the courts for vulnerable groups.
- **Enforcement powers** (described above in the “enforcement of remedies” section).⁶⁴
- **The ability to enter private business premises on the NHRIs’ own accord:**⁶⁵ The Indonesian NHRI, for instance, is rare in its ability to enter a private business premise on its own accord. The Malaysian NHRI has tried to put forward a legislative amendment to enter private business premises without prior notice but has been unsuccessful thus far.⁶⁶

Analysis of the UNWG questionnaire responses: investigations

Two thirds of the NHRIs that responded to the UNWG questionnaire indicated that they are able to conduct investigations in the context of BHR. In terms of thematic focus, NHRIs pointed to examples of investigations in the areas of labour rights, non-discrimination, water, and the rights of older persons.

While some NHRIs, for example the NHRI of Côte d’Ivoire, can only initiate investigations on the basis of received complaints, others can investigate on their own accord, such as the NHRIs of Albania or Georgia. Similar to the observed trend in connection with the complaints-handling function, most of the NHRIs that are not able to conduct investigations are geographically located in Europe.

Some NHRIs indicated facing certain restrictions related to investigation that are often connected to their respective mandate. For instance, the NHRIs of Honduras and Venezuela are limited to addressing BHR in the context of public organisations and private companies offering public services, and the NHRIs of

Australia, Cyprus and Georgia can only act in cases of discrimination. In addition, the NHRI of Samoa stressed that sufficient resources are a precondition for investigating individual complaints. At the moment, the NHRI does not have enough staff to engage in investigations due to budget and resource constraints.

In terms of other practical challenges in applying the investigative function to BHR, respondents noted access to information issues as critical. For example, seven NHRIs explicitly noted restrictions in terms of accessing company data and property as posing a challenge to effectively addressing BHR remedy matters, including during complaints and investigation handling. Some noted this in terms of businesses not being open to the public, others pointed to restrictions in their mandate in terms of accessing business sites, while others still noted limitations in publicly available information about specific business activities as the challenge. One respondent pointed to the need for compilation of reliable and disaggregated statistical data on human rights abuses involving business. In addition to challenges in terms of accessing company information, three NHRIs referred to the reluctance of actors to provide necessary information more generally.

To illustrate some of the investigatory safeguards that NHRIs may possess, the response of the Portuguese NHRI provides a useful summary. Besides the power to investigate, the Ombudsman is entitled to compel evidence as well as testimony, conduct inspection visits without prior notice and request actions within the investigation process directly to public prosecution officials as well as other public entities. The frequently mentioned aspect of referring complaints in order to facilitate access to remedy is reflected under sub-section 3.9.1 addressing collaboration with judicial and other remedial mechanisms.

3.7 PUBLIC INQUIRIES

National inquiries are non-judicial inquiries into systemic and widespread human rights violations. Through national inquiries, NHRIs can challenge systemic human rights violations, contribute to a state's internalisation of human rights norms and feed policy reform.⁶⁷ These inquiries are a public process that is change-oriented and relational in nature through bringing together all stakeholders.⁶⁸ For these reasons, national inquiries are often regarded as one of the most effective ways to fulfil the NHRI mandate to promote and protect human rights.⁶⁹

National inquiries may be focused on a diverse range of issues – between civil, political, economic, social and cultural rights – but often focus on many interrelated rights. Initiating a national inquiry is at the discretion of the NHRI although sometimes, the government can refer an issue for inquiry. Somewhat similar to own motion investigations, national inquiry is often initiated when an NHRI is overwhelmed with individual complaints, to facilitate examining the underlying causes of human rights violations.⁷⁰ However, national inquiries are very resource intensive, and often hampered due to a lack of resources.⁷¹

A number a number of NHRIs have conducted public inquiries specifically on the topic of BHR. The Malaysian NHRI, for instance, launched a national inquiry into BHR-related abuses against indigenous people between 2010 and 2013. The Commission had received complaints from indigenous people relating to encroachment and/or dispossession of land by companies and decided to launch a national inquiry to address the root causes of the issues, rather than attempting to solve them on a case-by-case basis. The inquiry entailed public consultations with stakeholders, written public submissions, commissioned studies by academics into land rights, inviting relevant government agencies to submit their views and public hearings. The final report made 18 key recommendations, and the Cabinet created a national task force to assess the findings and recommendations and address any constraints in implementation.⁷² A more recent example comes from the Australian NHRI, which launched an investigation into workplace sexual harassment in 2018. This national inquiry involved public consultations and online submissions to a national survey on sexual harassment in the workplace. The report found that sexual harassment had increased significantly in preceding six years and provided recommendations for broader change.⁷³ An example of a particularly ground-breaking public inquiry comes from the NHRI of the Philippines, which has undertaken a national inquiry to investigate the responsibility of Carbon Majors (a collection of the largest oil, gas, coal and cement companies) in climate change impacts through greenhouse gas emissions. The Commission has a constitutional mandate to investigate allegations of human rights abuses and can ultimately provide recommendations on how to adequately redress these violations. After the Commission served the petition to the Carbon Majors and received little response, it began to investigate the case. The Commission carried out site visits and fact-finding visits where it conducted interviews with residents and authorities. The Commission also held public hearings with testimonies from experts in climate change and human rights, as well as residents who had suffered from the human rights violations. The results of this inquiry can be used by rights-holders going forward as a foundation for filing future cases.⁷⁴

