
PRIVATE SECURITY COMPANIES AND HUMAN RIGHTS: ARE NON-JUDICIAL REMEDIES EFFECTIVE?¹

Stuart Wallace²

I. INTRODUCTION	70
II. EFFECTIVE REMEDIES	76
A. <i>Investigation and Fact-Finding</i>	78
B. <i>Accessibility</i>	80
C. <i>Speed</i>	81
D. <i>Transparency</i>	82
E. <i>Redress</i>	83
III. INTERNATIONAL-LEVEL MECHANISMS	84
A. <i>The ICoC</i>	87
i. Investigation and Fact-finding	89
ii. Accessibility	92
iii. Speed	93
iv. Transparency	94
v. Redress	96
vi. Preliminary Findings	97
IV. STATE LEVEL MECHANISMS	98
A. <i>State-based Non-Judicial Grievance Mechanisms</i>	98
B. <i>Case Study: National Contact Points</i>	99
i. Investigation and Fact-Finding	102
ii. Accessibility	103
iii. Speed	104
iv. Transparency	105
v. Redress	106
vi. Complaints Against PSCs	107
vii. Preliminary Findings	112
V. CONCLUSION	113

¹ The author would like to thank Corinna Seiberth, Mary Footer, Ugljesa Grusic and Jeff Kenner for their comments on earlier versions of this draft. This article is based on a report written in February 2016 for the FRAME project. The FRAME project - ‘Fostering Human Rights Among European Policies’ – is funded by the European Union under the Seventh Framework Programme for research, technological development and demonstration (Grant Agreement No 320000). The article represents the views of the author and not of the FRAME research consortium as a whole.

² Lecturer and Director of Studies, Homerton College, University of Cambridge.

ABSTRACT

The right to an effective remedy for victims of human rights abuses perpetrated by companies remains weak in international law. A host of substantive and procedural legal issues prevent victims from seeking redress in national and international courts. This problem is particularly acute where victims seek redress for abuses perpetrated by private military and security companies. The nature of these companies' activities and their regular deployment overseas makes it difficult to hold them accountable for human rights abuses. This article examines whether non-judicial mechanisms can provide effective remedies against these private military and security companies for their human rights abuses where judicial remedies have failed. The article establishes the parameters of an effective remedy under international human rights law and proceeds to assess whether two specific examples of non-judicial remedies, the International Code of Conduct Association for Private Security Providers' grievance mechanism and the Organisation for Economic Co-operation and Development's National Contact Point system, offer human rights-compliant remedies.

I. INTRODUCTION

The U.N. Guiding Principles on Business and Human Rights (“U.N. Guiding Principles”) have swiftly established themselves as the leading global instrument on business and human rights.³ The U.N. Guiding Principles are based around three pillars: the state’s responsibility to protect human rights, the corporation’s responsibility to respect human rights, and the shared burden of states and businesses to provide remedies where rights have been infringed.⁴ While the operations of businesses have spread to a global scale, the regulation of their activities has failed to keep pace with this expansion.⁵ The third pillar, the responsibility to

³ John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, ¶ 7, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter U.N. Guiding Principles].

⁴ *Id.* at ¶ 6.

⁵ See Larry Cata Backer, *On the Evolution of the United Nations “Protect-Respect-Remedy Project”*: *The State, the Corporation and Human Rights in a Global Governance Context*, 9 SANTA CLARA J. INT’L L. 37, 41 (2011) (“Economic enterprises are increasingly able to arrange their activities beyond the regulatory scope of any organization”); GWYNNE SKINNER ET AL., *THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS* 1 (2013), <http://icar.ngo/wp-content/uploads/2013/02/The-Third-Pillar-Access-to-Judicial-Remedies-for-Human-Rights-Violation-by-Transnational-Business.pdf>.

provide remedies, in particular, remains weak. We are slowly confronting the reality that the remedial structures available in national, supra-national, and international courts are incapable of providing effective remedies for victims of human rights abuses perpetrated by businesses within and outside the jurisdiction of the states in which the businesses are domiciled.⁶

The state-centric focus of International Human Rights Law (“IHRL”) has created a number of problems for lawyers trying to hold businesses accountable for human rights abuses. As international human rights law treaties, such as the European Convention on Human Rights (“ECHR”), impose obligations on states,⁷ the treaties lack direct horizontal effect and can only influence the conduct of private individuals and legal persons indirectly.⁸ This means that, normally, individuals cannot invoke the rights in these treaties directly against businesses, as businesses are not the subjects of the treaty obligations.⁹ As a result, courts like the Euro-

⁶ SKINNER ET AL., *supra* note 5, at 8.

⁷ At the European Court of Human Rights, for example, the alleged violation of the Convention must have been committed by a Contracting State or be in some way attributable to it. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 35(3)(a), [hereinafter European Convention on Human Rights]. Nonetheless, it is possible for the acts of private persons or companies to be attributed to states and for liability to arise that way. *See, e.g.,* Yasa v. Turkey, App. No. 22495/93, 1998-VI 28 Eur. H.R. Rep. 408, ¶ 53 (1998); Akkoç v. Turkey, App. Nos. 22947/93 and 22948/93, 2000-X 34 Eur. H. R. Rep. 51, ¶¶ 77-78 (2000); Ineta Ziemele, *Human Rights Violations by Private Persons and Entities: The Case-Law of International Human Rights Courts and Monitoring Bodies* 15 (Eur. Univ. Inst. Acad. Eur. Law, Working Paper No. 2009/8, 2009); Wolfgang Kaleck & Miriam Saage-Maass, *Corporate Accountability for Human Rights Violations Amounting to International Crimes*, 8 J. INT’L CRIM. JUST. 699, 710 (2010).

⁸ DAVID HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 21-24 (3d ed. 2014); CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 180 (1993). The same goes for the International Covenant on Civil and Political Rights, as the Human Rights Committee noted in General Comment No. 31: “The article 2, paragraph 1, obligations are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law.” U.N. Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004). These treaties can influence the conduct of private individuals through positive obligations arising from the substantive rights therein. Thus states may be obliged to investigate human rights abuses perpetrated by companies and to protect people within their jurisdiction from harm caused by third parties. *See, e.g.,* Guerra v. Italy, App. No. 14967/89, 26 Eur. H.R. Rep. 357, ¶ 60 (1998); Vilnes v. Norway, App. Nos. 52806/09 and 22703/10, Eur. Ct. H.R. (judgment of December 5, 2013 ¶ 161); Lopez Ostra v. Spain, App. No. 16798/90, 1994 Eur. H.R. Rep. 46, ¶ 51 (1994).

⁹ It is interesting to note that human rights were not always conceived of as state-centric obligations. Note, for example, the reference to every organ of society striving to realize the protections in the U.N. Declaration of Human Rights:

pean Court of Human Rights (“ECtHR”) and the courts of the states that have ratified the ECHR grant judicial remedies that are ill-suited to providing redress to victims of businesses that have committed human rights abuses.¹⁰

John Ruggie observed that victims of businesses seeking redress in their home country’s judicial system face extensive obstacles.¹¹ At the national level, tort law has provided some remedies against businesses for human rights abuses.¹² The Alien Tort Statute (“ATS”),¹³ for example, has previously been described as “the main engine for transnational human rights litigation in the U.S.”¹⁴ However, in the case of *Kiobel v. Royal Dutch Petroleum Co.*, the U.S. Supreme Court ruled that the presumption against extraterritoriality, which normally applies to U.S. domestic legislation, applies to the ATS.¹⁵ Although the full consequences of the *Kiobel* judgment for transnational human rights litigation

[T]his Universal Declaration of Human Rights [is] a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

¹⁰ Steering Comm. for Human Rights (CDDH), *Draft Preliminary Study on Corporate Social Responsibility in the Field of Human Rights: Existing Standards and Outstanding Issues*, Doc. No. CDDH(2012)012 (2012), at 10.

¹¹ John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶¶ 89-90, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008).

¹² Many human rights violations may be pursued as intentional torts, although tort does not provide a cause of action for all human rights violations. See Roger P. Alford, *The Future of Human Rights Litigation after Kiobel* 89 NOTRE DAME L. REV. 1749, 1750 (2014); Youseph Farah, *Toward a Multi-Directional Approach to Corporate Accountability*, in CORPORATE ACCOUNTABILITY IN THE CONTEXT OF TRANSNATIONAL JUSTICE, 27, 42-43 (Sabine Michalowski ed., 2014).

¹³ 28 U.S.C. § 1350 (2006).

¹⁴ Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 601 (2013). For a review of the history of the ATS, see generally Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. CHI. L. REV. 445 (2011).

¹⁵ “It is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the U.S. .’” *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 144-45 (2d Cir. 2010) (holding that the presumption against extraterritoriality applies to the ATS), *aff’d* 569 U.S. ____ (2013).

against companies are still unclear,¹⁶ lower federal courts have generally interpreted *Kiobel* as forbidding all suits based solely on tortious conduct that occurred overseas,¹⁷ thus reducing the ATS's utility in holding transnational corporations accountable for human rights abuses.

Even where a cause of action is available in tort law within the national legal system, a host of other issues can make seeking remedies in the national legal system less attractive. Two pervasive problems for non-national litigants are the principle of separate legal personality and the *forum non conveniens* doctrine. The principle of separate legal personality makes it difficult to hold parent companies responsible for the actions of their subsidiaries because each is a separate legal entity.¹⁸ A parent company is unlikely to be held responsible for the acts of its subsidiary unless certain exceptions apply.¹⁹ Further barriers exist in the U.S., where general allegations of a parent's participation in tortious actions will not be sufficient to ground a claim against a parent company for the actions of its subsidiary, leading to the dismissal of cases for lack of a cause of action.²⁰ The *forum non conveniens* doctrine can also prevent a case from moving forward in some common law jurisdictions when another jurisdiction is considered by the court to be more suitable or appropriate.²¹ This may be the case where a tort takes place outside the jurisdiction in which the company is domiciled, which is often the case where a Private Military and Security Company ("PSC") has staff deployed abroad. This doc-

See generally William S. Dodge, *Understanding the Presumption against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85 (1998).

