EFFECTIVE REMEDY AND CORPORATE VIOLATIONS OF CHILDREN’S RIGHTS

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Acronyms

ATS  Alien Tort Statute  
CRC  UN Convention on the Rights of the Child  
IACHR  Inter-American Commission on Human Rights  
ICC  International Criminal Court  
ILO  International Labour Organisation  
NCP  National Contact Point  
NGO  Non-Governmental Organisation  
NHRI  National Human Rights Institution  
OECD  Organisation for Economic Cooperation and Development  
OPSC  Optional Protocol on the sale of children, child prostitution and child pornography  
SRSG  Special Representative to the Secretary-General on the issue of human rights and transnational corporations and other business enterprises  
TNC  Trans-National Corporation
1. A child’s right to an effective remedy for corporate violations

“For rights to have meaning, effective remedies must be available to redress violations”

1.1 Introduction

Business policy and action can have a very significant impact – both positive and negative – on children’s rights whether they are acting alone, with business partners or in concert with government agencies. This impact is felt through policies and practices in the workplace, the products they produce and how they market them, and the way they act in the communities in which they operate. The vast majority of businesses will not intentionally set out to have a negative impact on children. However, their policies and actions can result in violations of children’s rights; for example, companies may use child labour whether directly or within supply chains; they may violate the rights of working children by failing to protect them from violence in the workplace or exposing them to unsafe working conditions; they may violate the rights of children, particularly indigenous children, during relocations following a land acquisition; the use of aggressive marketing may exploit children’s vulnerability; unsafe products in the marketplace can be dangerous for children; essential services such as water may be supplied by private sector providers in a way which discriminates against certain groups of children such as those living in remote rural areas; and business may be responsible for damaging and contaminating the environment in which children live.

The private sector can have a profound impact on the realization of children’s rights. At the same time it can be very challenging for children and their families to obtain effective remedy when their rights have been violated by business.

This report explores the various different remedies, both judicial and non-judicial, which are available to children who are victims of violations of their rights as a result of business action or inaction. It considers the extent to which these remedies are effective both in the sense that they are known about and genuinely available and accessible for children, and in the sense that they do provide adequate reparation. It finds that children have very limited options to obtain remedy for corporate violations of their rights and those options which are available often prove illusory in reality. Despite the plethora of possibilities, the existing framework for holding companies accountable for violations of children’s rights does not serve children well. The report concludes with some proposals for improving the chances of children to obtain remedy.

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1.2 The CRC and the State duty to investigate, adjudicate and redress

The duty to protect against human rights violations is a well-established principle of human rights both regionally and internationally. The UN Committee on the Rights of the Child has understood this duty to mean that States have an obligation to protect children against the violation of their rights by State agents or non-State actors including the business sector. An important element of the duty to protect is the obligation to take effective enforcement measures - that is to investigate, adjudicate and redress violations of children’s rights when they occur when the harm is caused or contributed to by third parties.

The UN Committee on the Rights of the Child states in its General Comment 5 that “for rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.” Several provisions in the UN Convention on the Rights of the Child (CRC) call for penalties, compensation, judicial action and measures to promote recovery after harm caused or contributed to by third parties. For example, Article 32 (2) regarding the economic exploitation of children requires States to provide penalties or other sanctions; Article 19 regarding protecting children from violence refers to investigation and judicial involvement as protective measures; and Article 39 demands that States promote recovery and reintegration following harm such as neglect or exploitation.

In its General Comment No. 11, the Committee asserts that States should provide effective remedies for children whose right to non-discrimination has been violated and that: “the obligations of the State party extend not only to the public but also to the private sector.” The Optional Protocol on the Sale of Children (OPSC) requires that all victims of Protocol offences have “access to adequate procedures to seek, without discrimination, compensation for damages from those legally responsible.” This includes legal persons such as business enterprises. The Committee also encourages States to give children access to different forms of complaints.

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**Children talk about the impact of business on their lives**

“I live in the suburbs of Dakar. There is a big plant that produces cement in Rufisque and has many risks for both the environment and people’s health. When producing cement, the smoke that comes out of the factory stacks creates air contamination. People breathe the air which can cause bronchitis, asthma and other respiratory diseases. Children do not know this danger. They often breathe this contaminated air without worrying about the risk and can get sick. For me, it is necessary to reduce the level of contamination. We should go to the big meetings such as in Copenhagen and speak out. But here in Senegal, we could also talk to the management of the cement company and ask them to reduce the contamination.”

Cheikh Ibrahima Dia, aged 16

Source: Feedback from consultation with children on the Children’s Rights and Business Principles held in Senegal (2011)
mechanisms and General Comment No. 2 focusses on the importance of National Human Rights Institutions (NHRIs) in providing children with remedies\(^3\). The implication of the Committee’s interpretative guidance is that providing children with just and timely remedy for corporate violations of their rights is a central part of a State’s commitment to the CRC.

There is growing awareness and understanding of the importance of access to remedy for corporate violations. In 2005, John Ruggie was appointed as the Special Representative to the Secretary-General (SRSG) on the issue of human rights and transnational corporations and other business enterprises. In 2008, the Human Rights Council endorsed the “Protect, Respect and Remedy” Framework proposed by the SRSG. This proposes that States have a duty to protect against human rights abuses by business, business has a responsibility to respect human rights and there is a need for greater access by victims to effective remedy, both judicial and non-judicial. In 2011, the Human Rights Council endorsed Guiding Principles on the implementation of this framework\(^4\).

The Framework and Guiding Principles, although not enshrined in a legal instrument, are increasingly becoming widely accepted. They state that: “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.” Consistent with this, the UN Committee on the Rights of the Child have made recommendations to States to apply the UN Framework\(^5\).

### 1.3 Business has a responsibility to respect children’s rights

Businesses have obligations to provide children with remedies for violations that they have caused or contributed to. In such circumstances, they must remove obstacles in the way of children accessing remedies provided by the State and should provide effective grievance mechanisms as a core part of their responsibility to respect human rights. This is expressed in the Guiding Principles on Business and Human Rights in the following way: “Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes\(^6\).”

### 1.4 What constitutes an effective remedy for children?

Effective remedy includes three different elements: right to equal and effective access to justice, effective and prompt reparation for harm suffered and access to relevant information concerning


\(^{5}\) See for example, New Zealand, Concluding Observations (2011) CRC/C/NZL/CO/3-4 Para 23 and for Bahrain (2011) CRC/C/BHR/CO/2-3 Para 21

violations and reparation mechanisms. Because of children’s unique status, there are particular dimensions to the concept of “effective remedy” which should be taken into account by States and businesses alike.

Many children, especially the very young, may not be able to speak out about violations nor fully understand that they have a right to remedy. States have a specific obligation to ensure that remedies are known about and trusted by children and that they are free of jurisdictional or procedural barriers that would under-cut the remedy entirely. The UN Committee on the Rights of the Child states: “Children’s special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights. So States need to give particular attention to ensuring that there are fast-acting, child-sensitive procedures available to children and their representatives.”

At the same time remedy processes will only be effective if they fully acknowledge that children can and do actively contribute to household, community and society: they are not simply a vulnerable group but should be empowered to have a voice in decisions which affect them, rather than being the passive objects of choices made on their behalf. Children have the capacity to be actively engaged in the remedy process according to their age and maturity and this participation needs to be fostered and encouraged where appropriate.

In terms of outcome, remedies should provide for appropriate reparation when a violation is established – such reparation might be “compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39.” When determining the level of reparation, mechanisms should take into account that children can be more vulnerable to the effects of corporate violations of their rights than adults: for example, they have a greater susceptibility to pollution; they are more vulnerable to exploitation and discrimination in the workplace; and they may be more swayed by irresponsible marketing than adults. Furthermore, violations of children’s right at key stages in their development may have life-long consequences. For example, economic exploitation, sexual exploitation and abuse of children and harmful physical punishment can have long term negative effects on health and physical and mental development. It is not always possible to make up lost years of schooling caused by economic exploitation or violence in the workplace. Poor health care as a result of lack of access to private health care providers may have irreversible effects on a child’s development.