To ensure effectiveness, inquiries should result in recommendations and success indicators to monitor the government and other actors. For example, the Australian NHRI's report from its first national inquiry on child homelessness and mental illness catalogued all responses to the inquiry since the inquiry was launched. As another strategy, the Indian NHRI built in a periodic review of the findings of its inquiry on health. NHRIs can also work with civil society actors in the process of following up and supporting ongoing advocacy work. For example, following its mental illness report, the Australian NHRI supported the Mental Health Council of Australia and the Brain and Mind Research Institute in a national review of mental healthcare.⁷⁵ National inquiries can also provide the impetus or political cover for policy changes. The Australian NHRI, for instance, investigated systemic discrimination against same-sex couples and families and the federal government amended 85 federal laws in response to the report.⁷⁶

Analysis of the UNWG questionnaire responses: public inquiries

Nine out of the 32 NHRIs having answered the UNWG questionnaire indicated being able to conduct public inquiries, namely the NHRIs of Bangladesh, India, Kenya, Malawi, Malaysia, the Philippines, Portugal, Samoa and Slovakia. Interestingly, when pointing to potential solutions to common challenges in the area of access to remedy in BHR, three NHRI respondents specifically pointed to the strategy of conducting public inquiries to address multiple complaints on the same topic. Respondents explained that this has benefits not only in terms of potentially providing solutions to more systemic issues but also in terms of constituting a useful application of precious and scarce resources for addressing BHR matters.

The examples mentioned by the NHRIs address a range of business-related human rights issues. The NHRI of Kenya, for instance, conducted two different public inquiries related to salt as well as gemstone and iron mining (see Part 2 of this report for the Kenya case study). The NHRI of Malawi initiated public hearings in the cases of water contamination by sewage waste and spillages of oil and other waste into nearby villages. In Malaysia, the public inquiry of the NHRI addressed violations of land rights of indigenous peoples, while the NHRI of the Philippines focused on climate change.

The NHRI of Malaysia specifically highlighted that public inquiries can be effective in addressing more systemic human rights issues and to raise public awareness about the matter. The Commission appoints a panel of inquiry comprised of Commissioners to hear testimonies from subpoenaed witnesses. At the end of the process, a national inquiry report is published containing a

number of recommendations and follow-up actions for the government and other actors.

3.8 INDIRECT FACILITATION OF ACCESS TO REMEDY

The questions on ‘indirect’ facilitation of access to remedy focused on how NHRIs use their different mandate functions to support access to remedy, including awareness raising, monitoring, education, research, etc. Many NHRIs have reported applying these different mandate areas to contribute to access to remedy in BHR. For example, through human rights monitoring and the various complaints that they receive, NHRIs may identify trends, systemic issues and gaps in legislation and policies. Addressing them contributes to avoiding the recurrence of violations. NHRIs may bring issues and suggested solutions to the attention of the government or the parliament through their annual reports, as the NHRIs of the Ukraine and Armenia have done, or, “by using the power of direct or indirect initiative, suggest the introduction of relevant law amendments (e.g., Ukraine, Kenya).”⁷⁷ Advocacy is another important area. Of the NHRIs interviewed by the DIHR in the context of the ARP II project, for instance, the NHRI of Colombia promoted the UNGPs, the NHRI of Australia spoke with the Parliament, the NHRI of South Africa applied public pressure when state-owned enterprises may have been involved with human rights violations, and the NHRI of Nigeria drove NAP adoption.⁷⁸ The NHRI of Uganda also reported that it monitors justice mechanisms and addresses forms of discrimination throughout this process.⁷⁹ As such, while most NHRIs do not have the mandate to issue legally enforceable remedies in BHR, they still have non-judicial and promotional capabilities to help in the remedy process, such as investigative authority, advisory and educational abilities.⁸⁰

Analysis of the UNWG questionnaire responses: indirect facilitation of access to remedy

All respondents made some form of reference to strategies of engaging on access to remedy in BHR that go beyond complaints-handling, investigation or inquiry functions. Broadly, for the purpose of discussion these strategies can be grouped in terms of awareness raising, influencing policy and legislation, research, monitoring and compliance, and strategies facing business.

Awareness raising activities were by far the most common, having been mentioned by over two thirds of the respondents. NHRI respondents pointed to awareness raising in numerous different ways, such as workshops, seminars, national dialogues, multi-stakeholder working groups, conferences and more. Usually, responses indicated that such awareness raising is targeted

at multiple different actors, including civil society, socio-professional groups, state actors, businesses and rights-holders. For example, the Indian NHRI mentioned a workshop held to strengthen the implementation of the bonded labour system abolition act. The NHRI of Côte d'Ivoire shared an example of a cooperation with an international donor targeted at capacity building of CSOs and local communities, including on access to remedy strategies and risk assessment of the mining sector. An interesting example regarding awareness raising of the legal profession came from Azerbaijan, where the respondent NHRI noted that it has undertaken awareness raising and education campaigns for judiciary candidates, lawyers, staff of the ministries of justice and internal affairs and prosecutors. Lastly, around one third of the respondents indicated that they advise victims of business-related human rights abuses, either by providing information about the remedy mechanisms available and/or providing direct legal advice.