¹⁶ Some are optimistic that the judgment leaves the door open for further litigation. *See* Doug Cassel, *Suing Americans for Human Rights Torts Overseas: The Supreme Court Leaves the Door Open*, 89 NOTRE DAME L. REV. 1773, 1773 (2014). Others consider that the effective result of *Kiobel* is to severely limit ATS litigation in the United States. *See* Alford, *supra* note 12, at 1749.

¹⁷ *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014); *Balintulo v. Daimler AG*, 727 F.3d 174, 188 (2d Cir. 2013).

¹⁸ "The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers and the same hands receive the profits, the company is not in law the agent for the subscribers or trustees for them. Nor are the subscribers as members in any shape or form, except to the extent and in the manner provided by the Act." *Salomon v. Salomon & Co. Ltd* [1897] AC 22 (HL) 51.

¹⁹ OXFORD PRO BONO PUBLICO, OBSTACLES TO JUSTICE AND REDRESS FOR VICTIMS OF CORPORATE HUMAN RIGHTS ABUSE 323 (2008), <http://www2.law.ox.ac.uk/opbp/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf>.

²⁰ *See* FED. R. CIV. P. 12(b)(6).

²¹ In *Spiliada v. Cansulex*, the House of Lords stated "the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdiction." [1987] AC 460 (HL) 474.

trine applies in the U.S.,²² Canada,²³ and Australia.²⁴ The U.N. Guiding Principles also specifically note that the costs of litigation could pose a practical barrier where the cost of bringing claims exceeds its purpose as an appropriate deterrent to unmeritorious cases and/or where the costs of litigation cannot be reduced to reasonable levels through Government support, “market-based” mechanisms (such as litigation insurance and legal fee structures), or other means.²⁵

As judicial remedies have faltered, there is scope for non-judicial remedial mechanisms to assume the mantle and provide effective remedies. The U.N. Guiding Principles recognize the value that non-judicial remedies can have in providing an important complement and supplement to judicial remedies.²⁶ This is especially true where issues arise between businesses and individuals that have not yet reached the threshold of a legal dispute, but still warrant appropriate resolution before they become more serious.²⁷ This article seeks to determine whether non-judicial remedies can provide effective remedial mechanisms for victims of human rights abuses perpetrated by PSCs.

There are a number of challenging problems with seeking to remedy PSCs’ human rights abuses. PSCs perform activities and act in environments that are substantially different from those of most other businesses, thus creating a unique scope for human rights violations.²⁸ During the Iraq War (2003-2009), for example, PSC contractors became embroiled in

²² *Sequihua v. Texaco*, 847 F.Supp. 61, 63-65 (S.D.Tex. 1994); see David W. Robertson, *Federal Doctrine of Forum Non Conveniens: An Object Lesson in Uncontrolled Discretion*, 29 TEX. INT’L L. J. 353, 372-73 (1994).

²³ *Spar Aerospace Ltd. v. Am. Mobile Satellite*, [2002] 4 SCR 205, 208-09 (Can.).

²⁴ *Voth v. Manildra Flour Mills Pty. Ltd.* (1990) 171 CLR 538, 590 (Austl.). European Union legislation has severely limited the application of the *forum non conveniens* doctrine in the United Kingdom. See Peter Muchlinski, *Corporations in International Litigation: Problems of Jurisdiction and the United Kingdom Asbestos Case*, 50 INT’L & COMP. L.Q. 1, 12-13 (2001).

²⁵ U.N. Guiding Principles, *supra* note 3, at Annex §§ II.B.23-II.B.24; Skinner et al., *supra* note 5, at 54.

²⁶ *Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders* 7 (Corp. Social Responsibility Initiative, John F. Kennedy School of Gov’t, Harvard Univ., Working Paper No. 41, 2008).

²⁷ Jonathan Drimmer & Lisa Laplante, *The Third Pillar: Remedies, Reparations, and the Ruggie Principles*, in THE BUSINESS AND HUMAN RIGHTS LANDSCAPE: MOVING FORWARD, LOOKING BACK 316, 318 (Jena Martin & Karen Bravo eds., 2015).

²⁸ WOLFGANG BENEDEK ET AL., REPORT ON ENHANCING THE CONTRIBUTION OF EU INSTITUTIONS AND MEMBER STATES, NGOs, IFIs AND HUMAN RIGHTS DEFENDERS, TO MORE EFFECTIVE ENGAGEMENT WITH, AND MONITORING OF, THE ACTIVITIES OF NON-STATE ACTORS, 64 (2015), <http://www.fp7-frame.eu/wp-content/materiale/reports/14-Deliverable-7.2.pdf>; PMSCs are more likely to commit human rights violations than violations of IHL as they are more likely to be deployed in post-conflict situations. Nigel D. White, *The Privatisation of Military and Security*

a number of human rights abuses directly related to their work.²⁹ In one instance, PSC contractors hired to interrogate detainees at Abu Ghraib allegedly ordered and participated in the torture, inhuman, and degrading treatment of detainees.³⁰ In another instance, PSC contractors responsible for escorting diplomats through Baghdad shot a number of unarmed Iraqi civilians.³¹ Four of the contractors were subsequently convicted of charges ranging from first-degree murder to manslaughter.³² PSCs often work outside the countries in which they are domiciled, deploying armed personnel to conflict zones throughout the world.³³ For example, the PSC Aegis is registered in the U.K., but has contractors deployed in Iraq, Afghanistan, Yemen, and East Africa.³⁴ The nature of Aegis' work often requires it to operate in fragile states or states emerging from armed conflict, where the rule of law may be weak or non-existent.³⁵ This can result in an absence of serious scrutiny within the states in which they operate. In fact, contractors can be made immune from the legal process of the state where they are deployed in a similar way to foreign military forces under specifically negotiated Status of Forces Agreements ("SOFAs").³⁶

Functions and Human Rights: Comments on the UN Working Group's Draft Convention, 11 HUM. RTS. L. REV. 133, 135 (2011).

²⁹ Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees*, 5 CHI. J. INT'L L. 511, 512-18 (2005).

³⁰ The PSC CACI was contracted by the U.S. to interrogate detainees at Abu Ghraib and four civilians alleged that CACI's civilian interrogators ordered U.S. military police to subject them to a wide variety of torture techniques. *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 517 (4th Cir. 2014) (allowing the case to proceed against the PSC employees).

³¹ Jonathan Finer, Recent Development, *Holstering the Hired Guns: New Accountability Measures for Private Security Contractors*, 33 YALE J. INT'L L. 253, 259 (2008).

³² Nicky Woolf, *Former Blackwater guards sentenced for massacre of unarmed Iraqi civilians*, THE GUARDIAN, (Apr. 13, 2015), <https://www.theguardian.com/us-news/2015/apr/13/former-blackwater-guards-sentencing-baghdad-massacre>.

³³ BENEDEK ET AL., *supra* note 28.

³⁴ Aegis World, *Case Studies*, (Nov. 25, 2015), <http://www.aegisworld.com/who-we-are/case-studies/>.

³⁵ PETER SINGER, GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES (DCAF), *THE PRIVATE MILITARY INDUSTRY AND IRAQ: WHAT HAVE WE LEARNED AND WHERE TO NEXT?*, 12-13 (2004), <http://www.dcaf.ch/Publications/The-Private-Military-Industry-and-Iraq>; Elke Krahnmann & Aida Abzhaparova, *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options 2* (Eur. Univ. Inst. Acad. Eur. Law, Working Paper No. 2010/8, 2010), http://cadmus.eui.eu/bitstream/handle/1814/18295/AEL_2010_8.pdf?sequence=1.

³⁶ Krahnmann & Abzhaparova, *supra* note 35, at 1. Although the U.S. has permitted a SOFA that allows PSC contractors to be tried in Iraqi courts, *cf.* Robert Nichols, *New U.S.-Iraq SOFA Lifts Contractor Immunity*, 5 INT. GOV. CONTRACTOR ¶ 103 (2008).

The legislation of many states also lacks extraterritorial reach, thereby making it difficult to hold PSCs accountable for human rights abuses perpetrated outside the states in which they are domiciled.³⁷ The combination of these two factors—the limited capacity of the state where the PSC is operating to scrutinize their activities, and the absence of extraterritorial reach of legislation from the states in which the PSCs are domiciled—generates a bubble of impunity for PSCs. This article examines whether non-judicial remedies can successfully pierce that bubble of impunity and provide effective remedies, as understood under IHRL. Part II identifies the characteristics of effective remedies under human rights law. Part III examines whether a non-judicial mechanism at the international level, the International Code of Conduct Association for Private Security Providers (“ICoCA”), provides an effective remedy to victims. Part IV examines a non-judicial mechanism at the national level, the Organisation for Economic Co-operation and Development’s (“OECD”) National Contact Point system, to evaluate whether it provides an effective remedy to victims. Part V concludes that non-judicial remedies have not yet lived up to their potential to offer accessible, quick and cost-effective remedies.

II. EFFECTIVE REMEDIES

It is imperative to establish what we understand to be an effective remedy and what determines effectiveness. The commentary to the U.N. Guiding Principles states that:

[A]ccess to effective remedy has both procedural and substantive aspects. The remedies provided by the grievance mechanisms . . . may take a range of substantive forms the aim of which, generally speaking, will be to counteract or make good any human rights harms that have occurred. Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome.³⁸

The following sections set out the characteristics of an effective remedial mechanism by analyzing IHRL standards and the standards set out in the U.N. Guiding Principles. I will then assess whether the selected non-judicial mechanisms conform to these standards. The primary source of inspiration in defining effectiveness will be IHRL. IHRL is a logical starting point because the U.N. Guiding Principles state that the designers of

³⁷ Nicola Jägers, *Regulating the Private Security Industry: Connecting the Public and the Private through Transnational Private Regulation*, 6 HUMAN RIGHTS & INTERNATIONAL LEGAL DISCOURSE 56, 68 (2012).

³⁸ U.N. Guiding Principles, *supra* note 3, at Annex § III.B.27.

non-judicial remedies should “[ensure] that outcomes and remedies accord with internationally recognized human rights.”³⁹ However, as human rights law is generally designed to apply to states and judicial systems, it will have to be adapted to the specific contexts of non-judicial remedies and businesses.