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7 These three elements are outlined in OHCHR Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005). The Committee on the Rights of the Child does not use the concept of ‘gross’ violations of child rights but instead emphasises the holistic and indivisible nature of children’s rights. The definition of effective remedy is useful in the context of children’s rights nonetheless.


1.5 Forms of remedies available to children

Victims are increasingly turning to the law to hold companies accountable for their involvement in human rights abuses. In doing so many different branches of law have been relied upon including criminal, constitutional and civil. Child rights law may also be used where it has been incorporated into domestic law and can be invoked directly before the courts. Children may also have recourse to regional and international human rights tribunals once domestic remedies have been exhausted. Remedies supported by the State can also be non-judicial and involve investigation, adjudication and mediation with NHRI, ombudspersons or the OECD National Contact Point mediation process. There are also a great number of company-led mechanisms available which can be relied upon to resolve disputes as well as grievance mechanisms attached to voluntary corporate responsibility initiatives or finance bodies.

Litigation is the most regulated form of response with binding outcomes for children. Settled case-law at national and international levels can create clarity about the substance of children’s rights and about how they apply to business. It can thereby function as a form of deterrent for corporate violations. However, children face enormous obstacles in accessing judicial mechanisms which may be expensive, slow, riven with procedural challenges and are often wholly ill-suited to responding to violations of children’s rights. Non-judicial mechanisms may be more effective in providing remedy for children in States where judicial remedy is all but impossible to access. However, these less formal and less expensive avenues for resolving disputes can be problematic when they are reliant on the cooperation and good will of companies both for their functioning and for implementation of decisions.

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**Remedies for corporate violations of children’s rights should be:**

- Meaningful in practice
- Fast-acting
- Child-sensitive
- Adapted to the evolving capacities of children
- Easily accessible
- Affordable
- Compatible with children’s rights
- Free of corruption
- Conducted by independent and impartial authorities who are able to decide whether a violation has taken place and offer appropriate and fair remedy where a violation is established which takes into account the impact of the violation on the child
- Conducted by authorities who have powers to enforce decisions

Adapted from International Commission of Jurists, Practitioner’s Guide No. 2: The Right to a Remedy and to Reparation for Gross Human Rights Violations
2. Judicial Remedy

2.1 Obstacles to accessing judicial remedies
Children with legitimate claims against business face many obstacles in gaining access to the courts. Many of these obstacles are not specific to business related child rights claims and are challenges regardless of the cause of a violation; for example, children’s lack of legal standing and overall lack of trust and confidence in the judicial process. However, there are further obstacles which are specific to the issue of accessing remedy against business. These include the way in which large corporations are structured which make attribution of legal responsibility challenging; the complexities of extra-territorial jurisdiction; power imbalances between the respective parties and the sheer costs involved in large scale litigation against companies who are highly motivated to avoid negative judgements.

This section considers the obstacles for children which are not specific to business but which are relevant since they impede access to remedy.

- **Legal standing of children**
  Children should be allowed and encouraged to participate in legal proceedings that affect them in line with Article 12 of the CRC which establishes the right of capable children to directly express their views and to be provided the opportunity to be heard in judicial and administrative proceedings either directly or indirectly. Their representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.

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10 Legal standing is defined here as the capacity of children participating in court proceeding to undertake independent procedural actions such as instructing a lawyer, filing claims, filing statements and appealing court rulings.

11 Committee on the Rights of the Child, General Comment No. 12, *The Right of the Child to be Heard* CRC/C/GC/12 (2009) para 37
Parents are often their children’s strongest advocates but there may be instances where it is not in children’s best interests for their family to be involved in bringing a complaint against business or where a child does not have any family to rely upon to assist them. However, children often cannot initiate civil proceedings directly because of their age but must do so through a parent, guardian or legal representative; in Libyan Arab Jamahiriya, for example, “persons under the age of 18... lack standing in legal proceedings and must be represented by a parent or adult guardian.” Many children lack adequate identity documents, including birth registration documents, to enable them to initiate proceedings. Babies and very young children will not of course, on their own initiative, be able to seek remedies, however accessible and child-friendly they become. However, claims brought by older children should be taken as seriously as those brought by adults.

In other States, children can bring a matter to a court, and receive support in doing so. In Paraguay, for example, specialized children’s courts have competence over cases concerning paternity, guardianship, maintenance, custody, foster care, adoption, child abuse, child labour, issues concerning health and education, and the protection of child rights in general. Children have the right to bring matters before this court, and the presiding judge has an obligation to listen to the child concerned, in accordance with the age and maturity of the child, before resolving any matter before the court. The Children’s Act of South Africa also recognizes a child’s rights to access the courts, to receive assistance in bringing matters before a competent court and to seek judicial remedy for violations or threatened violations of rights recognized in the Constitution or in the Children’s Act itself. Similar provisions are found in children’s codes in Latin American countries such as Bolivia and Ecuador.

- **Lack of knowledge and understanding of rights and remedies**

Children may lack knowledge about their rights in relation to the private sector. They may also be ignorant of mechanisms, whether judicial or non-judicial, available to them to seek redress. Children’s ability to access remedies for corporate violations will depend largely on the support they have from the adults around them; this is particularly the case for younger children. They will rely on the knowledge and understanding their families have of the mechanisms open to them and ways and means of accessing them. This knowledge may be lacking in countries where rates of literacy are low and where litigation is perceived as intimidating and inaccessible.

- **Costs of bringing cases**

In most jurisdictions, civil litigation is an expensive undertaking. Children or their families may not have the financial resources needed to litigate civil actions particularly when there is a risk of payment of legal costs of the opposing party if the case is lost or where lawyers cannot offer

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13 Article 167 of the Paraguay Children’s Code, cited in D O’Donnell as above

contingency fees\textsuperscript{15}. Even in those countries where legal aid is available for civil actions, it is likely to be means-tested and available only for the very poorest leaving many that have failed the means test but nonetheless still cannot afford to litigate. Irrespective of the costs of legal representation, court fees alone required to lodge claims can represent a barrier to initiating civil litigation and transportation costs to attend court hearings may also be an impediment particularly for children living in remote rural areas.

Litigation can last a very long time and there is much at stake for companies anxious to avoid negative court rulings which affect their status and reputation. On the other hand, individual children and their families do not necessarily have the resources or time available to endure lengthy and expensive proceedings to claim redress.

\begin{center}
\textbf{Financial barriers for garment workers in Bangladesh to seek redress for violations}
\end{center}
\begin{quote}
“Financial barriers to access present an important obstacle for some: fees for accessing legal channels begin at around £12 (1500 BDT). This represents close to the monthly wage received by some entry level workers, and half the monthly wage of the average worker. In addition, the fact that legal cases, commonly drag on for months, or years, discourages many workers from entering such processes.”

Source: The reality of rights: Barriers to accessing remedies when business operates beyond borders LSE (2009)
\end{quote}

\begin{itemize}
\item \textbf{Statutes of limitation}

Many causes of action, both civil and criminal, have statutes of limitation on them with the clock running from the date the offence, tort or contractual breach occurred. For children this may represent a particular difficulty if they were young at the time of the violation; such limitations should run from the age of majority rather than from the date the violation took place.

\item \textbf{Impact of out of court settlements}

In 2008, the Oxford Pro Bono Publico group researched the provision of remedy for extra-territorial corporate violations in thirteen jurisdictions\textsuperscript{16}. They found that many cases are settled out of court\textsuperscript{17} with the result that the law remains untested and uncertain in many jurisdictions. This prevents the development of a settled body of law and precedent which is available for other potential claimants to rely upon. In effect this means that many cases have to ‘start again’ to establish core legal foundations around the relationship between rights and business and in

\textsuperscript{15} Contingency fee arrangements are when lawyers agree to take on a case on the basis they will not charge for their legal fees if the case is lost but if they win they will take a ‘success’ fee in addition to their normal bill.

\textsuperscript{16} University of Oxford Pro Bono Publico, \textit{Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuses} (2008)

\textsuperscript{17} For example, significant out of court settlements were reached in Doe v Unocal in the US, in a criminal action brought against Total in France, Lubbe and Others v Cape Plc in the UK and Dagi v BHP in Australia. For more information on all these cases see the Business and Human Rights Resource Centre website – Corporate Legal Accountability Portal
particular on principles of extra-territorial litigation. In the absence of a body of developed case law, children and their families may be more likely to be put off undertaking litigation given extremely uncertain outcomes.