In terms of influencing policy and legislation, around half of the respondents noted that they use their advisory function to provide reviews of relevant laws and policies and provide respective recommendations to governments regarding compliance of these with international human rights obligations. In Venezuela, to name but one example, the NHRI provided contributions to the national assembly regarding companies' responsibilities vis-à-vis human rights, in an effort to include these matters in the pending constitutional reform. Some respondents also noted steps taken to promote particularly relevant pieces of legislation, such as the Australian NHRI, which mentioned efforts to promote the recently enacted modern slavery legislation. Several NHRIs also pointed to their engagement in NAPs processes as a way of engaging on BHR with the view to strengthening access to remedy.

On the topic of research, around one third of the respondents noted their work on BHR thematic reports, position papers and the like, as one of the strategies to promote access to remedy. The German NHRI, for example, mentioned its contribution to the BHR access to justice project of the EU fundamental rights agency, by producing the Germany country report for the project. The NHRI of Northern Ireland noted its efforts in public procurement where, among other things, the NHRI produced a guidance note on human rights in public procurement and conducted training of staff within the department of finance of the government. As such, research work cited focused not only on documenting human rights abuses but also on informing preventative measures.

In terms of monitoring and compliance, NHRI respondents made a variety of different observations. Some noted their mandate to ensure state compliance

with human rights obligations in general terms, while others made more specific references to shadow reporting to international bodies or annual reporting at the national level. The monitoring of agreements between companies and communities was also mentioned, as was the strategy of in situ site visits as part of monitoring the human rights situation on the ground.

Lastly, around one third of the respondents noted specific business-facing strategies to facilitate enhanced access to remedy in BHR. For example, some respondents noted training and capacity building of business actors, be this on BHR generally, specific human rights themes or on how to handle BHR-related complaints. For example, the Georgian NHRI noted that it had conducted six trainings in 2018 targeting the private sector, with a specific focus on the topic of gender equality. Similarly, the NHRI of Cyprus noted that it has conducted human rights training for companies and trade unions focusing on sexual harassment in the workplace, connected to input to codes of conduct on the topic. One respondent also noted that their NHRIs' awareness raising activities focused on business leaders specifically, rather than business actors generally. Somewhat relatedly, the Malaysian NHRI pointed out that it has introduced a human rights award for businesses that demonstrate good human rights practice, as an effort to create a race to the top in terms of business performance on human rights. Several respondents also noted the development of tools and guidance for business actors as a strategy. The Danish NHRI, for example, has developed numerous different tools and guides for business actors, including on human rights impact assessment and respect for indigenous peoples' rights. While not all of the business-facing strategies mentioned were specific to access to remedy, it was interesting to note that around one third of respondents determined that some direct engagement with business actors is necessary as part of their work on BHR; including by making the connection between promotional work on BHR and more specific efforts in terms of access to remedy for business-related human rights abuses.

3.9 COLLABORATION WITH OTHER ACTORS AND MECHANISMS

Collaboration with other actors to facilitate access to remedy in BHR can take a range of forms. For the purposes of discussion, four broad categories can be distilled: (1) judicial and other remedial mechanisms, such as multi-stakeholder mechanisms, national contact points, operational-level grievance mechanisms and so forth; (2) other actors at the national level, such as state, civil society and business actors; (3) collaboration with other NHRIs, either bilaterally or through NHRI networks; and (4) regional and international human rights mechanisms.

3.9.1 COLLABORATION WITH JUDICIAL AND OTHER REMEDIAL MECHANISMS

Although the UNGPs mainly define the role of NHRIs as being related to state-based non-judicial mechanisms, there is room for NHRIs to intervene in both judicial and non-judicial mechanisms.⁸¹ Within state-based judicial mechanisms, some NHRIs may refer cases to the courts, act in a representative capacity for rights-holders, or intervene as a third party as a friend of the court (*amicus curiae*). For example, the Egyptian NHRI has the right to file a lawsuit with the public prosecution and intervene in civil lawsuits in favour of the affected party;⁸² the Korean NHRI can order restitution in discrimination cases; and the Canadian and Kenyan NHRIs can represent in litigation.⁸³ Some NHRIs also offer human rights expertise to judicial institutions. The NHRIs of Uganda, Afghanistan and the Maldives, for instance, have all advised the judiciary on access to remedy and human rights knowledge.⁸⁴

However, there are some challenges to this approach, as NHRIs may have a lack of litigation expertise or capacity. This approach may also be difficult in countries where the judicial system is weak. In these countries, NHRIs can intervene in ongoing legal cases as well as by conducting mediation and settling cases outside of court.⁸⁵ This role is similar to the OECD's National Contact Points (NCPs), established to promote and implement the OECD Guidelines for Multinational Enterprises in adhering countries and provide a mediation and conciliation platform for resolving of issues that may arise in specific instances⁸⁶ In fact, in a few countries, multipartite NCPs include the NHRI. This is notably the case in Morocco, Argentina and New Zealand. In Chile, the NHRI entered a memorandum of understanding with the NCP to guide collaboration and exchange.⁸⁷ Some NHRIs have conducted training for businesses on how to set up project-level grievance mechanisms to provide remedy.⁸⁸