The right to an effective remedy is widely recognized under IHRL.⁴⁰ Article 13 of the ECHR stipulates that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”⁴¹ The simplicity of this statement belies a complex, multi-dimensional right comprising a range of related express and implied rights. Thus, for example, the right to an effective remedy is closely associated with the right of access to a court,⁴² the right to test the legality of one’s detention,⁴³ the right to just satisfaction,⁴⁴ and the right to effective judicial protection.⁴⁵ The primary guarantor of these rights is the state.⁴⁶ The U.N. Guiding Principles make it clear that states must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory or jurisdiction, those affected have access to an effective remedy.⁴⁷

Generally speaking, the form that the remedy takes is not important⁴⁸ as long as it allows the competent authorities to deal with the substance of a complaint and grant appropriate relief.⁴⁹ The U.N. Guiding Principles, for example, state that the remedy must include “investigation, punishment and redress.”⁵⁰ Additionally, the remedy must be effective in

³⁹ *Id.* at 26.

⁴⁰ See also Universal Declaration of Human Rights *supra* note 9, at art. 8; International Covenant on Civil and Political Rights art. 2, ¶ 3, Dec. 16, 1966, S. EXEC. REP. NO. 102-23, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85.

⁴¹ See ICCPR, *supra* note 40, at art. 2.

⁴² European Convention on Human Rights, *supra* note 7, at art. 6(1).

⁴³ *Id.* at art. 5(4).

⁴⁴ *Id.* at art. 41.

⁴⁵ Charter of Fundamental Rights of the European Union art. 47, 2010 OJ (C 83/02); American Convention on Human Rights art. 25, Nov. 22, 1969, 1144 U.N.T.S. 123.

⁴⁶ European Convention on Human Rights, *supra* note 7.

⁴⁷ U.N. Guiding Principles, *supra* note 3, at Annex § II.B.22.

⁴⁸ *Id.*; Scordino v. Italy (No. 1), App. No. 36813/97, 2006-V Eur. Ct. H.R., ¶ 200 (2006).

⁴⁹ MSS v. Belgium and Greece, App. No. 30696/09, 2011 Eur. Ct. H.R., ¶ 288 (2011).

⁵⁰ U.N. Guiding Principles, *supra* note 3, at Annex § I.A.1.

theory and in practice⁵¹ and must offer a genuine prospect of success.⁵² If it is too speculative, it may not be considered effective.⁵³ In cases where an individual remedy is insufficient, the cumulative effect of a number of remedies may satisfy the effectiveness criterion.⁵⁴ The following sections lay out the key components of effective remedies.

A. *Investigation and Fact-Finding*

The U.N. Guiding Principles specify that investigation is a general requirement of remedies regardless of the nature of the violation.⁵⁵ The main IHRL standards on investigation developed as procedural obligations to substantive rights, such as the right to life.⁵⁶ Once a potential human rights abuse is brought to the attention of the relevant authority, the authority should actively investigate the issue.⁵⁷ This investigation must be capable of establishing the facts and identifying and punishing those responsible for the violation of human rights.⁵⁸ Investigation is also linked to the “right to the truth,” a right for the victims of human rights violations and the public at large to know about the abuses committed by the state or third parties.⁵⁹

Independence is central to effective investigations. The U.N. Guiding Principles speak of “legitimacy” as a necessary criterion for effective non-judicial remedies, meaning “having a clear, transparent and sufficiently independent governance structure to ensure that no party to a particular grievance process can interfere with the fair conduct of that process.”⁶⁰

⁵¹ *Ilhan v. Turkey*, App. No. 22277/93, 2000-VII Eur. Ct. H.R. 354, ¶ 97 (2002); *Karamitrov v. Bulgaria*, App. No. 53321/99, 2008 Eur. Ct. H.R. ¶ 78 (2008).

⁵² *Costello-Roberts v. United Kingdom*, App. No. 13134/87, A247-C Eur. Ct. H.R., ¶ 26 (1993).

⁵³ *McFarlane v. Ireland*, App. No. 31333/06, 2010 Eur. Ct. H.R. ¶ 117 (2011).

⁵⁴ *De Souza Ribeiro v. France*, App. No. 22689/07, 2012 Eur. Ct. H.R., ¶ 79 (2012).

⁵⁵ U.N. Guiding Principles, *supra* note 3, at Annex § III.A.25.

⁵⁶ *McCann v. United Kingdom*, App. No. 18984/91, 21 Eur. H. R. Rep. 97 (1996).

⁵⁷ *Ergi v. Turkey*, App. No. 23818/94, 1998-IV 32 Eur. H. R. Rep. 18, ¶ 82 (2001). The U.N. Guiding Principles stipulate that where a business enterprise identifies that they have caused or contributed to adverse impacts on human rights, they should provide for or cooperate in their remediation through legitimate processes. U.N. Guiding Principles, *supra* note 3, at Annex §§ II.B.20-II.B.21. G.A. Res. 55/89, Annex (Dec. 4, 2000).

⁵⁸ *Keenan v. United Kingdom*, App. No. 27229/95, 2001-III Eur. Ct. H.R., ¶ 123; *Ogur v. Turkey*, App. No. 21594/93, 1999-III Eur. Ct. H.R. 912, ¶ 88; G.A. Res. 55/89, *supra* note 57, at Annex ¶ 1(a).

⁵⁹ *El-Masri v. Macedonia*, App. No. 39630/09, 2012 Eur. Ct. H.R., ¶ 191 (2012). See also Federico Fabbrini, *The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism*, 14 HUM. RTS. L. REV. 85, 85 (2013).

⁶⁰ U.N. Guiding Principles, *supra* note 3, at Annex § I.A.1.

There should be hierarchical, operational, and practical independence in investigations. Hierarchical independence requires that the chain of command controlling the investigators be independent from that of the accused parties.⁶¹ In *Jordan v. United Kingdom*, for example, a violation of the procedural obligations of the right to life was found, in part, because there was a hierarchical link between the police officers running the investigation and the officers subject to investigation.⁶² All officers were ultimately responsible to the same leader and there was insufficient independence to achieve an effective investigation. In *Al-Skeini v. United Kingdom*, the ECtHR stated that operational independence required the military police investigating the incidents to be institutionally separate from the soldiers they were investigating.⁶³ Finally, practical independence demands that investigators have access to their own resources and be self-reliant.⁶⁴ While these conditions arose in the context of violations of the right to life, similar standards of independence should apply to non-judicial actors investigating PSCs who violate human rights.

By contrast, the U.N. Guiding Principles do not specify independence as an explicit criterion for non-judicial grievance mechanisms. Instead, the U.N. Guiding Principles demand that non-judicial remedies enable trust from the stakeholder groups for whose use they are intended.⁶⁵ If grievance mechanisms are not sufficiently independent and impartial, they are unlikely to engender trust among their users. When evaluating independence and impartiality, we should consider how members of the non-judicial body are appointed, their terms of office, and whether they are safeguarded from outside pressures.⁶⁶ The remedial mechanism should also be impartial from an objective and subjective perspective. Subjectively, no member of the tribunal should hold any personal prejudice or bias toward the applicant, while objectively the remedial mechanism should offer sufficient guarantees to exclude any legitimate doubt in this respect.⁶⁷ There should not be any ascertainable fact that may raise doubts as to the impartiality of the investigators or decision-makers, and even appearances that raise doubts may be of certain impor-

⁶¹ Case C-506/04, *Graham J. Wilson v. Ordre des Avocats du Barreau de Luxembourg*, 2006 E.C.R. I-08613, ¶ 52; G.A. Res. 55/89, *supra* note 57, at Annex ¶ 2.

⁶² *Jordan v. United Kingdom*, App. No. 24746/94, 2001 Eur. Ct. H.R., ¶ 120 (2001).

⁶³ *Al-Skeini and Others v. United Kingdom*, App. No. 55721/07, 2011 Eur. Ct. H.R. 1093, ¶ 167 (2011).

⁶⁴ Alastair Mowbray, Shorter Articles, Comments and Notes, *Duties of Investigation under the European Convention on Human Rights*, 51 INT'L & COMP. L.Q. 437, 440 (2002); G.A. Res. 55/89, *supra* note 57, at Annex ¶ 3(a).

⁶⁵ U.N. Guiding Principles, *supra* note 3, at Annex 26.

⁶⁶ *Moiseyev v. Russia*, App. No. 62936/00, 2008 Eur. Ct. H.R., ¶ 173 (2008); G.A. Res. 55/89, *supra* note 57, at Annex ¶ 5(a).

⁶⁷ *Micallef v. Malta*, App. No. 17056/06, 2009 Eur. Ct. H.R., ¶ 93 (2009).

tance.⁶⁸ These criteria are closely associated with judicial remedies, but in order for non-judicial remedies to engender trust and be ‘rights compatible’ in a more general sense, non-judicial investigations and remedial mechanisms should accord with these standards.

B. Accessibility

The U.N. Guiding Principles specify that an important factor in determining the effectiveness of a remedy is accessibility.⁶⁹ Accessibility requires that a remedy is known to all stakeholder groups, for whose use the remedy is intended, and that the remedy provides adequate assistance for those who may face particular barriers to access.⁷⁰ These barriers could include lack of awareness of the remedy, language, and cost. In the context of IHRL, many of the rulings on accessibility are made in the context of fair trial rights and the right of access to a court. However, there are a number of parallels that can be drawn to non-judicial grievance mechanisms.

As a general principle, concerning the idea that stakeholders should be aware of the remedy, human rights law requires the remedy to be available in theory and practice.⁷¹ If a remedy is too speculative or not well known, it will impinge on its effectiveness.⁷² Every party to a complaint should have a reasonable opportunity to present their case under conditions that do not place them at a substantial disadvantage *vis-à-vis* their opponent.⁷³ Thus, when the cost of seeking a remedy may create a substantial barrier to access, human rights law may require the provision of legal aid to applicants for a particular remedy.⁷⁴ This is especially pertinent where there is a significant disparity in the levels of legal assistance available to each party, as may often be the case in a complaint between a PSC and private individuals. An interesting example is *Steel and Morris v. United Kingdom*, where McDonalds successfully sued environmental campaigners for defamation and was awarded thousands of British pounds in damages.⁷⁵ The campaigners, who had been denied legal aid for their case by the U.K. government, successfully sued the U.K. for failing to provide them with legal assistance.⁷⁶ The ECtHR held that the

⁶⁸ *Id.* at ¶ 96; *Bryan v. United Kingdom*, App. No. 19178/91, A335-A Eur. Ct. H.R., ¶ 38 (1995).