### Drug trials on children in Nigeria – Example of an Out of Court settlement

In 1996, Pfizer tested an experimental antibiotic drug, Trovan, on about 200 children in Kano, Nigeria during an epidemic of bacterial meningitis. A group of affected Nigerian children and their guardians sued Pfizer in US federal court under the Alien Tort Statute. They alleged that the company violated customary international law by administering Trovan because the drug was given without the informed consent of the children and their parents and because the drug trial led to the deaths of 11 children and serious injuries to many others. In January 2009, the US Court of Appeals found that the prohibition of non-consensual medical experimentation on humans is binding under customary international law. In 2011, the parties announced that they had reached a settlement and compensation payments were begun. The terms of the settlement are confidential.

Source: Business and Human Rights Resource Centre, Corporate Legal Accountability Portal

### Lack of class actions

Class actions are when a group of individuals who claim to be similarly affected by a company can bring a collective claim before the court. They can significantly help access to justice for claimants since they can reduce costs, enable single legal counsel to bring a case, alleviate the burden of proof each individual would otherwise have, and possibly reduce the length of litigation. However, they are not available in many countries.

### The power of class actions

The UK law firm Leigh Day and Co brought a class action against Shell on behalf of 69,000 Nigerians living in one of the world’s poorest communities. The case results from two massive oil leaks in 2008/9 which caused devastating damage to the environment, in particular the waterways of the fishing community of the Bodo Community in the Niger Delta. It concerns a claim for damages against Royal Dutch Shell plc and its subsidiary Shell Petroleum Development Company (Nigeria) Ltd. The claim was brought in the UK in 2011 and very shortly afterwards Shell accepted responsibility and agreed to urgent remediation work to the environment.


### 2.2 Effectiveness of civil law remedies

The following examines how effective a range of different civil remedies are for children seeking reparation for corporate violations of their rights.

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Tort Law

Business conduct which causes or contributes to violations of children’s rights will often be in breach of tort law which has proven all over the world to be the strongest basis for suits against companies for a range of rights violations. Tort laws throughout different jurisdictions share a general principle that the actor whose faulty conduct, whether an act or omission, caused damage is obliged to repair it. Civil liability can therefore arise for companies and/or their officials when they are involved in violations of children’s rights.

For such claims to succeed, the harm must be “foreseeable” and there must be proximity between the person seeking redress and the defendant; this may relate to a physical proximity, a pre-existent relationship, a causal connection between the conduct and the harm produced or an assumed responsibility. Often proximity will be determined as a matter of fact. So, for example, day to day involvement between a parent company in one country and subsidiary operating in another has been successfully argued as demonstrative of sufficient proximity for workers employed by the subsidiary to bring a claim against the parent company for mercury poisoning 19.

Once these two tests of foreseeability and proximity have been satisfied then Courts weigh public-policy considerations as well as justice considerations when considering cases. English courts, for example, consider whether it is “just, fair and reasonable” to impose duties of care on potentially negligent actors. In the context of children’s rights and business, it could be argued that it is fundamentally unfair as a matter of public policy for a company based in one country to operate in a developing country, and derive profits and benefits from this arrangement, without also imposing a duty on the company to protect the workforce and others affected by its operations. It is particularly unjust, unfair and unreasonable in countries where children are vulnerable due to poverty, lack of education and lack of access to remedy.

Adequate accountability?

Although they do not rely directly on human rights as a basis for action, tort actions do serve to make companies’ accountable to the extent that they involve claims for compensation and are invariably costly for companies. In some jurisdictions, damages awarded by the courts under tort law are “substantial” or “exemplary”. While the former is aimed at compensating the victims, the latter seeks to have a deterrent effect. In theory, the payment of damages and, in particular, exemplary damages can help to prevent future violations of children’s rights. Nonetheless, the main emphasis in tort cases is on providing personal compensation rather than ensuring permanent changes in corporate policies and practices which have a negative impact on children.

Barriers to remedy in the context of transnational business activities

Companies invest in foreign countries for a variety of reasons. They might be looking to expand into new markets; searching for natural resources; pursuing access to cheap energy, or taking advantage of relatively low labour and production costs. In doing so, their impact on children’s rights – positive and negative - in their host countries can be significant whether they are operating directly or through a subsidiary or a commercial partner of the parent company. When

19 Ngobo & Sithole & ors v Thor Chemicals
a subsidiary company is involved in child rights violations, it may be the case that the parent company was actively involved in the violation and/or knew of this conduct, tolerated it or even directed it. Holding the parent company liable in such instances is very important as a way of deterring future violations but also as a way of obtaining remedy and meaningful compensation for the children affected.

Corporations are obviously subject to the domestic law of the countries in which they are based. However, TNCs - whose operations straddle national boundaries – have frequently been able to elude legal responsibility; the parent company is based in one country and the operating subsidiary is based in another. The parent company contends that it is only a shareholder and can't be held responsible for the wrongdoings of its subsidiaries. Generally speaking, causes of action—whether criminal or civil—are not intended to operate outside of the State in which they are established. Invoking the civil liability of a TNC can only be done at the national level, either in the corporation’s country of origin or in its host country. Host States often have weaker governance and accountability structures than home States. Economic arrangements between the host State and the TNC may also restrict the ability of the host State to regulate the TNC in practical and legal terms. There are procedural difficulties as well in obtaining remedy in home States.

The result is that TNCs may benefit from the operations of their subsidiaries and contractors, while not being held directly responsible for child rights abuses committed in the course of these operations. This may happen even in instances where the company knew of and supported the conduct of its subsidiary. This is particularly problematic when subsidiaries and contractors operate in countries with legal regimes that provide lower levels of child rights protection than the home State. The framework of laws, regulations and initiatives that govern the activities of TNCs have been described as “piecemeal, fragmented and unequal to the task of ensuring companies respect human rights.” The lack of monitoring and accountability from either the host or home State can have devastating impacts on children’s rights and there are a host of procedural obstacles for children in obtaining effective remedy in this context.

“The impunity of MNEs is a reality, whether these enterprises are directly responsible for human rights violations or whether their responsibility is more indirect, for instance because their presence in certain jurisdictions facilitates or encourages human rights abuses by governments.”


In host countries, litigation may founder on a lack of lack of political will or insufficient legal capacity among local authorities due to inadequate legislation, poor infrastructure, corruption,

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20 Evidence given by Amnesty International to the UK Human Rights Committee “Any of our business, Human Rights and the UK private sector”
lack of legal aid, the politicisation of the judiciary, etc. It is not uncommon for a TNC’s subsidiaries, sub-contractors or business partners to be uninsured. They may have limited liability. Access to information in such situations can be very problematic. Much of the evidence in the form of documents, records and archives might be in the control of the parent-company and be located at head-quarters in the home State. The parties to the dispute will often have very unequal access to financial resources to prepare their respective cases which means that children and their representatives may not be able to produce the evidence required to make their case. In cases where State military forces provide security to TNC operations and both the State and the TNC are implicated in the abuse, it may be futile and even dangerous for victims to bring claims or to seek prosecution of the corporations.

Bringing a civil case in the parent company’s country of origin or ‘home State’ is also not straightforward. There may be funding difficulties. Host State company law may have allowed the creation of complex corporate structures involving distinct legal personalities of parent companies and subsidiaries; “the principle of separate legal personality presents a difficult, if not insurmountable, obstacle in situations in which the parent company has incorporated subsidiaries to carry on its overseas operations”\(^{21}\). This may mean that it can be impossible to establish that a parent company in the home State jurisdiction is liable for acts of subsidiaries and associates.

There may be legal and evidential difficulties in connecting the behaviour of the home State companies to subsidiaries. Courts have not provided certainty regarding the amount of effort parent companies should put into obtaining and acting upon information of its partners’ conduct: “[T]he defendable and acceptable threshold of diligence expected from a responsible business remains a debatable issue”\(^{22}\)."