Analysis of the UNWG questionnaire responses: collaboration with judicial and other remedial mechanisms

Almost all respondents provided some information regarding engagement with the judicial system and other remedial mechanisms. In terms of engagement with the judicial system, seven NHRIs specifically noted their mandate in terms of being able to submit *amicus curiae* to cases before the courts. While some noted that despite having this power they had not yet exercised it in the realm of BHR, others gave specific examples. For instance, the NHRI of Georgia indicated that it has exercised its amicus function 15 times since 2014 on discrimination cases, of which five were specifically related to businesses. To the contrary, two NHRIs explicitly pointed out that their mandate does not entitle them to intervene before the courts. In addition to the ability to make submissions to matters pending before the courts, some

respondents noted that they can act as a legal representative to rights-holders before the courts or issue recommendations for the prosecution of particular cases where they have identified human rights abuses. The NHRI of Malawi, for example, pointed to an example where it had made a recommendation to prosecute human rights violations associated with air pollution caused by quarry blasting. The NHRI of Colombia noted that it has referred select BHR cases to the judicial system with the specific aim to set judicial precedent on BHR matters. In addition, two NHRIs, namely the ones in Kenya and Malawi, mentioned that they engage in public interest litigation. Furthermore, some respondents pointed to their monitoring function, indicating that they exercised this function specifically to monitor relevant BHR cases before the courts. Interestingly, some respondents also gave recommendations specifically to engagement with the judicial system, suggesting, for example, that NHRIs may serve as technical advisors for judicial mechanisms, that training and capacity building of judicial actors or the establishment of specialised BHR divisions in courts, might be strategies for enhancing access to remedy in BHR.

In terms of engagement with other remedial mechanisms, by far the most common strategy mentioned was referral of cases to the relevant government authority with the subject matter expertise in question and mandate to address non-compliances. Notably, 13 respondents indicated that as part of contributing to access to remedy they referred BHR cases to labour, environment, water and waste, anti-corruption or public administration authorities or agencies with the mandate to address these matters and sanction non-compliance with the respective standards. This referral of cases to specialised bodies therefore appears to be one of the key strategies utilised by NHRIs to support access to remedy in BHR.

Four respondents also specifically pointed to engagement with their country's NCP for the OECD Guidelines on Multinational Enterprises. The NHRIs of Argentina and Australia, for instance, noted that they are part of the formal structure of their respective NCPs. Denmark's NHRI pointed to providing input and undertaking joint projects with the NCP, while Germany's NHRI elaborated on its participation in the peer review of the NCP and being part of the OECD Guidelines working group, a forum of exchange consisting of federal ministries, representatives of business associations, trade unions and NGOs in Germany. A further respondent pointed to the need to establish NCPs, as a recommendation to enhance access to remedy for BHR matters.

Beyond these three more specific categories of engagement with remedial mechanisms, respondents made a number of other interesting observations.

Eight NHRIs answering the questionnaire, for instance, referred to collaboration with judicial and non-judicial mechanisms more broadly but noted specific strategies such as awareness raising, dialogues, consultations, advocacy, peer learning and capacity development as methods for engagement with remedial mechanisms. Respondents also pointed to the need to bridge between different actors, including to stimulate effective multi-stakeholder mechanisms to address BHR-related complaints and issues. The Australian NHRI, for example, noted its approach to information exchange and discussion with non-judicial bodies as part of ensuring equitable complaints-handling processes. The NHRI of Northern Ireland pointed to its participation in a more general BHR forum to promote the topic of access to remedy.

3.9.2 COLLABORATION WITH GOVERNMENT, BUSINESS AND CIVIL SOCIETY ACTORS

Effective remedy is ultimately dependent on government action and NHRIs can interact with governments, particularly on legislation, in a variety of ways. In line with their promotion powers, NHRIs can advise on legislation to make domestic legislation consistent with human rights standards.⁸⁹ The Ugandan NHRI, for example, has reviewed laws and bills before parliament, such as the Employment Act and the Oil and Gas laws, to ensure their compliance with international and human rights instruments.⁹⁰ Similarly, the French NHRI has engaged with the government on France's corporate duty of vigilance law.⁹¹ NHRIs can also engage with government in the form of presenting findings of their investigations to legislative plenaries.⁹² In this relationship between governments and NHRIs, it is important to have certain independence safeguards, including: constitutional or legislative status; immunity from prosecution; and no government representation with decision power in the NHRI.⁹³ The biggest obstacle to this relationship is a lack of political will, as many challenges faced by NHRIs – lack of independence or limited resources – often come down to a lack of political will to reform mandates or legislation.⁹⁴

NHRIs can also work with businesses to directly shape their performance in terms of exercising their responsibility to respect human rights. Some NHRIs have begun to work with businesses to focus on human rights due diligence. As an example, the Danish NHRI has worked on human rights impact assessments of business activities.⁹⁵ NHRIs can also spotlight good behaviour and encourage businesses to recognise the benefits of respecting human rights, such as when the South Korean NHRI co-hosted business roundtables to include national business representatives in discussions about human rights.⁹⁶ However, of course this type of collaboration requires voluntary cooperation from the businesses to prevent and address human rights impacts with which they are

involved. Furthermore, NHRIs need to exercise caution that collaboration with businesses does not result in co-optation and that their independence is maintained when working with business actors. As collaboration with business actors is much newer ground for many NHRIs, when compared to engagement with government or civil society actors, how independence can be maintained while fostering meaningful engagement with business actors presents a fertile area for further practice development, exchange of learning and scholarly enquiry.