⁶⁹ U.N. Guiding Principles, *supra* note 3, at 26.

⁷⁰ *Id.*

⁷¹ *Kudla v. Poland*, App. No. 30210/96, 2000-XI Eur. Ct. H.R. 512, ¶ 157 (2000).

⁷² *McFarlane supra* note 53, at ¶ 117.

⁷³ *De Haes v. Belgium*, App. No. 19983/92, 1997-I Eur. Ct. H.R. 1, ¶ 53 (1997).

⁷⁴ *Airey v. Ireland*, App. No. 6289/73, Eur. Ct. H.R. 3, ¶ 24-25 (1979).

⁷⁵ *See generally Steel and Morris v. United Kingdom*, App. No. 68416/01, 2005-II Eur. Ct. H.R. (2005).

⁷⁶ *Id.* at ¶ 32-33.

disparity between the levels of legal assistance available to each party could not have failed to give rise to unfairness.⁷⁷

Language may also generate a barrier to access for applicants. In the context of criminal trials, IHRL demands that the state provide translations of relevant court documents, such as indictments,⁷⁸ and translations of court proceedings.⁷⁹ Ultimately, victims should have access to the advice and expertise necessary to engage in a grievance process on fair and equitable terms.⁸⁰

C. Speed

IHRL requires that remedies be delivered within a reasonable time.⁸¹ Under the ECHR, for example, there is a positive obligation on contracting states to organize their legal systems in such a way as to ensure that legal proceedings are conducted in an efficient and speedy manner,⁸² while Article 6(1) guarantees the right to have a case heard in a reasonable time.⁸³ The Council of Europe's Venice Commission for Democracy through Law notes that the speed of a remedial action itself is a factor in assessing its effectiveness.⁸⁴ Remedies that can take a long time to conclude will not be considered effective.⁸⁵ Even when a remedy is generally considered effective, this effectiveness could be undermined by its excessive duration.⁸⁶

Generally speaking, there is no fixed amount of time a grievance should take to resolve. The U.N. Guiding Principles mention that non-judicial remedies should provide an indicative time frame for each stage and that the outcomes and remedies need to "accord with internationally

⁷⁷ *Id.* at ¶ 69.

⁷⁸ *Kamasinski v. Austria*, App. No. 9783/82, A168 Eur. Ct. H.R. 93, ¶ 79 (1989).

⁷⁹ *Cuscani v. United Kingdom*, App. No. 32771/96, Eur. Ct. H.R. ¶ 38 (2002).

⁸⁰ U.N. Guiding Principles, *supra* note 3, at 26.

⁸¹ EUR. COMM. FOR DEMOCRACY THROUGH LAW, CAN EXCESSIVE LENGTH OF PROCEEDINGS BE REMEDIED?, 16-17 (2007) [hereinafter EUROPEAN COMMISSION FOR DEMOCRACY].

⁸² *Süssman v. Germany*, App. No. 20024/92, 1996-IV Eur. Ct. H.R., ¶ 55.

⁸³ European Convention on Human Rights, *supra* note 7, at art. 6(1).

⁸⁴ European Commission for Democracy, *supra* note 81.

⁸⁵ *Id.* at ¶ 161; *See also Vaney v. France*, App. No. 53946/00, Eur. Ct. H.R., ¶ 53 (2004); *Pine Valley Developments Ltd. v. Ireland*, App. No. 12742/87, A246-B Eur. Ct. H.R. 379, (2004).

⁸⁶ *McFarlane*, *supra* note 53, at ¶ 123. Of course duration and delay are also significant issues for judicial remedies for human rights. At the international level, the ECtHR has approximately 65 thousand applications pending. *See* ECtHR, ANALYSIS OF STATISTICS 2015 4 (2016). At the national level, the judicial systems of a number of states have significant issues with delay. Italy is perhaps the most notorious example where a specific human rights remedy aimed at compensating people for delay itself was found to be taking too long in providing compensation. *See, e.g., Daddi v. Italy*, App. No. 15476/09, Eur. Ct. H.R., 6-8 (2009).

recognized human rights,” which would include the speed requirement.⁸⁷ However, we must recognize that the speed of the remedy is a relative concept and the conduct of the parties is a significant factor. When the ECtHR, for example, is considering whether a particular case has taken too long, it looks at “the circumstances of the case and having regard to the criteria laid down in the Court’s case law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities, and the importance of what is at stake for the applicant in the litigation.”⁸⁸ Thus, while speed is a factor in determining effectiveness, it is a relative factor that should be subject to careful individual assessment.

D. *Transparency*

The criterion of transparency encompasses a number of different obligations, which touch on other criteria. First, remedial mechanisms must have transparent processes and outcomes.⁸⁹ They should be predictable and clear, a condition linked to accessibility in that the remedy must be clear and certain in theory and practice for it to be considered effective.⁹⁰ In general, states have an obligation to inform the general public and victims of human rights abuses of the remedies available to them.⁹¹

Second, transparency entails an element of information disclosure. The U.N. Guiding Principles stipulate that grievance mechanisms should provide sufficient information about the mechanism’s performance to build confidence in its effectiveness and meet any public interest at stake.⁹² We noted above that there is a broader “right to the truth” about serious violations of IHRL, which is linked to the right to an effective remedy.⁹³ The “right to truth” has an element of transparency, enabling a victim of a human rights violation to learn the truth about what happened by seeking and obtaining information on the causes and conditions pertaining to the violation.⁹⁴ These two elements of information disclosure and public interest are closely related. National legal systems also have detailed rules on the disclosure of evidence between parties to a case, as having access to this information is extremely important for litigants to defend or prosecute their respective cases.⁹⁵

⁸⁷ U.N. Guiding Principles, *supra* note 3, at 26-27.

⁸⁸ *Comingersoll v. Portugal*, App. No. 35382/97, 2000-IV Eur. Ct. H.R., ¶ 19

⁸⁹ U.N. Guiding Principles, *supra* note 3, at 26.

⁹⁰ *Mifsud v. France*, App. No. 57220/00, 2002-VIII Eur. Ct. H.R., ¶ 19 (2002); *Da Silva v. Luxembourg*, App. No. 30273/07, 2016 Eur. Ct. H.R., ¶ 40 (2010).

⁹¹ G.A. Res. 60/147, ¶ 24 (Dec. 16, 2005).

⁹² U.N. Guiding Principles, *supra* note 3, at 26-27.

⁹³ See generally Rep. of the Office of the U.N. High Commissioner for Human Rights, *Promotion and Protection of Human Rights: Study on the right to the truth*, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006).

⁹⁴ *Id.* at 9.

⁹⁵ See Fed. R. Civ. P. 26; CPR 31.6. (Eng. and Wales).

Third, there should be a degree of public scrutiny of the remedy and how it functions, although this will vary from case to case.⁹⁶ Under IHRL, there must be a sufficient element of public scrutiny of investigations and their results to secure accountability and public confidence in the authorities.⁹⁷ While there is a presumption that state authorities are accountable to the public, a lower level of public accountability arguably applies to private companies where they carry out remedial functions or investigations related to human rights violations. The victims or their next of kin must be involved in the remedial action to the extent necessary to safeguard their legitimate interests.⁹⁸ While there is no requirement that the victim have access to an investigation while it is ongoing, access to the investigation or documents should occur at other stages, such as after completion, and complainants should be kept informed about the progress of the complaint.⁹⁹ Finally, the U.N. Guiding Principles specify that openness and transparency should be the default position, and transparency should be presumed wherever possible.¹⁰⁰

E. Redress

It is important that grievance mechanisms advise complainants, at the outset, about the redress the mechanism may provide complainants for human rights violations, a concept closely related to the issue of transparency.¹⁰¹ Yet, there is a great deal of flexibility in terms of the potential redress a grievance mechanism can offer. Restitution is the preferred remedy,¹⁰² but the state has discretion when this is not possible, provided that the remedy ultimately chosen is compatible with the court's conclusions.¹⁰³ Other options for redress can include apologies, restitution, compensation, and guarantees of non-repetition.¹⁰⁴ It may be necessary for the grievance procedure to offer some kind of interim relief or suspension of adverse activities while a complaint is investigated.¹⁰⁵

Dialogue between the parties aimed at settling the dispute prior to adjudication is encouraged, an example of which at the IHRL-level

⁹⁶ *Ramsahai v. Netherlands*, App. No. 52391/99, 2007-II Eur. Ct. H.R., 55 (2007); U.N. Guiding Principles, *supra* note 3, at 26.

⁹⁷ *Ramsahai*, *supra* note 96; *Anguelova v. Bulgaria*, App. No. 38361/97, 2002-IV Eur. Ct. H.R., at 28.

⁹⁸ *Anguelova* *supra* note 97, at 28.

⁹⁹ *McKerr v. United Kingdom*, App. No. 28883/95, 2001-III Eur. Ct. H.R., at 40-41.

¹⁰⁰ U.N. Guiding Principles, *supra* note 3, at 26.

¹⁰¹ PHILIP LEACH, *TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS* 83 (Oxford U. Press, 3d ed. 2011).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Selçuk and Asker v. Turkey*, App. Nos. 23184/94 and 23185/94, 1998-II Eur. Ct. H.R., at 28; U.N. Guiding Principles, *supra* note 3, at 22; *Kudla*, *supra* note 71, at 34-35.

¹⁰⁵ ECtHR, *Rules of Court*, R. 39 (June 1, 2010) [hereinafter *Rules of Court*].

occurs through friendly settlements at the ECtHR.¹⁰⁶ Another example of dialogue aimed at settling disputes prior to adjudication occurs at the national level, where grievance mechanisms like the National Contact Points for the OECD offer good offices to complainants in an attempt to resolve the dispute.¹⁰⁷

When compensation is offered, it must be adequate, and where a low level of compensation is offered, it may be considered so derisory that it impacts the effectiveness of the remedy at issue.¹⁰⁸ Equally, compensation should be paid in a timely manner, as delays can impact effectiveness.¹⁰⁹ Redress may also involve the adoption of general or specific measures to put an end to a violation or prevent its re-occurrence.¹¹⁰ These remedial measures may need to address structural deficiencies or systemic problems, which have given rise to particular human rights abuses, in order to be effective.¹¹¹ Finally, the U.N. Guiding Principles stipulate that there should be a means of monitoring the implementation of any outcome of a remedial mechanism.¹¹²

Thus, overall effective remedial mechanisms require a swift and thorough investigation of the facts of the complaint by independent parties. The remedy must be accessible in theory and in practice by the complainant and the mechanism must address the complaint in a timely manner. The procedures of the remedy should be clear and all the necessary information, including outcomes, should be disclosed. Finally, the mechanism must offer redress for the complainant where a company is deemed to be at fault.