Even where claimants can establish liability of the parent company, can establish jurisdiction and identify an available cause of action under the relevant applicable law (whether that of the host State or home State), a claim may be challenged on the grounds that the home State is not the appropriate forum for the case to be heard (the doctrine of forum non conveniens). The basic principle of forum non conveniens is that a court having jurisdiction can choose not to exercise it where it is confident that another court has jurisdiction and that justice can better be done in that court. It demands the application of a two-stage test: Is there a forum that has a more real and substantial connection with the case? If there is, are there nevertheless reasons why justice requires that the TNC home court should retain jurisdiction? This determination is based on factors such as the location of the evidence and the witnesses, the applicable law, and the nature of the alternative forum: in short, where the other court offers a more appropriate forum.

The extent to which this poses an obstacle to child rights victims bringing civil actions varies from jurisdiction to jurisdiction. For example, research has found that whereas in the US, the concept of forum non conveniens may pose a significant obstacle to litigation, as evidenced in the

\(^{21}\) University of Oxford Pro Bono Publico, Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuses (2008)

Bhopal litigation brought by India in the US, there is no such concept in Germany\textsuperscript{23}. Indeed a decision of the European Court of Justice (the decisions of which are binding on the courts of all EU states) in 2005 clarified that the national courts of the EU do not have the power to halt proceedings on the grounds of \textit{forum non conveniens} in cases brought against EU domiciled defendants, where the alternative venue is outside the EU\textsuperscript{24}.

\textbf{Forum non Conveniens in Canada}

Cambior Inc. was sued in Quebec Superior Court for environmental damage associated with its joint venture gold-mining operations in Guyana. The claimants comprised 23,000 victims suing for damages arising from a rupture in a dam in a treatment plant of a gold mine which resulted in approximately 2.3 billion litres of contaminated liquid spilling into two rivers in Guyana in 1995. The mine was owned by Omai Gold Mines Limited, a Guyanese corporation, 65% of whose shares were owned by Cambior, a company based in Canada. The Government of Guyana was also a shareholder. The Superior Court concluded that the courts of Guyana were competent to hear the Case because:

“\ldots neither the victims nor their action has any real connection with Quebec. The mine is located in Guyana. That is where the spill occurred. That is where the victims reside. That is where they suffered damage. But that is not all. The law which will determine the rights and obligations of the victims and of Cambior is the law of Guyana. And the elements of proof upon which a court will base its judgment are located primarily in Guyana. This includes witnesses to the disaster and the losses which the victims suffered. It also includes the voluminous documentary evidence relevant to the spill and its consequences.”


[BOX] \textbf{No forum for children poisoned by tainted milk}

In 2008, the Chinese dairy company Sanlu admitted publicly that it had knowingly sold milk products tainted with melamine worldwide (mostly in China). The tainted milk caused serious health problems for over 300,000 children and caused the deaths of six children in China. A number of different criminal and civil cases followed. In 2009, 21 employees of Sanlu were sentenced in China for knowingly producing and adding melamine to milk products, in order to boost the milk’s protein count. The court issued prison sentences ranging from 5 years to life imprisonment. Although Sanlu had filed for bankruptcy in November 2008, the court also fined the company over 50 million yuan (US$7.3 million).

From 2008 to 2009, a number of civil class-action lawsuits were filed in various Chinese regional courts but none were admitted. Parents, whose children were harmed by the melamine tainted

\textsuperscript{23} Oxford Pro Bono Publico (2008) As above
\textsuperscript{24} Meeran, R Tort litigation against multinationals (“MNCs”) for violation of human rights: an overview of the position outside the US (2011)
milk, filed a writ against Fonterra Cooperative Group on 8 April 2010 at the Small Claims Tribunal in Hong Kong. Fonterra is a dairy co-operative based in New Zealand. It has a subsidiary registered in Hong Kong that held a 43% stake, and three out of seven board seats, in Sanlu. The plaintiffs, mainland China residents, sought individual compensation and alleged that, as a major shareholder of Sanlu, Fonterra knew about the melamine-tainted milk, and Fonterra was vicariously liable for the illnesses of children who had consumed the milk.

Fonterra applied to dismiss the claim on the basis that Hong Kong was not the appropriate forum for the claim because the claimants were mainland China residents and the injuries also occurred in mainland China. On 25 May 2010, the Hong Kong Small Claims Tribunal dismissed the claims on the basis that Fonterra was a minority shareholder and did not control the production process, and the tribunal also ruled that Hong Kong was not the correct venue for the claims. On 6 August 2010 the tribunal held a review hearing and again rejected the lawsuit, on the same grounds.

Source: Business and Human Rights Resource Centre, Corporate Legal Accountability Portal

- **Alien Tort Statute**

  In the United States, cases have been brought under the ATS for human rights violations committed by corporations abroad. It applies to the small group of customary international law norms such as the prohibition of slavery, genocide, torture, crimes against humanity and war crimes. It has also applied to child labour. Complainants cannot be US citizens and must show that a corporation was in some way linked with a government itself bound by these norms. Although most ATS cases concern violations committed abroad, some have related to corporate abuses committed in the US. Exhaustion of domestic remedies is not required.

  A number of cases concerning children’s rights have been brought using the ATS primarily relating to child labour, forced labour and torture. To date, some have settled out of court and none have been successful for the plaintiffs. In part this is because of the evidentiary difficulties of bringing a case in a country far from the physical location of the violations; in part this is because of the compelling incentives for companies to settle out of court; and in part because of difficulties in establishing jurisdiction and corporate liability.

  For example, in 2005, three people from Mali filed a class action lawsuit in California federal court against Nestlé, Archer Daniels Midland and Cargill. The individuals alleged they had been trafficked from Mali as child slaves and forced to work harvesting and/or cultivating cocoa beans on farms in Côte d’Ivoire. They were forced to work long hours without pay, kept in locked rooms when not working and suffered severe physical abuse by those guarding them. The plaintiffs allege that the companies aided, abetted or failed to prevent the torture, forced labour and arbitrary detention that they had suffered as child slaves in violation of the ATS, Torture Victim Protection Act, US Constitution and California state law. The plaintiffs further claimed that the companies’ economic benefit from the labour of children violates international labour conventions, the law of nations and customary international law. However, on 8 September 2010

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25 28 USC § 135
the court dismissed the case concluding that corporate liability was not sufficiently well established and universal to satisfy a claim under the ATS.

In cases where specialised NGOs are engaged in the litigation, local grassroots networks can be mobilised to construct strong cases and the skills of pro bono lawyers can be drawn upon26. However, the ATS is not a viable remedy in practice for the vast majority of children who are victims of corporate violations globally. Even the largest NGOs can only afford the time and money to pursue a few of the most egregious cases. In short, the ATS should not be viewed as a substitute for robust domestic mechanisms for remedy in both home and host States.

Furthermore, a majority decision of the US Second Circuit Courts of Appeals in September 2010 may have put obstacles in the way of the future use of the ATS27. In the case of Kiobel v. Royal Dutch Petroleum, the appeals court found that corporations cannot be held liable for international human rights violations in US courts, only individuals can. This decision was at odds with rulings from other US Courts including the Eleventh Circuit, the Seventh Circuit and the District of Columbia Circuit, which in July 2011 ruled that corporations can be held liable under the ATS - in this case, the court found that EXXON Mobil was not immune for operations in Indonesia, “for torts based on heinous conduct allegedly committed by its agents in violation of the law of nations.” The issue may yet be resolved in the Supreme Court28.

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26 Davis, J Justice Across borders: The struggle for human rights in US Courts, New York: Cambridge University Press, (2008). Davis’ quantitative analysis reveals that cases in which NGOs represented plaintiffs were 34 percent more likely to win an ATS decision in the district courts and 41 percent more likely to prevail in the court of appeals than those with other types of representation.

27 Kiobel v Royal Dutch Petroleum Docket Nos 06-4800-cv, 06-4876-cv US. Ct. App.2d Cir.

28 See Meeran, R (2011) for a full discussion of the future of the ATS
Civil, administrative and criminal laws regarding sale of children, prostitution and pornography

The Optional Protocol on the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (OPSC) requires each State party to establish criminal, civil or administrative liability for offences regarding the sale of children, prostitution and pornography committed by ‘legal persons’ which includes companies. The Protocol goes on to authorise, though not require, the use of nationality jurisdiction over nationals and residents to prosecute and punish extraterritorial offences. It lays down minimum standards for protecting child victims in criminal justice processes and recognizes the right of victims to seek compensation. It encourages strengthening of international cooperation and assistance and the adoption of extra-territorial legislation.