As well as engagement with duty-bearers such as state and business actors, many NHRIs also regularly engage with civil society actors as part of their work on BHR and remedy. This may be in the form of collaboration with CSOs in capacity building of rights-holders or other actors on access to remedy in BHR, engaging in joint advocacy or other strategies. In Tanzania and Kenya, for example, the respective NHRIs have engaged with CSOs in conducting concrete research into specific business-related abuses and taking these to the NHRI complaints mechanism or other remedy avenues.⁹⁷ In addition, this engagement included considering the relationship between NAPs processes and access to remedy in BHR, with the view to strengthening the access to remedy dimensions of NAPs.

Analysis of the UNWG questionnaire responses: collaboration with government, business and civil society actors

Regarding state actors, NHRIs pointed to engagement with relevant state agencies and authorities, such as labour or environment. Strategies mentioned included requesting relevant information, being a part of joint inter-agency taskforces or more specific bilateral engagement efforts. For example, the NHRI of Kenya noted efforts to engage with the National Environmental Management Authority in the form of joint training on the environment and human rights, with the view to reducing environmental pollution and human rights abuses in artisanal mining in Kenya. The NHRI of Samoa pointed to the strategy of engagement with embassies and diplomatic representatives as part of stimulating access to remedy in BHR.

In terms of engagement with the state level, the NHRI role with regard to development of NAPs is also worth noting. Around one third of respondents indicated there is no active NAPs process in their country. Around a further third of the respondents noted engagement with the NAPs process in general terms, rather than referring to the issue of access to remedy, and the role of the NHRI in this regard, specifically. The remaining one third of respondents provided more explicit indication of whether the NAP in their country refers to

the role of the NHRI on the topic of access to remedy. Two respondents from the African region indicated that the draft NAP in their country makes reference to the mandate and role of the NHRI specifically with regard to access to remedy. On the other hand, six European NHRI respondents explicitly noted that their country's NAP does not foresee a specific role for the NHRI when it comes to the topic of access to remedy.

In terms of engagement with companies and industry, several respondents noted specific activities and strategies. The NHRI of Argentina, for example, noted that it has undertaken joint activities with companies to facilitate solutions finding to BHR claims, while the NHRI of Ecuador pointed to having facilitated dialogue tables with public and private entities to this effect. The Colombian NHRI noted participation in a mine and energy national table, the Polish NHRI collaboration with the polish bank association and the Serbian NHRI collaboration with the chamber of commerce and industry regarding regulations for protecting the rights of employees through joint draft laws, information exchange, education, research and training. A further interesting example came from the NHRI of Malaysia, which elaborated on a memorandum of understanding that includes a company as well as the federal land development authority, pursuant to which the parties actively engage with each other, discuss and review current policies to ensure compliance with human rights principles and organise roundtable discussions about the company's social compliance and human rights initiatives. Three NHRIs named collaboration with the UN Global Compact as a strategy, including, for example, through engagement during the UN Global Compact annual dialogue on BHR or by acting as an actual member of the UN Global Compact. On the topic of engagement with companies, NHRIs also pointed to the absence of mechanisms to assess human rights impacts and absence of operational-level grievance mechanisms at many sites, as posing a challenge to facilitating access to remedy and stronger engagement with business actors. Given the complexities faced by NHRIs in engaging with business actors, be this in terms of mandate, access to information or other factors, many of which are elaborated in this report, these diverse examples provided by respondents of how engagement with business actors can occur, may serve as useful inspiration to the NHRI community going forward.

Engagement with civil society, rights-holders (including human rights defenders in particular) and multi-stakeholder partnerships and collaboration was the third broad category of collaboration with actors at the national level. Overall, four NHRIs specifically pointed to multi-stakeholder partnerships and collaboration; and nine referred to collaboration and engagement with CSOs and human rights defenders. In terms of engagement with CSOs and human

rights defenders, respondents noted the importance of engagement with civil society both in terms of sourcing relevant information and ensuring inclusion of civil society perspectives, as well as making specific provisions to support rights-holders, such as human rights defenders. The NHRI of the Philippines, for instance, noted that it has a special fund in place to support human rights defenders. Focusing more on the structure of engagement with CSOs, the NHRI of Bangladesh elaborated that it is part of a dedicated thematic committee in place that focuses on BHR, which it chairs and that consists of CSOs, human rights defenders, state institutions, academia, development agencies and international organisations. Similarly, the NHRI of the Philippines noted that it is part of a CSO-NHRI consultative caucus for human rights, the objective of which is to facilitate collaboration between human rights organisations, among other things to push for enactment of legislation to protect human rights defenders.

3.9.3 COLLABORATION WITH NHRIS AND NHRI NETWORKS

Collaboration with other NHRIs, either bilaterally or through NHRI networks, can be a key collaboration strategy, also on the topic of access to remedy in BHR. Such collaboration may be useful for capacity building, information exchange or to address cross-border matters. However, many challenges remain to this type of collaboration and indications are that NHRIs need to improve technical and practical exchanges between one another.⁹⁸

Analysis of the UNWG questionnaire responses: collaboration with NHRIs and NHRI networks

Around one third of the respondents explicitly named collaboration with other NHRIs as one of the collaboration strategies applied to enhance access to remedy for BHR-related human rights abuses.