III. INTERNATIONAL-LEVEL MECHANISMS

PSCs have grown into transnational corporations that operate in one country, recruit employees outside that jurisdiction, and deploy personnel throughout the world.¹¹³ As a result, regulation by individual states is unlikely to be sufficient to properly control their activities.¹¹⁴ In fact,

¹⁰⁶ European Convention on Human Rights, *supra* note 7, at art 39.

¹⁰⁷ UK NATIONAL CONTACT POINT PROCEDURES FOR DEALING WITH COMPLAINTS BROUGHT UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 14 (2014) https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/270577/bis-14-518-procedural-guidance.pdf.

¹⁰⁸ *Keenan*, *supra* note 58, at 39.

¹⁰⁹ *Öneryildiz v. Turkey*, App. No. 48939/99, 2004-XII Eur. Ct. H.R., at 50 (2004).

¹¹⁰ *Scozzari and Giunta v. Italy*, App. Nos. 39221/98 and 41963/98, 2000-VIII Eur. Ct. H.R., at 50 (2000).

¹¹¹ *Rules of Court*, *supra* note 105, at R. 61; *Olaru v. Moldova*, App. Nos. 476/07, 22539/05, 17911/08 and 13136/07, Eur. Ct. H.R. (2009); *Broniowski v. Poland*, App. No. 31443/96, 2004-V Eur. Ct. H.R. 1 (2004).

¹¹² U.N. Guiding Principles, *supra* note 3, at 26-27.

¹¹³ Gabor Rona, *A Tour de Horizon of Issues on the Agenda of the Mercenaries Working Group*, 22 MINN. J. INT'L L. 324, 344 (2013).

¹¹⁴ *Id.*

adopting tougher regulations in the state where the PSC is domiciled may trigger a counter-productive “race to the bottom” with PSCs moving to the states with the least stringent domestic regulations.¹¹⁵ Thus, it makes sense to regulate PSCs at the international level.¹¹⁶ Such international regulation would reduce the capacity of PSCs to capitalize on the current disparities between different regulatory regimes in different states.

Yet, even if one accepts the logic behind international regulation, the process of regulating at the international level can be protracted, complex, and riven with political issues. The U.N. Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of Rights of Peoples to Self-Determination developed a draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies covering this subject.¹¹⁷ However, because states with large private security industries, like the U.S. and the U.K., opposed the Convention, it will have to overcome significant opposition before it becomes law.¹¹⁸

Jägers argues that “conventional international law-making is as yet unable to deliver a substantive answer to the challenges posed [by the regulation of PSCs].”¹¹⁹ The Draft Convention, for example, envisages that remedies for violations of its terms will be grounded in the national systems of contracting states.¹²⁰ This means that the remedy is only as strong as the national system and, as White points out, many national legal systems are weak.¹²¹ States already have obligations to protect people within their jurisdiction from human rights violations caused by third

¹¹⁵ Erica L. Gaston, *Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement*, 49 HARV. INT’L L. J. 221, 241 (2008); EUR. COMM. FOR DEMOCRACY THROUGH LAW (VENICE COMM.), *Report on Private Military and Security Firms and Erosion of the State Monopoly on the Use of Force*, 79th Plenary sess., Doc. No. CDL-AD(2009)038 (2009).

¹¹⁶ Eugenio Cusumano, *Policy Prospects for Regulating Private Military and Security Companies*, in WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS 26 (Francesco Francioni & Natalino Ronzitti eds., 2011).

¹¹⁷ José Luis Gómez del Prado (Chairperson/Rapporteur, U.N. Human Rights Council), *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, U.N. Doc. A/HRC/15/25, annex (2010) [hereinafter *Mercenaries*].

¹¹⁸ Laurence Juma, *Privatisation, Human Rights and Security: Reflections on the Draft International Convention on Regulation, Oversight and Monitoring of Private Military and Security Companies*, 15 L. DEMOCRACY & DEV. 182, 183-85 (2011); White, *supra* note 28, at 150.

¹¹⁹ Jägers, *supra* note 37, at 88.

¹²⁰ *Mercenaries*, *supra* note 117, at 36.

¹²¹ White, *supra* note 28, at 149.

parties,¹²² including PSCs. However, as noted above, the national judicial systems of states are, by and large, failing to provide effective remedies for human rights abuses perpetrated by PSCs. There is also a palpable absence of international political will to introduce binding International Law aimed at regulating the actions of PSCs,¹²³ and indeed business more generally.¹²⁴ Shah argues that there is insufficient international consensus to take forward a comprehensive treaty on PSC regulation, pointing to the Montreux Process as a clear example of the lack of consensus.¹²⁵ This process aimed to define how International Law applies to the activities of private security companies when they are operating in an armed conflict zone and resulted in the non-binding Montreux Document.¹²⁶ At first, the Montreux Document was signed by only seventeen states, though it has since been signed by a total of fifty-four.¹²⁷ The impetus to develop voluntary, non-judicial international mechanisms in this field results in part from the weakness of the public law response to the regulation of PSCs,¹²⁸ the Voluntary Principles on Security and Human Rights¹²⁹ and the Sarajevo Code of Conduct for PSCs are just two examples of this trend.¹³⁰ These codes of conduct have incorporated human rights standards to varying degrees.¹³¹ However, the International Code of Conduct for Private Security Providers (“ICoC”), discussed in the next sections, represents a new type of voluntary agreement, incorporating a collabora-

¹²² *Ergi supra* note 57, at 26; *Kolevi v Bulgaria*, App. No. 1108/02, Eur. Ct. H.R., 32 (2009); *Angelova and Iliev v. Bulgaria*, App. No. 55523/00, Eur. Ct. H.R., 17 (2007).

¹²³ See Jägers, *supra* note 37, at 88 (showing the Draft Convention has encountered strong resistance from states, particularly the U.K. and U.S., which have large PSC industries).

¹²⁴ A recent U.N. Human Rights Council resolution on the elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights sharply divided the council. While the resolution passed, there were 20 votes for 14 against and 13 abstentions. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/26/L.22/Rev.1, at 2 (June 25, 2014).

¹²⁵ Reema Shah, Comment, *Beating Blackwater: Using Domestic Legislation to Enforce the International Code of Conduct for Private Military Companies*, 123 YALE L. J. 2559, 2564 (2014).

¹²⁶ *Id.*

¹²⁷ *Participating States of the Montreux Document*, MONTREUX DOCUMENT FORUM, (Nov. 5, 2016, 11:14 AM), <http://www.mdforum.ch/en/participants>.

¹²⁸ Jägers, *supra* note 37, at 91.

¹²⁹ *What are the Voluntary Principles? VOLUNTARY PRINCIPLES ON SECURITY AND HUMAN RIGHTS* (Feb. 19, 2016) <http://www.voluntaryprinciples.org/what-are-the-voluntary-principles/>.

¹³⁰ *The Sarajevo Code of Conduct for PSCs 2006*, SEESAC (Feb. 19, 2016) <http://www.seesac.org/res/files/publication/544.pdf>.

¹³¹ Carsten Hoppe & Ottavio Quirico, *Codes of Conduct for Private Military and Security Companies: The State of Self-regulation in the Industry*, in *WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS* 362, 368 (Francesco Francioni & Natalino Ronzitti, eds., 2011).

tion of states, civil society organizations (“CSOs”), and members of the PSC industry to synthesize existing industry standards into its regulatory framework.

A. *The ICoC*

The ICoC is a spinoff from the Montreux process. While the Montreux process was directed toward the states’ obligations, the ICoC was directed toward the companies’ obligations.¹³² Because the ICoC itself and its Association, the ICoCA, are still new, their procedures and working modalities are still germinating. The ICoC establishes a multifaceted compliance regime, which includes certification of companies, internal and potentially external grievance mechanisms, rules on procurement, periodic reporting within the companies themselves and in the field, and obligations of cooperation with different authorities.¹³³

The ICoCA oversees the ICoC and is comprised of a Board of Directors, a General Assembly (“GA”) and a Secretariat.¹³⁴ The GA serves as a forum for multi-stakeholder dialogue, votes on ICoC matters, and appoints the Board of Directors.¹³⁵ The Board of Directors includes an even distribution of representatives from civil society, states, and the industry.¹³⁶ In addition, it serves as the executive body of the ICoCA by overseeing the Secretariat, reporting on the implementation of the ICoC, making recommendations to the GA, and developing the ICoCA’s operating procedures.¹³⁷ The Secretariat’s key role is to gather information for compliance reports on the companies, receive complaints from third parties about the activities of PSCs, and engage in dialogue with PSCs.¹³⁸ This open dialogue offers observations aimed at improving performance or addressing specific compliance concerns.

A key element of the ICoC involves certification, which is defined as: [a] process through which the governance and oversight mechanism [ICoCA], will certify that a Company’s systems and policies meet the Code’s principles and the standards derived from the Code and that

¹³² CORINNA SEIBERTH, *PRIVATE MILITARY AND SECURITY COMPANIES IN INTERNATIONAL LAW: A CHALLENGE FOR NON-BINDING NORMS: THEN MONTREUX DOCUMENT AND THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS*, 164 (2014).

¹³³ See generally *THE INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY PROVIDERS* (2010) [hereinafter *INTERNATIONAL CODE OF CONDUCT*].

¹³⁴ *The ICoC Association: About*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION (last visited Oct. 28, 2016), <http://www.icoca.ch/en/icoc-association>.

¹³⁵ *Articles of Association*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, art. 6 (September 20, 2013) http://www.icoca.ch/en/articles_of_association#article-15-formation-and-dissolution [hereinafter *ICoCA Articles of Association*].