It is rare for companies to be directly involved in acts relating to the sale of children, child prostitution and child pornography but they can be complicit in these violations through their actions; so for example, child sex tourism can be facilitated by travel and tourism companies which are performing their core activities. The US 2003 “PROTECT” Act created a new offence under US law aimed at tour operators, of “arranging, inducing or facilitating” the travel of a person, while knowing that the person was intending to commit criminal acts once they got

29 Article 3(4) OPSC
30 See the US Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act 2003 Public Law 108–21—APR. 30, 2003
to their destination. In Australia, companies can be prosecuted for carrying out acts with the intention of “benefiting” (including financially) from child sex tourism overseas.\(^{31}\)

The OPSC encourages States to provide children with remedies against companies who violate children’s rights in terms of the sale of children, child prostitution and child pornography since it encourages States to make corporations and other businesses liable for committing these offences whether under criminal, civil or administrative liability. If the remedy is under criminal law provisions then the victims are unlikely to receive direct compensation. However, it may also be possible for children to rely upon civil or administrative law to bring a claim against companies. It is not clear whether this liability extends to offences committed abroad.

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**Civil remedy in the US for children who allege they were trafficked for sex in Brazil**

In June 2011, the NGO Equality Now supported the filing of a case in the US District Court for the Northern District of Georgia against a US based tourism company called Wet-A-Line Tours. The case is brought by four indigenous Brazilian women who claim to have been trafficked as children by the fishing tour operator for the purposes of sex with the company’s clients. The case is based on the Trafficking Victims Prevention Act (2000) which has extra-territorial jurisdiction over US citizens who commit offences under this Act in the course of international commerce. Wet-A-Line Tours, which organized fishing tours on the Amazon mainly for US customers, allegedly lured girls from the surrounding indigenous communities onto the fishing boats promising them a chance to earn money. Once on the boat, the girls allegedly were given alcohol and drugs and made to perform sexual acts with men on the fishing tours. The four plaintiffs in this case were all under the age of 18 when they were allegedly sold for sex on a Wet-A-Line fishing boat, the youngest girl allegedly being only 12 years old. The case is ongoing. A criminal case has reportedly been initiated against the CEO of this company in Brazil.

Source:

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**Employment Law**

For children of working age, employment law can be used to enforce certain employment rights such as the right to health, protection from violence and non-discrimination. Children may receive financial compensation if a court or tribunal finds a breach of their rights under employment law. Furthermore, businesses may be liable under criminal law for serious breaches. However, there may be procedural difficulties for children in accessing courts dealing specifically with employment issues because there are fewer of them than courts dealing with civil matters more generally. In Bangladesh for example, the country has only seven labour courts compared to 1,300 magistrates’ courts. As well as creating excessive waiting times and overall lack of

\(^{31}\) Australian Crimes (Child Sex Tourism) Amendment Act 1994, inserting new sections 50DA and 50DB into the Australian (Cth) Crimes Act
system capacity, this means that physically accessing the courts is often a major problem for those in the many major industrial towns and cities lacking a labour court.\footnote{32}

**Discrimination against a teenager in the workplace**

The US Equal Opportunity Commission successfully brought a lawsuit against the clothes retailer Abercrombie and Fitch in the Tulsa Federal Court in the US. In June 2008, a Muslim teenager, who wears a hijab, applied for a sales position in an Abercrombie and Fitch shop. She was not hired because the store claimed the wearing of headgear was prohibited by its Look Policy. The case was brought claiming a failure to accommodate her religious beliefs and discrimination in violation of the Civil Rights Act. A jury will determine what, if any, damages will be awarded.

Source:  

- **Environmental Law**

Breaches of environmental law are frequently prosecuted by the State. In some jurisdictions the penalties are severe and may act as a deterrent; for example, in India the Environmental (Protection) Act of 1986 allows for punishment for breaches by fines and/or sentence of imprisonment up to five years. If a State fails to enforce its own domestic environmental laws resulting in pollution then those affected, including children, may bring a claim against the State for this failure.

- **Constitutional law**

Provisions on the rights of children are included in many constitutions (see for example box below). In some States, cases concerning corporate violations of children’s rights may be brought by children against the State for some regulatory failure resulting in the breach; for example, failing to protect key constitutional rights such as the right not to be subject to child labour or allowing an environmentally damaging industrial project to take place without proper due diligence. In certain circumstances cases might be brought claiming a breach of constitutional rights against a public or state-owned company. However, these kinds of claims generally only relate to the State action that made the corporate abuse possible – not to the corporate abuse itself. If there has been no regulatory failure then they will not be of use. Furthermore, in the majority of jurisdictions, constitutional cases will only result in a declaration that conduct was ‘unconstitutional’ and not for other outcomes.

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\footnote{32}{For more information on the difficulty in accessing labour courts in Bangladesh see *The reality of rights: Barriers to accessing remedies when business operates beyond borders* LSE (2009)}
Domestic level
Business may become liable for criminal offences in a number of different ways: crimes may be committed for and on behalf of a business (such as bribery and some frauds); crimes may be committed by individuals for their own profit but using their employer’s time and resources (such as producing indecent images of children) and crimes may occur due to an aggregation of gross negligence (such as the use of child labour in the supply chain, corporate manslaughter or environmental pollution). Companies can be held liable in criminal law when the acts and omissions, and the knowledge of the employees can be attributed to the corporation.

Criminal laws exist in some States to punish and deter certain forms of serious corporate behaviour. Victims of these offences will not normally receive compensation as a result of successful prosecutions although they will have obtained justice. Furthermore, criminal

For a detailed overview of this complex area see FIDH Corporate Accountability for Human Rights Abuses: A Guide for Victims and NGOs on Recourse Mechanisms (2010) section on judicial remedies section on judicial remedies
prosecutions for offences may have a deterrent effect on companies. The advantage of corporate criminal prosecutions is that the burden of proof is on the State rather than on victims personally. On the other hand, the standard of proof in criminal proceedings is much higher than in civil proceedings and the understanding of corporate criminal responsibility extremely complex and can be interpreted very differently from State to State.

**Criminal investigation against Google in Brazil**
In 2006, the Federal prosecutors’ office in Brazil initiated a criminal investigation against the board of directors of Google Brazil in connection with the use of a social networking website, Orkut, which enabled access to child pornography. This was resolved in 2008 when Google signed a TAC (*Termo de Ajustamento de Conduta*) by which Google committed to review all complaints of child pornography, racism and other crimes in the social network.

- **International level**
Conduct that gives rise to violations of children’s rights may also involve breaches of international criminal law such as crimes against humanity, torture, slavery and genocide. Currently, there is no established international criminal mechanism to address corporate human rights abuses. While the statute of the International Criminal Court (ICC) allows for persons to be prosecuted for crimes such as enslavement, forced disappearance, and unlawful deportation, there is no specific mention of corporations or their personnel and it remains unclear whether corporate actors can be prosecuted for violating human rights. Theoretically this could occur in extreme situations; for example, individual company managers may be held criminally liable for violations under the ICC Statute where a director “orders, solicits or induces the commission” of crimes falling under the ambit of the Statute namely genocide; crimes against humanity; war crimes and/or aggression. This could be relevant for example where a company is complicit in extreme abuses carried out by public security forces against local population especially if the company benefits from such actions (eg forced child labour, rape when committed as part of a widespread or systematic attack). For the ICC to be a truly effective forum for addressing corporate human rights abuses, the international community needs to establish that corporate executives can be subject to liability under the ICC’s jurisdiction.