Five NHRI respondents referred to collaboration with other NHRIs, several naming specific examples of bilateral engagement on the topic of access to remedy in BHR. For instance, the Danish NHRI noted bilateral collaboration with the Kenyan and Tanzanian NHRIs (as well as CSOs) on the topic of access to remedy in BHR. The German NHRI pointed to collaboration with the NHRI of Colombia, focusing specifically on the topic of coal mining in Colombia, noting that the capacity of both institutions to work on BHR had been enhanced as a result of the collaboration. The Australian NHRI shared an example of a capacity building workshop regarding the protection of seasonal workers, that it had organised in coordination with the NHRIs of New Zealand, Fiji and Samoa (as well as the Business & Human Rights Resource Centre and the Freedom Partnership).

In terms of engagement through regional networks, nine respondents pointed to such engagement. For instance, three respondents noted their engagement with the GANHRI BHR Working Group, two pointed to their engagement with the European Network of NHRIs network and two noted their membership of the Iberoamerican Federation of Ombudsman. In addition, respondents noted their participation in BHR capacity building that has been facilitated through the regional NHRI networks, such as the Network of African NHRIs or the Asia Pacific Forum of NHRIs.

Increased communication and collaboration between NHRIs was noted by some respondents as a recommendation for how the role of NHRIs in access to remedy in BHR may be strengthened going forward.

3.9.4 COLLABORATION WITH REGIONAL AND INTERNATIONAL HUMAN RIGHTS MECHANISMS AND OTHER ACTORS

NHRIs may assist individuals or groups to access various international avenues to seek protection and remedies for business-related human rights abuses. For instance, GANHRI suggests that NHRIs may help rights-holders negatively impacted by projects funded by international financial institutions to lodge complaints with these institutions' dispute resolution mechanisms, such as the World Bank's Inspection Panel.⁹⁹ NHRIs may also be able to launch a complaint on behalf of victims against the state in certain international human rights remedial mechanisms that allow for that, as is the case for the Inter-American Commission on Human Rights and the communications procedure under the Optional Protocol of the Committee on the Rights of the Child. For instance, the Bolivian NHRI presented a complaint together with CSOs to the Inter-American Commission on Human Rights on water pollution by mining companies.¹⁰⁰

Analysis of UNWG questionnaire responses: collaboration with regional and international human rights mechanisms and other actors

It should be noted that the question regarding collaboration with regional and international human rights mechanisms in the UNWG questionnaire was posed as a forward-looking recommendation question, i.e. rather than capturing what NHRIs are actually doing. Nevertheless, several NHRIs pointed to activities in this space, while others presented ideas for how collaboration with such actors and mechanisms might be utilised to enhance access to remedy in BHR.

In terms of actual activities and initiatives, several NHRIs referred to treaty body reporting and collaboration with international human rights actors, e.g.,

UNICEF. Also mentioned was active collaboration with regional human rights actors, such as the European Court of Human Rights, the ASEAN Intergovernmental Commission on Human Rights or thematic working groups of the Iberoamerican Federation of Ombudsmen. One NHRI also mentioned engaging with the International Commission of Jurists to develop case studies and guidance on project-level grievance mechanisms.

In terms of recommendation-based observations, around two thirds of the respondents pointed to interactions with international human rights treaty bodies and special procedures as a primary strategy. Specifically, NHRI respondents pointed to the ability of NHRIs to make statements during sessions, undertake shadow reporting, engaging in advocacy during the assessment of states during review sessions, following up on the implementation of recommendations, engaging during country visits and consultations hosted by special procedures and engaging in regular meetings with them to raise issues related to access to remedy in BHR. Interestingly, eight respondents specifically pointed to the Universal Periodic Review as a key mechanism, including by noting that several recommendations made through this process have now been made that explicitly address BHR and that these could be leveraged to call attention to the specific issue of access to remedy. Relatedly, several respondents noted the need to enhance data collection and capacity to engage in activities related to UN treaty bodies and special procedures. Two respondents also noted the need to engage with other relevant collaborators, such as NGOs, on shadow reporting. One NHRI mentioned the opportunity to engage in the Intergovernmental Working Group on a binding instrument on BHR process for a binding instrument on BHR, including by reflecting on the proposal that NHRIs might act as national implementation mechanisms under such an instrument.