¹³⁶ See *The ICoC Association: About*, *supra* note 134.

¹³⁷ *ICoCA Articles of Association*, *supra* note 135, at arts. 7-8.

¹³⁸ *Id.* at arts. 12-13.

a Company is undergoing Monitoring, Auditing, and verification, including in the field, by the governance and oversight mechanism.¹³⁹

The aim here is to harmonize the ICoC with existing standards, such as the American National Standards Institute's PSC 1,¹⁴⁰ and emerging national and international standards for the private security industry.¹⁴¹ The certification committee assesses submissions from members of any relevant standard related to security operations as a potential pathway to ICoCA certification.¹⁴² This committee evaluates the content of the standard and the process by which a company is, or would be, certified to it.¹⁴³ Once this assessment is complete, the committee drafts a recognition statement for it, which includes its assessment of the standard.¹⁴⁴ Members can then comment on this and the ICoCA Board of Directors ultimately vote on whether or not to accept the proposed standard.¹⁴⁵ As of November 2016, the committee has only accepted the PSC 1 standard and ISO 28007 as compatible with the ICoCA.¹⁴⁶

Given that the ICoCA is so new and its procedures and processes are still developing, it is difficult to assess the ICoCA's long-term effectiveness as a remedial mechanism at this point in time. However, we can evaluate the mechanism as it currently stands, evaluate the standards accepted by the ICoCA, and assess their future prospects. At first glance, the ICoC and ICoCA appear to be a promising prospect for regulating PSCs. The ICoC's objective of establishing external and independent mechanisms for effective governance and oversight of PSCs is sorely needed in the industry.¹⁴⁷ Whereas other instruments, like the Montreux Document, focused solely on PSC activities during armed conflict,¹⁴⁸ the ICoC covers a much broader category of PSC action. It addresses the

¹³⁹ INTERNATIONAL CODE OF CONDUCT, *supra* note 133.

¹⁴⁰ The PSC 1 standard requires PSCs to introduce a quality assurance management system, which assists companies working in circumstances of weakened governance where the rule of law has been undermined due to human or naturally caused events. This standard provides auditable criteria and guidance for PSCs, which is consistent with the International Code of Conduct for Private Security Providers (ICoC). See generally AMERICAN NATIONAL STANDARDS INSTITUTE, INC., MANAGEMENT SYSTEM FOR QUALITY OF PRIVATE SECURITY OPERATIONS - REQUIREMENTS WITH GUIDANCE (2012).

¹⁴¹ Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L. J. 417, 426-27 (2013).

¹⁴² *Draft ICoCA Certification Principles and Procedure*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, 2 (July 1, 2015).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Certification*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION (Nov. 4, 2016) <https://icoca.ch/en/certification>.

¹⁴⁷ INTERNATIONAL CODE OF CONDUCT, *supra* note 133, at 4.

¹⁴⁸ SEIBERTH, *supra* note 132, at 164.

actions of signatory companies while performing security services in “complex environments,” which encompass “any areas experiencing or recovering from unrest or instability.”¹⁴⁹ This means that it applies to the actions of PSCs in both pre- and post-conflict contexts.

Many have commented on the need to engage a wide network of stakeholders in the process of regulating PSCs.¹⁵⁰ The fact that the ICoCA is a multi-stakeholder affair comprised of states, PSCs, and CSOs is a welcome development.¹⁵¹ The Board of Directors, for example, is comprised of twelve members, with four representatives from each stakeholder group.¹⁵² CSOs, in particular, can play a valuable role in regulating PSCs through transnational networks, exerting pressure on PSCs’ home states, and financing litigation.¹⁵³

The ICoC has been praised for its detailed articulation of a wide range of norms and procedures to which PSCs should adhere.¹⁵⁴ However, while the ICoC offers detailed rules on issues such as the use of force and detention, the absence of any economic, social, or cultural rights is concerning given the capacity of PSCs to impact upon these rights.¹⁵⁵ Despite largely following the approach of the U.N. Guiding Principles, not all of the due diligence obligations of corporations identified in Ruggie’s Framework are covered in the ICoC; for example, there is little on PSCs undertaking a proper assessment of their likely human rights impacts.¹⁵⁶ In the following sections, we will scrutinize the ICoC and ICoCA to determine whether they conform to IHRL standards on effective remedies.

i. Investigation and Fact-finding

The Secretariat of the ICoC may receive complaints from third parties about the activities of the PSCs that signed up to the ICoC.¹⁵⁷ The ICoC also contains provisions aimed at ongoing compliance monitoring, which is described as a “process for gathering data on whether Company Personnel, or subcontractors, are operating in compliance with the ICoC’s principles and standards derived from this Code.”¹⁵⁸ The mechanism is

¹⁴⁹ INTERNATIONAL CODE OF CONDUCT, *supra* note 133, at 5.

¹⁵⁰ Daphne Richmond-Barak, *Can Self-Regulation Work: Lessons from the Private Security and Military Industry*, 35 MICH. J. INT’L L. 773, 784 (2014); Cusumano, *supra* note 116, at 11.

¹⁵¹ Richmond-Barak, *supra* note 150, at 774.

¹⁵² *ICoCA Articles of Association*, *supra* note 135, at art. 7.2.

¹⁵³ Cusumano, *supra* note 116, at 27.

¹⁵⁴ Jägers, *supra* note 37, at 74.

¹⁵⁵ Nigel D. White, *Due Diligence Obligations of Conduct: Developing a Responsibility Regime for PMSCs*, 31 CRIM. JUST. ETHICS 233, 249-50 (2012).

¹⁵⁶ *Id.* at 250.

¹⁵⁷ *ICoCA Articles of Association*, *supra* note 135, at arts 12 & 13.

¹⁵⁸ INTERNATIONAL CODE OF CONDUCT, *supra* note 133, at 5.

clearly capable of identifying the facts of an alleged human rights abuse, but it is unclear how deep investigations can or will go in practice and the degree of cooperation from companies that will be required for any investigations to be successful. While companies are certified to the PSC 1 standard in order to comply with the ICoC, the certification procedure includes assessment by an external auditor, who can also receive complaints about the company's behavior and investigate them.

The ICoCA has fleshed out the monitoring procedures of the ICoC.¹⁵⁹ Under these procedures the ICoCA will develop and issue "performance and compliance indicators" to its members.¹⁶⁰ The Secretariat of the ICoCA will search for, receive and review information from the public and other available sources on whether the members are complying with the ICoC.¹⁶¹ The Secretariat reviews the information, identifies compliance concerns against the performance and compliance indicators, assesses the human rights impacts of the company's operations, and identifies and analyzes broader patterns.¹⁶² There are legitimate concerns about how thorough this process will be, given that there are over one hundred PSCs signed up to the ICoC and the Secretariat consists only of a team of six people.¹⁶³ To offset this, companies themselves will provide a written assessment of their performance pursuant to a set of criteria covered by "necessary confidentiality and nondisclosure arrangements."¹⁶⁴ The format and structure of information sought through the reports will align with the performance and compliance indicators.¹⁶⁵ The Articles of Association for the ICoCA are not very clear about the periodicity of the reports and the level of detail required in particular whether specific proof is required of how each criterion of the ICoC is satisfied.¹⁶⁶ Additionally, the ICoC makes provision for some on-site monitoring of PSCs in other states, although this is limited to situations where risk assessments have identified the need for further monitoring or in response to a specific request from a member of the ICoCA.¹⁶⁷ Accordingly, the Secretariat will conduct a more active investigation once specific human rights concerns are identified.

¹⁵⁹ *Procedures Article 12: Reporting, Monitoring and Assessing Performance and Compliance*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, (Nov. 4, 2016), <https://icoca.ch/sites/default/files/resources/ICoCA-Proc-12-Monitoring.pdf> [hereinafter PROCEDURES ARTICLE 12].

¹⁶⁰ *Id.* at I. B.

¹⁶¹ *Id.* at II.A. *ICoCA Articles of Association*, *supra* note 135, at art. 12.2.1.

¹⁶² *Id.* at art. 12.2.4.

¹⁶³ *The Secretariat*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, (Nov. 4, 2016), <http://www.icoca.ch/en/secretariat>.

¹⁶⁴ *ICoCA Articles of Association*, *supra* note 135, at art. 12.2.2.

¹⁶⁵ PROCEDURES ARTICLE 12, *supra* note 159, at III. A.

¹⁶⁶ SEIBERTH, *supra* note 132, at 197.

¹⁶⁷ *ICoCA Articles of Association*, *supra* note 135, at art. 12.2.3; SEIBERTH, *supra* note 132, at 199.

The possibility of carrying out on-site monitoring represents a positive development in the ICoC, as it could offer a means of assessing whether the company's commitment to the Code is actually being operationalized. While it can be expensive, on-site monitoring offers a beneficial avenue for assessing compliance. It is lamentable that this process appears to have been watered down significantly, and instead of all companies being subject to inspections, few companies will be subjected to on-site monitoring in limited circumstances.¹⁶⁸ There are no specific conditions that automatically trigger on-site monitoring, which is left to the Executive Director's discretion.¹⁶⁹ The ICoCA must also seek the consent of the company before engaging in on-site monitoring with no express sanctions for refusing consent.¹⁷⁰

As far as the independence and impartiality of the ICoCA is concerned, the Secretariat is composed of IHRL and corporate social responsibility experts, not industry figures.¹⁷¹ The ICoCA is separated from the people it is investigating and has its own allocated budget. While individuals from the PSC industry sitting on a Board of Directors oversee the Secretariat, the Board is balanced between states, PSCs, and CSOs, which reduces concerns over impartiality and independence.¹⁷² However, there are a few issues that need to be addressed. There is a clear and significant disparity in the membership of the Association. There is a lack of geographical diversity among the Association's members,¹⁷³ as over 60% of the PSCs involved are either based in the U.S. or Europe.¹⁷⁴ Furthermore, the membership of the Association currently consists of six states, eighteen CSOs, and one hundred and one PSCs.¹⁷⁵ The dominance of PSCs could affect the ICoCA's independence. Since all members get to vote in the election of directors, and the industry significantly outnumbers the other factions, they can exert a substantial amount of influence.¹⁷⁶

¹⁶⁸ *Id.*

¹⁶⁹ PROCEDURES ARTICLE 12, *supra* note 159, at VI. B.