3. **Quasi-judicial mechanisms - regional and international human rights tribunals**

3.1 **International human rights treaties**

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34 De la Veg, C, Mehra, A and Wong, A Holding Businesses Accountable for Human Rights Violations Recent Developments and Next Steps (2011)
Communications alleging a failure by the State to prevent and remedy corporate violations of children’s rights may be brought under international human rights treaties. For each of the main UN human rights treaties a committee is created to monitor Member States’ adherence to the convention and its implementation. At present, five of the nine human rights Committees allow for complaints from individuals (or groups of individuals) relating to alleged violations by a State Party of the rights guaranteed by the instruments concerned. The Committees’ rulings on individual complaints are not legally binding since they are not acknowledged as having a judicial function. However, their decisions are influential and it is generally considered that States have an obligation in good faith to take Committees’ opinions into consideration and to implement their recommendations. Moreover, Committees’ decisions play an extremely important role in determining the extent of the obligations of States.

These individual complaints procedures are still very rarely used to invoke the responsibilities of States for violations of human rights by business enterprises. However, a new Optional Protocol to the International Covenant on Economic, Social and Cultural Rights may stimulate more cases on this issue. Furthermore, a third Optional Protocol to the CRC to provide a communications procedure was adopted by the UN Human Rights Council in June 2011. Once this comes into force it will provide a quasi-judicial remedy for children bringing cases against States for failing to prevent violations of their rights by business provided certain conditions are met (including exhaustion of domestic remedies, communication notified in writing and not ill-founded etc). The Optional Protocol includes the following safeguards for children:

- In reviewing communications, the Committee on the Rights of the Child must follow the principle of the best interests of the child and have regard to the rights and views of the child;
- The Rules of Procedure for using the complaints mechanism are to be child-sensitive;
- Safeguards must be introduced to prevent the potential manipulation of children, and the Committee can decline to consider communications found not to be in a child's best interests;
- The identity of any individuals involved in submitting a complaint, including child victims, cannot be revealed publicly without their express consent; and
- Communications must be submitted with the child victim's consent, unless the person submitting the complaint can justify acting on the child's behalf without that consent.

States have a vital role to play in raising awareness of these international mechanisms and making them available to children, their families and civil society representatives.

3.2 Regional human rights treaties

36 CCPR, CERD, CEDAW, CAT, CRPD. This will also apply to the CESCR, the CMW, the CRC and the Committee on enforced disappearances when these communication procedures come into force.

37 To read the full text of the CRC complaints mechanism as adopted by the Human Rights Council in June 2011, visit http://www2.ohchr.org/english/bodies/hrcouncil/OEWG/docs/A-HRC-17-36.doc.

38 For detailed analysis of how these regional bodies approach state obligations to prevent and remedy corporate violations see FIDH (2010)
There are a number of regional treaty bodies with complaints mechanisms which have had more latitude and opportunities to consider cases involving the state obligation to prevent and remedy corporate violations; for example, the European Court of Human Rights and the Inter-American Commission on Human Rights (IACHR). The African Commission on Human and Peoples’ Rights has also had some notable cases involving state obligation to prevent corporate abuses. Currently, nearly all Member States in the African Union have ratified the African Charter on the Rights and Welfare of the Child39. The African Committee of Experts on the Rights and Welfare of the Child has a robust communications procedure however it has only reviewed one case to date and has not yet received any communications in relation to the state obligation to prevent and remedy corporate violations.

### Remedy for child victims of excessive pollution in Peru

In 2005, a case was brought to the IACHR on behalf of 60 adults and children who live in La Oroya and suffer from health problems believed to be caused by pollution from a smelter run by the US firm Doe Run. Ninety-nine percent of children living in and around La Oroya have blood lead levels that exceed acceptable limits, according to studies carried out by the Director General of Environmental Health in Peru in 1999. Lead poisoning is known to be particularly harmful to the mental development of children. Furthermore, neurologists at local hospitals have found that even newborn children have high blood lead levels, inherited while still in the womb. The case claimed that violations of rights were attributable to state actions and omissions in particular non-compliance with environmental and health regulations and lack of supervision and inspection of Doe Run. In 2007, the Commission requested that the State of Peru take precautionary measures to prevent irreversible harm to the health, integrity, and lives of the people of La Oroya. In August 2009, the IACHR fully evaluated the case and found that the illnesses and deaths allegedly resulting from the severe pollution constitute potential violations of the human rights to life and integrity. It also found that the State of Peru likely violated the public’s right to information when it manipulated and failed to publish important human health information. In 2010, a further case was brought claiming that the State had still failed to comply with the IACHR rulings.

Source: [http://www.aida-americas.org/project/doerun_en](http://www.aida-americas.org/project/doerun_en) [accessed 1st August 2011]

Enforcement of judgements at both international and regional levels can be problematic as is illustrated by the example of Guatemala’s failure to comply with precautionary measures issued by the IACHR to suspend the activities of Goldcorp’s Marlin mine to prevent imminent harm to communities living near the mine. Lawyers involved in the case commented on this failure: “The order to suspend mine operations is designed to protect the right to life. This is a right that cannot be negotiated. The Guatemalan state has demonstrated that it lacks the capacity to

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39 As of June 2011, all save for 7 Member States of the African Union have ratified the ACRWC. The member States which have signed but not yet ratified the Charter are: Central African Republic, Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, Swaziland and Tunisia. See [http://www.au.int/en/sites/default/files/96Welfare_of_the_Child.pdf](http://www.au.int/en/sites/default/files/96Welfare_of_the_Child.pdf) for an up to date list of ratifications [accessed 15th June 2011]
protect the rights of its citizens in this case, which is the very reason the IACHR issued the precautionary measures. The IACHR did not ask Guatemala to judge whether or not contamination, or any other risks, exist for people affected by the Marlin mine. The state has tried to distort the meaning of what the commission said40.”

4. Non-judicial remedies

4.1 Introduction

Non-judicial remedies for rights violations can play a very important part in establishing accountability. This is particularly the case when legal accountability is not possible. The SRSG on Business and Human Rights has committed significant effort to exploring the strengths and weaknesses of non-judicial mechanisms for providing remedy for corporate violations of rights to see what different models could look like. This is in recognition of the fact that little research had previously been done in this area41. There is a wide variety of non-judicial mechanisms which are described comprehensively in other documents.42 This report is limited to examining those which are of most direct relevance for children with a view to considering how effective they are in providing remedy in terms of process and outcome. It considers both state-based mechanisms, including NHRIs and the OECD National Contact Points, and those which are non-state based including operational level grievance mechanisms provided by companies themselves.

One of the key advantages of non-judicial remedies is that they can create flexible, innovative and sustainable solutions to issues concerning children based upon a shared understanding of roles and responsibilities – at times it may be in a child’s best interests for concerns raised about a company’s conduct to be resolved or settled informally. Furthermore, they operate in the ‘shadow’ of litigation and this may go some way to mitigate the weakness of non-judicial remedies that they lack strong enforcement of their decisions. Non-judicial mechanisms can therefore play an important complementary role alongside judicial processes.

4.2 State-based mechanisms

Most States will have some agencies with oversight of particular standards relevant to children’s rights; for example, health and safety inspectorates, environmental tribunals and bodies focussed on non-discrimination and unequal treatment in the private sector. These agencies may have regulatory powers allowing them to impose administrative sanctions on businesses which violate children’s rights. Other non-judicial mechanisms established with the support of the State


42 See FIDH (2010) and Rees, C (2008)
include publicly funded mediation services, NHRIs, or mechanisms such as the OECD’s National Contact Points. These mechanisms can enable redress for children through mediation, investigation or producing recommendations.

In some instances these non-judicial mechanisms can provide children with remedy by making recommendations which are backed up by informal pressures on companies such as the risk of reputational damage or even the intervention of government. However, in many instances, the lack of strong enforcement powers means that non-judicial mechanisms do not always provide children with effective remedy. Related to this is that claimants may not have much trust or confidence in them as effective. Furthermore, they may be uncertain about how they function, distrust their perceived relationship with the government, find them physically difficult to access and may fear retaliation from others for bringing cases to public attention.

- **NHRIs and Ombudspersons**

  NHRIs are defined in the Paris Principles as national institutions “vested with competence to promote and protect human rights”\(^{43}\). More than 100 countries have established NHRIs, with 63 maintaining an ‘A-level’ accreditation, meaning they meet the highest standards of independence and output\(^{44}\). Increasingly, States are establishing independent human rights institutions specifically for children – there are either separate ombudspersons for children, children’s rights commissioners, or focal points on children’s rights within general human rights commissions or ombudsman offices. Many NHRIs work on children’s rights issues and have crucial on the ground knowledge of challenges to the effectiveness and enjoyment of children’s rights in their national contexts.