3.10 EXTRATERRITORIALITY AND CROSS-BORDER CASES

There exists a large governance gap in terms of regulating transnational corporations. For instance, states are permitted but not required to regulate extraterritorial activity, and significant challenges arise when trying to hold transnational companies accountable, such as for activities of subsidiaries. The Paris Principles state that NHRIs have the responsibility of cooperating “with the regional institutions and *the national institutions of other countries* that are competent in the areas of the protection and promotion of human rights.”¹⁰¹ However, the mandate of most NHRIs does not allow the institution to address abuses outside of the state’s borders.¹⁰² For example, both the Canadian and Australian NHRIs interpret their mandate as restricting them from resolving extraterritorial claims. The Canadian NHRI reported that it “can only deal with

complaints against a Canadian regulated business and filed by a person that is either a Canadian citizen, permanent resident, or in Canada lawfully as a visitor, student or temporary foreign worker and, if they were temporarily absent, they are entitled to return.”¹⁰³ In South Africa and Nigeria, NHRI involvement has also been limited in extraterritorial matters. The Nigerian NHRI reports that it refers these complaints to other bodies, such as the Ministry of Foreign Affairs.¹⁰⁴

Additionally, some NHRI mandates also have restrictions on who can bring a complaint forward. For example, the Afghan NHRI strictly defines human rights to only mean the human rights of Afghan citizens, meaning they are the only ones eligible to bring complaints.¹⁰⁵

An example of an exception to these strict mandates is the NHRI of the Philippines. According to its mandate, the NHRI may investigate “all forms of human rights violations involving civil and political rights” and provide protection for “all persons within the Philippines, as well as Filipinos residing abroad.”¹⁰⁶ This has allowed the NHRI to interpret its mandate as including the ability to receive extraterritorial complaints.¹⁰⁷

Despite these limitations to their mandate, some NHRIs have begun to react to transnational complaints. For example, the Thai NHRI was approached by Cambodian families when a Thai sugar company allegedly displaced Cambodians from their land to create sugar plantations. The Malaysian and Indonesian NHRIs have also collaborated to resolve disputes. The NHRIs of the Philippines, Malaysia, Indonesia and Azerbaijan have all interpreted their mandate as including the ability to receive extraterritorial complaints.¹⁰⁸

Analysis of the UNWG questionnaire responses: extraterritoriality and cross-border cases

Information provided by respondents regarding extraterritorial applicability of the NHRI mandate and activities regarding cross-border cases was somewhat patchy. Of those respondents that provided information specifically on these points, six NHRIs explicitly noted that they do not have a mandate to contribute to access to remedy in the case of matters that have an extraterritorial or cross-border reach. Two further respondents noted that their ability to address such matters would be limited to analysis or promotional activities but would not encompass addressing specific cases or complaints and two further respondents noted that while they interpret their mandate to encompass cross-border matters they had not actually applied their powers to cases involving an extraterritorial dimension. Some respondents commented on the topic of extraterritoriality in terms of posing

challenges to the NHRI exercising its mandate. One respondent specifically noted the possibility of a conflict of laws as a likely challenge in cross-border cases.

Two notable exceptions cited come from the Philippines and Spain. The current public inquiry of the NHRI of the Philippines into the Carbon Majors' contribution to climate change related human rights abuses and environmental degradation is ground-breaking in this regard (see above for a brief elaboration under public inquiries). The Spanish NHRI noted that it was active in a case in Guatemala and although this was technically possible under its mandate, challenges were posed to the effectiveness to engage on the matter as the activities did not occur in Spanish territories.

In terms of potential solutions, collaboration with other NHRIs to address cross-border matters was specifically pointed out by five respondents. Several interesting examples of such existing collaboration were also cited. For example, the Malaysian NHRI noted a case where it had referred a matter to the Myanmar NHRI regarding a Malaysia-Myanmar joint venture in the palm oil sector that had cause environmental degradation, human rights and land rights abuses in Myanmar. The NHRIs of the Philippines and Qatar noted having a cooperation agreement in place addressing the issue of migrant workers and the involvement of recruitment agencies, to collaboratively develop strategies to address associated cross-borders human rights abuses. More generally, one respondent pointed to the potential of NHRIs engaging parent companies in cross-border cases, in particular where these might be located in home countries that provide more fruitful avenues for access to remedy than in the host country. The possibility to request information from the ministry of foreign affairs, or similar government agency, regarding specific business operations with cross-border dimensions, was also pointed out as a possible strategy for NHRIs in facilitating access to remedy for business-related human rights abuses that have an extraterritorial dimension.

CHAPTER 4

4 FURTHER ANALYSIS OF IDENTIFIED THEMES AND PATTERNS

Policy recommendations corresponding to the themes, patterns and challenges raised above are presented in conjunction with the executive summary. In this Chapter, however, we would like to point to some more general observations raised by the above analysis, that we believe may present further research opportunities for scholars and practitioners working on the topic of NHRIs and access to remedy in BHR.¹⁰⁹ For the purpose of discussion, we have grouped these under four themes: (1) operational specificities of the field of BHR; (2) “effectiveness” of remedy in BHR; (3) the NHRI Paris Principles mandate and BHR; and (4) the added value of NHRIs in access to remedy for business-related human rights abuses.

Regarding the first theme, arguably, the responses provided by the NHRIs to the UNWG questionnaire raise a number of interesting factors that point to operational specificities in the field of BHR, enquiry into which warrants further attention. At an overarching level, the lack of hard law and established rules in the field of BHR, at least when compared to more consolidated areas of international human rights law, poses both operational challenges for NHRIs applying their mandate in this space, as well as raising normative questions as to which sets of rules, principles and requirements should guide the processes and outcomes facilitated by NHRIs in the space of access to remedy in BHR. Relatedly, certain aspects and trends that characterise BHR – such as the informal economy; the transnational dimensions of many operations, the global reach and complexity of value and supply chains; emerging issues such as the human rights implications of technologies – are plagued by persistent absence or unclarity regarding applicable frameworks, complicating NHRI engagement on these themes, including with regard to remedy. Interestingly, by and large the NHRI respondents did not reference new rule development in BHR that might provide further clarity regarding access to remedy, such as mandatory human rights due diligence developments in the European Union or the UN process for a binding treaty on BHR. As such, further enquiry into how the conditions that are posed by BHR – for instance the global reach of business activities, power

disparities between businesses and rights-holders, or the uncertainties regarding legal and normative rules applicable – is likely to yield important insights for how NHRIs can best position themselves to contribute to access to remedy in BHR.