¹⁷⁰ *Id.* VI. D.

¹⁷¹ *The Secretariat*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, (Aug. 17, 2015), <http://www.icoca.ch/en/secretariat>.

¹⁷² Richemond-Barak, *supra* note 150, at 774.

¹⁷³ Jägers, *supra* note 37, at 80.

¹⁷⁴ This statistic is based on analysis of the 101 PSC members of the association as of 5 November 2016, 63 of which were based in Europe or the U.S. *Membership*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, (Apr. 7, 2016), <http://www.icoca.ch/en/membership>.

¹⁷⁵ Accurate on November 4, 2016.

¹⁷⁶ Shah, *supra* note 125, at 2567; White, *supra* note 155, at 251.

ii. Accessibility

There are some concerns over the accessibility of the ICoCA's remedial mechanism. First, while the ICOC has been translated into a number of languages, the information on certification and monitoring is only available in English or French, making these documents less accessible.¹⁷⁷ The Secretariat is in the process of creating a public form for the submission of complaints, which will be in English and "any additional languages the Board may determine are appropriate,"¹⁷⁸ which may also impact on accessibility. The overall approach of the ICoCA's remedy lacks predictability and transparency and may be difficult for complainants to grasp. Individual complaints could take a number of different paths. In the first place, the ICoCA's complaints procedure has a residual character and the ICoCA will typically recommend using the company's grievance mechanism. The ICOC imposes an obligation on businesses to create company-based grievance mechanisms that are "fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence."¹⁷⁹ If a complainant alleges that a company's grievance mechanism is not fair, not accessible, does not or cannot offer an effective remedy, or otherwise does not comply with the ICOC, the Secretariat shall review that allegation.¹⁸⁰ If the grievance mechanism of the PSC is considered deficient, this will result in dialogue between the company and the Board and possible recommendations for corrective actions or referral of the complaint to a different mechanism.¹⁸¹ Where the PSC's grievance mechanism is considered inadequate, the complainant may elect to follow one of the following paths, utilise the good offices of the ICoCA to try to resolve the complaint between the parties, accept referral to an external mediator or receive advice from the ICoCA on potential alternative grievance mechanisms available to the complainant.¹⁸² Thus there is a clear emphasis on first utilizing company-based mechanisms and existing judicial and non-judicial machinery to address com-

¹⁷⁷ *Certification*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, <http://www.icoca.ch/en/certification> (follow drop-down menu on top right of website; then select "Functions" hyperlink, then follow the "Certification" hyperlink; then select drop-down menu on top right of website) (demonstrating that English and French are the only available translations for information regarding ICOC Certification); *Monitoring*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, *supra* note 161 (select drop-down menu on top right of website) (demonstrating that English and French are the only available translations for information regarding ICOC Monitoring).

¹⁷⁸ *Procedures for Receiving and Processing Complaints under Article 13*, INTERNATIONAL CODE OF CONDUCT ASSOCIATION, (Nov. 4, 2016), <https://icoca.ch/sites/default/files/resources/ICoCA-Procedures-Article-13-Complaints.pdf> [hereinfter COMPLAINTS PROCEDURE].

¹⁷⁹ INTERNATIONAL CODE OF CONDUCT, *supra* note 133, at 15.

¹⁸⁰ *ICoCA Articles of Association*, *supra* note 135, at art.13.2.3.

¹⁸¹ *Id.* at art. 13.2.4.

¹⁸² COMPLAINTS PROCEDURE, *supra* note 178, at IV D 3.

plaints. This is in keeping with the U.N. Guiding Principles approach, but White argues that in the absence of some effective oversight, the remedies provided by company-based grievance mechanisms will be at the whim of businesses.¹⁸³ This unpredictability and obligation first to exhaust other avenues undermines the accessibility of the ICoC as a remedy.¹⁸⁴ Equally, the ICoC relies too much on other mechanisms, which may not themselves offer effective remedies, while failing to offer a better solution itself.¹⁸⁵

Stakeholders are often at a considerable disadvantage when dealing with a company in terms of the expertise they have available to them on issues such as their rights, scientific data, and other relevant information.¹⁸⁶ In practice, companies certified to the PSC 1 standard must minimize obstacles to access of their remedial structures caused by language, educational level, or fear of reprisal.¹⁸⁷ PSC 1 requires that the organization protect individuals submitting a complaint or grievance in good faith from retaliation,¹⁸⁸ including express commitments that the organization or persons working on its behalf may not retaliate against anyone who files a grievance or cooperates in the investigation of a grievance.¹⁸⁹ While the PSC 1 standard does not explicitly require companies to provide funding support for neutral third-party expertise and advice, such a requirement could be read into the obligation to minimize obstacles caused by educational level.

iii. Speed

On the positive side, the PSC 1 standard obliges companies to provide indicative timeframes for investigations and outcomes,¹⁹⁰ which is one of U.N. Guiding Principles' recommendations for non-judicial remedies.¹⁹¹ The complaints process implemented by the ICoCA must also include indicative timeframes.¹⁹² However, the aforementioned issues with the predictability of the ICoCA remedial mechanism also generate concerns over the speed of the remedy. The ICoCA is reliant on the PSC to pro-

¹⁸³ White, *supra* note 155, at 250.

¹⁸⁴ The same criticism can of course be levied against international judicial remedies in the field of human rights, such as applications to the European Court of Human Rights, which demand that applicants exhaust domestic remedies before applying to the court. *See* European Convention on Human Rights, *supra* note 7, at art. 35(1).

¹⁸⁵ SEIBERTH, *supra* note 132, at 211-12.

¹⁸⁶ *Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders*, *supra* note 26, at 16-17.

¹⁸⁷ AMERICAN NATIONAL STANDARDS INSTITUTE, INC., *supra* note 140, at 23.

¹⁸⁸ *Id.* at 26.

¹⁸⁹ *Id.* at 73.

¹⁹⁰ *Id.* at 74.

¹⁹¹ U.N. Guiding Principles, *supra* note 3, at 26.

¹⁹² COMPLAINTS PROCEDURE, *supra* note 178, at I B.

vide a quick and effective remedy. Where the PSC's grievance mechanism proves ineffective, the prospect of entering into dialogue with the complainant to establish how the grievance mechanism is deficient is unlikely to produce swift results. It may be beneficial for both the ICoC and the companies to engage in this dialogue to improve the grievance mechanisms, but it is difficult to see how this process will benefit the complainant. There also appears to be a presumption that the grievance mechanisms are effective and the onus rests with the complainant to prove otherwise. The complainant may require expert advice to determine these deficiencies, which may not be apparent at the outset, meaning that the complainant may waste time utilizing the mechanism, thereby negating the speed and utility of the remedy. Ultimately, victims of human rights violations do not want to debate the merits of a particular grievance mechanism; they want redress for the violations they have suffered. The fact that the ICoC requires applicants to pursue potentially ineffective remedies and engage in these dialogues means that it will be unlikely to provide a timely remedy to satisfy IHRL requirements. The ICoCA could learn from the approach of international human rights bodies, such as the ECtHR and the Human Rights Committee, where applicants are not obliged to exhaust remedies if they are likely to be ineffective.¹⁹³

iv. Transparency

The PSC 1 standard requires PSCs to establish set procedures to document grievances.¹⁹⁴ They must also make provisions for the confidentiality and privacy of complainants,¹⁹⁵ including procedures for registering anonymous complaints and grievances.¹⁹⁶ By having a clear process for handling complaints, PSC 1 should satisfy some of the transparency criteria discussed above. As for the ICoC itself, a number of commentators have remarked on how transparent the process of adopting and implementing the ICoC has been overall.¹⁹⁷ However, the fact that the companies' assessments of their performance are to be covered by "confidentiality and nondisclosure arrangements"¹⁹⁸ is a cause for concern. This generates scope for companies to refuse to share information with the monitoring mechanisms owing to contractual provisions or the potential for parallel legal proceedings.¹⁹⁹ The issue of confidentiality, a

¹⁹³ See *McFarlane*, *supra* note 53; Länsman et al. v. Finland, Communication No. 511/1992, ¶ 6.1, U.N. Doc. CCPR/C/52/D/511/1992 (Nov. 8, 1994).

¹⁹⁴ AMERICAN NATIONAL STANDARDS INSTITUTE, INC., *supra*, note 140, at 26.

¹⁹⁵ *Id.* at 74.

¹⁹⁶ *Id.* at 67.

¹⁹⁷ Richmond-Barak, *supra* note 150, at 796; Jägers, *supra* note 37, at 80-81.

¹⁹⁸ *ICoCA Articles of Association*, *supra* note 135, at art.12.2.2.

¹⁹⁹ Gómez del Prado, *Mercenaries*, *supra* note 117, at 7.

sticking point for other codes of conduct in the past,²⁰⁰ and the innate secrecy of the PSC industry could make achieving transparency in reporting problematic.²⁰¹ The reports compiled by the PSCs on compliance with the code remain confidential, as do any discussions between the Secretariat of the ICoCA and PSCs concerning suspected non-compliance with the ICoC.²⁰² However, in the event of non-compliance there is scope for the Board of Directors to issue a public statement on the outcome of a review undertaken by the ICoCA.²⁰³ There is no express obligation on the ICoCA to do so and this is again left to the discretion of the Board. While the confidentiality of the reports and dialogue is supposed to “encourage frank and honest disclosure,”²⁰⁴ the secrecy of the process and the absence of independent public scrutiny generate legitimate concerns regarding the transparency of the process of review.

The complaints procedure enacted by the ICoCA also has strict confidentiality requirements and the procedure set out by the ICoCA stipulates that “[p]arties participating in the ICoCA Complaints process will be required to agree in writing to keep all matters pertaining to the Complaints process confidential and not to disclose it outside of the procedure.”²⁰⁵ Furthermore, allegations of the complaint, facts in dispute, and the resolution of any complaint brought to the ICoCA will not be disclosed beyond the parties to the complaint. While confidentiality during the dispute may be understandable, the ICoCA apparently wishes to keep a tight rein on disclosure of its results. The Secretariat is to keep a public register noting only “(1) when a complaint was brought, (2) the name of the affected company, (3) the general nature of the alleged violation(s), and (4) the resolution of the complaint or other conclusion to the complaints process.”²⁰⁶ This limits the scope for independent external evaluation of the complaints procedure’s performance.