  As we have seen, there are significant imbalances of power, knowledge and economics at play for children seeking remedy for corporate violations. NHRIs can be in a strong position to redress these imbalances and to ensure that children’s voices are properly represented. This support can take many different forms. The most clear-cut is for NHRIs themselves to receive complaints directly from children and to mediate and/or adjudicate upon them. However, many, if not most, NHRIs do not have this role but are limited to advisory or consultative functions. Of those NHRIs which do have a complaints mechanism, not all are able to handle complaints addressed at business rather than the government; claims against a private company may only be brought if it is a state-owned enterprise. Other NHRIs are able to accept complaints against private companies for certain issues such as discrimination. A few are able to address any human rights issues with regard to any type of company (e.g. Kenya, Nigeria, Paraguay, Egypt, Namibia, Nepal and Ghana)\(^{45}\). The type and range of grievance processes they can use include investigation, adjudication, conciliation, mediation, hearings and the right to take issues to court.


\(^{44}\) For a full list of accreditations see 

\(^{45}\) See Rees, C Strengths, Weaknesses and Gaps for more discussion of this
Even if they are not directly involved in dealing with cases involving corporations themselves, NHRIs can support children to bring cases to other non-judicial bodies or to national, regional, hybrid, or international judicial mechanisms in the following ways:

- adopting a proactive approach to raising awareness of remedy mechanisms amongst children themselves as well as within communities and amongst companies
- supporting child victims to undertake mediation and conciliation
- promoting access to remedies via judicial and non-judicial mechanisms (such as OECD National Contact Points), company level grievance mechanisms and multi-stakeholder initiatives (such as ICMM Sustainable Development Framework, Ethical Trading Initiative, SA8000, Fair Wear Foundation, Fair Labour Association)
- conducting public inquiries and fact-finding missions
- supporting children’s right to have their voice heard regarding the impact of business on child rights including through the use of digital technology
- co-operating with other NHRIs with regards to child rights violations across borders and jurisdictions
- encouraging confidentiality and privacy for child complainants
- providing appropriate resource assistance such as translation of documents
- being a forum for dialogue between children, affected groups, civil society and business.

Access to NHRIs is a challenge for many children. Their existence and any complaints mechanisms may not be well known and they may be seen as being closely associated with the government and therefore lacking impartiality. Furthermore, in many cases NHRIs’ decisions are not enforceable but amount to non-binding recommendations. Nonetheless, there is a great deal of scope for NHRIs to be more involved in providing children with remedy for corporate violations and States should empower such bodies to consider the promotion and protection of children’s rights in relation not only to government but also private bodies and to expressly investigate child rights abuses by companies.

- **OECD – National Contact Points**
  The OECD Guidelines for Multi National Enterprises are multilaterally endorsed voluntary principles and standards, which aim to promote the positive contributions multinationals can make to economic, environmental and social progress. These Guidelines were reviewed recently and a new set adopted in May 2011. Adhering Governments are required to recommend the guidelines to multinational enterprises operating in or from their territory. Government offices, called National Contact Points (NCPs), are mandated to ensure that their national business community and other interested parties understand the guidelines, encourage adherence, solve related problems and report annually to the OECD Investment Committee. Governments have flexibility in the exact form of their NCP and how it operates and the institutional set up of NCPs differs from country to country. They play a crucial role in promoting observance of the Guidelines, but international practice is uneven.
NCPs also handle enquiries and complaints (known as “specific instances”). On receipt of a case, the NCP is required to make an initial assessment of whether the issue raised merits further examination. After completion of an initial assessment, an NCP must focus on problem solving. This often requires mediation with the parties involved and help from experts, stakeholders, other NCPs and the OECD Investment Committee. All NCPs should function in a visible, accessible, transparent and accountable manner.

There are a number of problems with the NCPs as a source of remedy for child rights violations.

**Limited scope:** The right to be protected against child labour (which is addressed by Article 32 of the CRC) is the only children’s right mentioned explicitly in the revised Guidelines (2011). Other aspects of the guidelines are relevant for children’s rights as well but it is not sufficient for the Guidelines only to address child labour. Reflecting this limitation, the complaints which have been received and which directly concern children are almost all concerned with the issue of child labour with the exception of a claim filed against Makro Habib Pakistan Limited by Pakistan based NGO Shehri – Citizens for a Better Environment (2010) regarding the building of a store on a local playground and environmental pollution close to a school.

46 See For Example, Allegation of Child Labour in Football Production for Adidas Issued Joint Statement by The Netherlands National Contact Point, Adidas and the India Committee of The Netherlands (2002) and Complaint Filed against Bayer Cropscience by German Watch, Global March, And Coordination Gegen Bayer-Gefahren (2007)
47 For more information on this case see the full list of final statements by NCPs found at [http://www.oecd.org/document/59/0,3343,en_2649_34889_2489211_1_1_1_1,00.html](http://www.oecd.org/document/59/0,3343,en_2649_34889_2489211_1_1_1_1,00.html) [accessed 1st August 2011]
Limited geographical coverage: The Guidelines are supported by the 32 OECD participating countries and 10 non-Member countries (Argentina, Brazil, Egypt, Estonia, Israel, Latvia, Lithuania, Morocco, Peru, and Romania) all of whom have NCPs. This leaves a great many States who do not adhere to the Guidelines and who have not established a NCP – notable amongst these are India and China. Generally, issues are dealt with by the NCP in whose country the issue has arisen. If, however, there is no NCP in that country, cases can instead be brought before the NCP in the country where the company is headquartered.

Weak investigation and fact-finding capacity: NCPs usually deal with complaints concerning actions in third countries. There is no expectation of any on-the-ground investigation or fact-finding, nor is this usual. Indeed the governmental nature of the mechanism raises considerable sensitivities about such activities. There also appears to be a general lack of resources for proactive investigations, which can be costly and time-consuming. The investigative process is therefore usually conducted remotely and based solely on written information provided by the interested parties.

Weak mediation capacity: According to the OECD’s guidance to NCPs, if they allow a complaint, they must offer good offices to help the parties resolve the issues, including, where the parties agree, the options of conciliation or mediation. Many NCPs appear to take on this mediation role themselves. This raises questions as to the ability of a government official to provide this function from two perspectives: first, whether they have the training and expertise to perform a complex mediation role; and second, whether they can be, and be seen to be, sufficiently neutral with regard to the issues in dispute particularly given that NCPs are frequently staffed by civil servants from the Ministry of Trade and Investment.

Compliance with recommendations is weak: Various cases show a lack of compliance by companies with NCP recommendations. This emphasises the limits of the current NCP model relying as it does on the good will of companies to comply with commitments made in the course of mediation. The case of Survival International vs Vedanta Resources plc is a good illustration of this. Survival International filed a complaint against British mining company Vedanta Resources on the basis that the company’s aluminium refinery and planned bauxite mine on Niyam Dongar Mountain in Orissa, India would violate the rights of the Dongria Kondh tribe. In 2009, the UK NCP made a Final Statement which concluded that Vedanta failed to engage the Dongria Kondh in adequate and timely consultations about the construction...
of the mine, or to use other mechanisms to assess the implications of its activities on the community such as an indigenous or human rights impact assessment. Vedanta therefore failed to develop and apply effective self-regulatory practices to foster a relationship of confidence and mutual trust between the company and an important constituent of the society in which it was operating. The NCP also made recommendations to Vedanta to bring its business practices in line with the OECD Guidelines and requested that both parties provide an update on the implementation in three months. In a follow up statement, in 2010, Survival International stated that Vedanta had declined to alter its conduct in any way following the recommendations made by the UK NCP in the Final Statement. In March 2010, the UK NCP issued a follow-up statement urging Vedanta to immediately work with the Dongria Kondh people to explore alternatives to resettlement of the affected families. The NCP also recommended the company include a human rights impact assessment in its project management process and take concrete action to implement any self-regulatory practices it adopts.