Secondly, how the effectiveness of remedy in BHR, and more specifically the effectiveness of NHRIs in soliciting remedy for business-related human rights abuses, is to be conceptualised normatively and achieved practically emerges as an important nexus in the above findings, which would warrant further attention. As noted in the above analysis, for instance, several scholars have undertaken substantive work to enquire into how specific institutional design features of NHRIs might contribute to their effectiveness. More detailed research examining the implications of different design features specifically for BHR, including through comparative analysis, could make a valuable contribution to better understanding of how NHRI mandates might be best shaped to enhance their ability to contribute to effective remedies for business-related human rights abuses. For instance, powers to handle individual complaints, enforce remedies, undertake investigation of their own accord, compel evidence or enter business premises, were frequently mentioned by respondents as hindering or enabling their ability to contribute to obtaining remedies for rights-holders adversely affected by business operations. However, while the above data provides useful anecdotal illustrations that point to what the challenges and solutions might be, further research is needed that probes into details and applies a more rigorous analytical framework and method to triangulate multiple sources of information on these points, with the view to more definitively identifying correlations and causation between different NHRI functions and their implication for contributing to effective remedies in BHR. Relatedly, further conceptual clarity – informed by international human rights law and practice on the ground – regarding how the “effectiveness” of different types of remedies for BHR-related matters is to be understood and implemented, would arguably be helpful. While there are a number of different sources – ranging from the 2017 report of the UNWG to the Office of the United Nations High Commissioner for Human Rights ARP II study – provide insights as to what may constitute effective remedy in BHR, there is a need to further operationalise this in the NHRI context, including by elaborating how standards and principles should apply to the processes and outcomes that may be generated through different NHRI functions when applied to BHR (e.g., complaints handling, ADR, investigations, public inquiry).

Relatedly, a third area for further enquiry identified by the above findings may be around the balancing act between the different Paris Principles mandate functions. Interestingly, for instance, many NHRI respondents seemed to be of the view that a complaints-handling function is necessary to achieve effective remedies in BHR, that systemic BHR issues are best addressed through public

inquiries, and that the application of advisory and educative functions creates important indirect effects promoting access to remedy in BHR. The data provided, however, does not allow us to draw any definitive conclusions on these points. While it may bring us somewhat closer to confirming and understanding that what is ultimately important is the balancing act between these different functions, more detailed further research, in particular through institutional case studies, could usefully shed light on the nuances; including, for example, by providing further insights on how differences in the type of NHRI, global region or other factors (e.g., resources), might point to the utility of some functions over others depending on the given context. Again, BHR specificities should also inform lines of enquiry in such further research. For example, to gain better understanding of how challenges such as power disparities between rights-holders and businesses in ADR affect processes and outcomes; how NHRIs can ensure independence when they work directly with the private sector; how pro-investment government interests play out and can be negotiated in investigations; or how follow-up to public inquiry recommendations directed at business actors is best conducted to yield maximum results.

Lastly, the above findings call for further clarification of the precise nature and added value of NHRIs in access to remedy and BHR, when compared to other external actors and mechanisms. Clearly, as illustrated by the rich and diverse examples provided by NHRIs to the UNWG questionnaire, the role of NHRIs in access to remedy for BHR stretches well beyond a straight forward characterisation of NHRIs as simply “one of” the state-based non-judicial mechanisms available. Due to the multiple functions available and exercised by NHRIs, the potential of NHRIs to play a more dynamic role is high, providing the right conditions are in place. For instance, in addition to the balancing act between different functions, numerous NHRIs noted the need for increased technical expertise, or collaboration with other relevant actors, to be able to properly address BHR matters. In the same vein, referral of specific instances to other relevant mechanisms, such as labour, environment, land or anti-corruption tribunals, agencies or other bodies, was frequently noted. As such, further research into the role of NHRIs as part of a dynamic system of access to remedy might be useful to guide directions in practice to ensure that NHRIs’ use of precious resources in the area of BHR is targeted to those interventions providing the most likely added value. While some general conclusions may be found, it is likely that region and country contexts will play an important role in guiding what works best in a particular setting. As another subset of enquiry on this point, further research might examine how NHRIs can maximise collaboration with other actors to contribute to access to remedy, for example, through strategic use of *amicus curiae* or public interest litigation; collaboration with other NHRIs to address extraterritorial and cross-border cases; or

engagement with regional and international human rights mechanisms to highlight business-related human right abuses and mobilise action to address these.

Part 2 of the present report, presenting and analysing the findings from four case studies, is one contribution to unpacking some of these salient dimensions generated by the literature overview and the analysis of NHRIs' responses to the 2019 UNWG questionnaire.

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