Ultimately, the UK NCP could not compel Vedanta to comply or cooperate with the procedures and recommendations which begs the question of the extent to which it has given effective remedy to the Dongria Kondh people. One way of strengthening the hand of NCPs would be for governmental bodies to withhold support, such as export credit guarantees, from companies that have received a negative final statement from an NCP. On the other hand, multiple investors such as the Church of England, did divest from Vedanta and the NCP decision may have played a part in this and indicate the kind of repercussions that NCP decisions could have in the future.

4.3 Non-state based mechanisms

- **Company-led**

Business can fulfil its responsibility to respect human rights – that is, to do no harm – by ensuring that communities affected by its operations have access to remedies through a company-level grievance mechanism. People, including children, who believe they have been harmed by a company’s practices should be able to use the mechanism to bring this to the company’s attention and work towards a solution. An effective, human rights-compatible grievance mechanism can provide a channel through which communities impacted by company operations can gain recognition for legitimate concerns, engage in a process to secure acceptable solutions, and share in the ownership of that process. A company-level grievance mechanism can help identify, mitigate, and possibly resolve grievances before they escalate and greater harm is done. There are numerous corporate responsibility standards (including the forthcoming Principles on Business and Children’s Rights) which demand that companies commit to putting in place operational-level grievance mechanisms.

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49 These include the Performance Standards of the International Finance Corporation, which are mirrored in the Equator Principles; the ISO 14000 standard; and initiatives such as Social Accountability international, the Fair Labor Association and Ethical Trading Initiative. The International Council on
In theory it should be quite straightforward for children to access these mechanisms directly particularly since they are often administered in collaboration with stakeholders and their representatives. They can thereby engage the company at a local level in assessing the issues and seeking remediation of any harm. Ideally, companies should work with communities, including children and their families, to design the mechanism. This will help ensure the mechanism is legitimate and culturally appropriate. However, it is rare for companies to be inclusive of children or to take children’s views into account in the design and implementation of such grievance mechanisms.

- **Multi-stakeholder and industry initiative grievance mechanisms**

A number of multi-stakeholder and industry initiatives have been established based on principles that participating companies voluntarily commit to respect. Some of them include human rights and/or labour rights principles (including child labour). Several of these initiatives have complaint mechanisms attached for those affected by companies’ failure to adhere to these principles. These include multi-stakeholder initiatives such as the Fair Labor Association, Social Accountability International, the Ethical Trading Initiative, the International Council of Toy Industries and the Voluntary Principles for Security and Human Rights. However, none of these mechanisms explicitly refer to children in their guidance for accessing complaints mechanisms.

As far as children are concerned, the SA 8000 is promising in the sense that it bases its standards on the principles of core ILO conventions, the CRC and the Universal Declaration of Human Rights. The Social Accountability Accreditation Service (SAAS) is responsible for monitoring the use of the SA8000 standards and for accrediting and monitoring certification bodies carrying out SA8000 audits. Any interested party may file a complaint. A review of existing cases found that they are predominantly focussed on labour issues with just one complaint filed regarding the use of child labour.

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Mining and Metals has also developed guidance for its members on the development of grievance mechanisms.


51 For a full list of complaints made under this procedure see [http://www.saasaccreditation.org/complaints.htm](http://www.saasaccreditation.org/complaints.htm)
• Financial support
A final source of remedy lies in the mechanisms provided by the organisations which financially support TNCs involved in corporate-related abuses. These mechanisms are increasingly used by affected communities and include\(^{52}\): Multilateral Development Banks, often criticised for funding projects which have negative impacts on human rights (World Bank, European Investment Bank and the European Bank for Reconstruction and Development, Inter-American Development Bank, African Development Bank and Asian Development Bank); Export Credit Agencies; and private banks bound by the Equator Principles. There is no evidence that these mechanisms have been designed with a view to enabling access by children and the mechanisms are too distant and ill-suited to properly accommodate child rights concerns.

5. Overcoming obstacles
States are expected to take appropriate steps to prevent corporate-related human rights abuse and to investigate, punish and provide redress when it occurs. Businesses too have an obligation to provide children with effective remedies as part of their responsibility to respect human rights. Yet businesses and States are failing children who in reality have very limited options to obtain remedy for corporate violations of their rights.

Recommendations regarding judicial remedies
Ensuring effective judicial remedy for children who are victims of corporate violations requires effort on various levels with a particular focus on children who are the most excluded and the most difficult to reach: first, building a child-sensitive system and second, providing child-friendly information and support to children in claiming their rights and obtaining redress.

Child-sensitive judicial remedies

- There are many ways in which court processes and proceedings around the world need to be improved so that they are child-friendly. With regards specifically to the issue of bringing cases against business, children with the appropriate capacity should be allowed to initiate proceedings against companies in their own right and their standing before civil courts should be enhanced.

- Children need to have access to legal aid and the support of lawyers in bringing cases in order to even out economic imbalances.

- States which do not have provision for class actions should consider introducing this as a means of increasing accessibility to courts.

- Many countries have taken steps to incorporate the Convention into their national laws and policies so that it can be relied upon in Court. However, many have not and States should ensure that children can enforce their rights under the CRC directly in court.

> “[T]he Committee recommends that the State party should ensure that no obstacles are introduced in the law that prevent the holding of such transnational corporations accountable in the State party’s courts when such violations are committed outside the State party.”

Committee on the Elimination of Racial Discrimination, Concluding Observations UK (2011)

Increasing knowledge of remedies

- Children must be provided with information about their rights and remedies for violation of their rights by the private sectors.

- Child rights education should normally be integrated into the regular school curriculum, but alternative channels should be designed for children who are out of school, for example, through youth clubs, health centres or similar community-based programmes. Child participation and peer education programmes could also be used for this purpose.

Provide support to children in bringing cases

- For remedies to be meaningful, children need to be able to access advice and information at local levels in the communities where they live. This advice will often be provided through decentralized, community-based centres such as socio-legal defence centres, legal clinics or child rights promotion centres, where children and their families can obtain information on avenues of redress.

- There is great potential for NHRI’s to focus on the impact of business on children in their work. They should adopt a proactive approach to raising awareness of remedy mechanisms amongst children themselves as well as within communities and amongst companies and promoting access to remedies via judicial and non-judicial mechanisms.

Non-judicial mechanisms
Professor Ruggie has developed a set of criteria to assess both state and non-state based non-judicial mechanisms in the context of the need to enhance access to justice for victims. Those principles include: accessibility, legitimacy, predictability, equitability, rights compatibility, transparency, continuous learning and, for company-led mechanisms, being based on dialogue. All of these principles are directly relevant for children however the following considerations should also be taken into account to ensure that non-judicial mechanisms are effective for children as well as for adults.

- All non-judicial remedies should be accessible to children both in theory and in practice.
- It is critical that any non-judicial mechanisms are in accord with key child rights instruments – primarily the CRC but also relevant regional instruments such as the African Charter on the Rights and Welfare of the Child as well as ILO Conventions concerning children.
- Non-judicial mechanisms must in substance and procedure be guided by the best interests of the child.
- Non-judicial remedies will be trusted and used by children so long as they are child-sensitive and adapted to children’s evolving maturity and understanding. A crucial part of building this trust and legitimacy is through ensuring that children have a voice and participate in the remedy process. Under Article 12 of the CRC, children’s voices should be heard and their views taken into account. Business has a responsibility to respect his right within company-level grievance mechanisms.
- Another important element of legitimacy is ensuring that the confidentiality and privacy of child complainants is respected.
- Proactive steps need to be taken to make children aware of non-judicial mechanisms available to them; for example, publicising their existence through child rights clubs in schools and translating relevant publicity materials into local languages.
- Steps also need to be taken to make mechanisms more accessible by providing children with multiple points of entry, including face-to-face meetings, written complaints, telephone conversations, or e-mail. Specific assistance may need to be granted to more vulnerable children, such as migrant children, refugees and asylum seeking children, unaccompanied children, children with disabilities, homeless and street children and children in residential institutions to facilitate the bringing of their case including for example, translation of documents into local languages.
- Another important part of building trust in a procedure is by keeping children informed of progress at all stages of the process giving due weight to the child’s maturity and any speech, language or communication difficulties they might have.