It is worth reiterating that the ICoCA’s own grievance procedure lacks predictability as to its potential outcomes. It could also be argued, as Seiberth does, that the ICoC relies on external third parties, such as bodies evaluating accreditation for PSC 1, too much to properly assess and evaluate the standards upheld by the PSCs. The ICoC’s oversight role is thus delegated to private accreditation and certification bodies in practice, meaning it is only as strong as the processes employed by these third parties. The process of contracting out the task to industry members developing their own standards carries the danger of a conflict of inter-

²⁰⁰ Jägers, *supra* note 37, at 80-81.

²⁰¹ *Id.* at 72.

²⁰² PROCEDURES ARTICLE 12, *supra* note 159, at III. B.

²⁰³ *Id.* at VIII. D.

²⁰⁴ *Id.* at III. B.

²⁰⁵ COMPLAINTS PROCEDURE, *supra* note 178 at VIII A.

²⁰⁶ *Id.* at VIII D.

ests, so there is a need for careful oversight to ensure industry-made standards still comply with IHRL.²⁰⁷

v. Redress

On paper, the ICoC seems to provide good redress options, as it enables review and follow-up on PSC human rights compliance and an avenue for third-party complaints.²⁰⁸ The ICoC also contains a welcome commitment on the part of PSCs “to cooperate in good faith with national and international authorities exercising proper jurisdiction, in particular with regard to national and international investigations of violations of national and international criminal law, of violations of international humanitarian law, or of human rights abuses.”²⁰⁹ However, as previously noted, the ICoCA is too reliant on third parties for remedial activities and its own remedial mechanism lacks predictability and clarity.

Many commentators have criticized the approach the ICoC takes to remedy. Rona argues that the voluntary nature of the ICoC means that it cannot ensure that all PSCs are covered by it.²¹⁰ The U.N. Working Group on the use of mercenaries maintained that while the approach of the ICoC was “useful,” it was an insufficient mechanism to regulate and monitor the activities of PSCs.²¹¹ Hoppe and Quirico argue that a code of conduct cannot be effective if both the act of committing to a code and compliance with it are entirely voluntary and breaches remain without consequence.²¹² This last criticism is not entirely well founded, as breaches can result in a loss of certification to the ICoC and suspension and termination of membership of the ICoCA, although admittedly this will do little to remedy individual violations. Jägers, in contrast, argues that even voluntary commitments may ultimately have legal effect, for example, by being included in contracts.²¹³

Before the ICoC was drafted, Nils Rosemann proposed that states should make compliance with any international code a condition for awarding contracts to PSCs.²¹⁴ This is starting to happen in practice, with

²⁰⁷ SEIBERTH, *supra* note 132, at 204-05.

²⁰⁸ *The International Code of Conduct Association (ICoCA): Core documents, Frequently Asked Questions, Membership Requirements*, INT’L CODE CONDUCT ASS’N 1, 49 (2014), [https://icoca.ch/sites/default/files/resources/ICoCA%20Brochure-Online Designed.pdf](https://icoca.ch/sites/default/files/resources/ICoCA%20Brochure-Online%20Designed.pdf).

²⁰⁹ INTERNATIONAL CODE OF CONDUCT, *supra* note 133, at 3.

²¹⁰ Rona, *supra* note 113, at 341-42.

²¹¹ Gómez del Prado, *Mercenaries*, *supra* note 117, at 17.

²¹² Hoppe & Quirico, *supra* note 131, at 373.

²¹³ *Id.*; Jägers, *supra* note 37, at 82.

²¹⁴ Nils Rosemann, *Code of Conduct: Tool for Self-Regulation for Private Military and Security Companies*, 15 GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES 1, 39 (2008) http://mercury.ethz.ch/serviceengine/Files/ISN/94781/ipublicationdocument_singledocument/5af67983-6392-472a-b4aa-ec6fd3c04d82/en/ocasional_15.pdf.

the U.S., U.K., and U.N. all making compliance with the ICoC a precondition for awarding contracts.²¹⁵ Thus, suspension or exclusion from the ICoCA could have a significant impact on a company's procurement eligibility, making it, in theory at least, a strong driver for compliance.²¹⁶

However, using the market to regulate depends on clients actually valuing human rights and having sufficient market power to make compliance with the ICoC a factor that firms compete on,²¹⁷ which may not be the case in practice. Many governments have renewed contracts with PSCs even while the companies were associated with significant human rights abuses and scandals.²¹⁸ Furthermore, not all states will follow the lead of the U.S. and U.K., and lucrative contracts may be available where human rights are less of a concern, as is the case in China, Saudi Arabia, and Russia.²¹⁹ While award, renewal, and termination of public contracts are important means of regulating,²²⁰ relying on market forces alone as the basis for regulation is not going to be sufficient and has not worked in the past.²²¹ Beyond suspension and termination of membership, the ICoCA's punitive measures are limited, and, while it can engage in mediation, the ICoCA does not have the power to bestow specific awards on the parties to a complaint,²²² which limits the effectiveness of its redress apparatus.

vi. Preliminary Findings

Overall, the ICoC has introduced some extremely positive developments, but suffers from some debilitating shortcomings. On the positive side, the multi-stakeholder approach adopted by the ICoC is welcome and the combination of state buy-in, CSO oversight, and PSC support has great potential to properly regulate the industry. The multi-faceted approach to regulation, which includes certification, reporting, and monitoring, is also useful, and certification could play a powerful role in homogenizing standards within the industry. José L. Gomez del Prado wisely cautions against rushing to judgment of the ICoC though, noting it

²¹⁵ Shah, *supra* note 125, at 2565.

²¹⁶ Meg Roggensack, *U.S. Legislative and Regulatory Developments and the International Code of Conduct for Private Security Providers: Filling the Accountability Gap*, 107 AM. SOC'Y INT'L L. PROC. 203, 204 (2013).

²¹⁷ Hoppe & Quirico, *supra* note 131, at 375.

²¹⁸ Cusumano, *supra* note 116, at 23.

²¹⁹ Shah, *supra* note 125, at 2565-6.

²²⁰ Cusumano, *supra* note 116, at 22.

²²¹ Hoppe & Quirico, *supra* note 131, at 377; SINGER, *supra* note 35, at 21-22; White, *supra* note 155, at 251.

²²² *ICoCA Articles of Association*, *supra* note 135, at art. 13.2.5.

is a document of “good intentions” and many of the factors to oversee the ICoC still need to be established.²²³

There are a number of shortcomings that reduce the effectiveness of the ICoCA as a remedial mechanism. While the ICoCA has the power and mandate to identify and investigate suspected human rights abuses, there are clear concerns about its capacity to fulfill this mandate. Equally, although the ICoCA has been refreshingly transparent in its activities thus far, the confidentiality and non-disclosure rules surrounding the reporting and complaints processes are a cause for concern. The remedial mechanism itself lacks predictability and transparency. The requirement that complainants exhaust other avenues of redress before coming to the ICoCA means it is unlikely to provide swift remedies. The fact that the ICoC relies so heavily on external factors, from groups offering certification services to external remedial mechanisms, leaves its effectiveness worryingly at the mercy of these third parties. Furthermore, enforcement remains a significant stumbling block, with market forces unlikely to adequately regulate the PSC industry and the remedial mechanism itself offering limited sanctions and redress where violations are identified. It is difficult to see how the complaints procedure and in-field assessments will engender compliance with the ICoC without any punitive mechanisms.²²⁴ In sum, the ICoCA demonstrates a very limited capacity to address individual complaints concerning human rights abuses, an over-reliance on external grievance mechanisms and, arguably, a disproportionate focus on procedural compliance of PSCs with the ICoC rather than substantive compliance with international human rights law and international humanitarian law. While the ICoC has a great deal of promise, at present, it is far from providing an effective remedy for victims of human rights abuses at the hands of PSCs.

IV. STATE LEVEL MECHANISMS

A. *State-based Non-Judicial Grievance Mechanisms*

The U.N. Guiding Principles declare that states should provide “effective and appropriate” non-judicial mechanisms alongside judicial mechanisms as part of a comprehensive state-based system.²²⁵ Non-judicial mechanisms include ombudsmen processes and other national human rights institutions, with a steady growth in these types of mechanisms recently.²²⁶ The mechanisms are often customized to address specific

²²³ José L. Gómez del Prado, *A United Nations Instrument to Regulate and Monitor Private Military and Security Contractors*, 1 NOTRE DAME J. INT'L & COMP. L. 1, 36 (2011).

²²⁴ Shah, *supra* note 125, at 2564.

²²⁵ U.N. Guiding Principles, *supra* note 3, at 24.

²²⁶ Corporate Responsibility (CORE) Coalition, *Protecting Rights, Repairing Harm: How State-Based Non-Judicial Mechanisms Can Help Fill Gaps in Existing*

areas and complaint types, such as non-discrimination, and can therefore offer more tailored solutions to human rights issues than more generic mechanisms are able to provide. The mechanisms play an “essential role” in complementing and supplementing judicial mechanisms.²²⁷ The mechanisms complement and supplement judicial mechanisms in a number of ways, such as by identifying systemic problems, making recommendations for law reforms, and clarifying standards through practice, which can inform legal standards further down the line.²²⁸

Overall, non-judicial mechanisms tend to be more accessible, more flexible, and less costly ways of resolving disputes than resorting to judicial remedies.²²⁹ These processes also often rely on mediation as a means of resolution, which companies are more comfortable and familiar with when compared to adversarial judicial processes. However, the corollary is that these mechanisms also tend to be less transparent and less independent than judicial mechanisms and can suffer from problems with enforcement.²³⁰ This can discourage non-governmental organizations (“NGOs”) from utilizing non-judicial mechanisms; but the fact that these mechanisms operate under a threat of judicial action in practice tends to encourage the parties to seek an acceptable outcome.²³¹ In the following section we will examine the efficacy of one of the most ubiquitous non-judicial mechanisms: the National Contact Points (“NCPs”) system, which implements the OECD Guidelines governing multinational enterprises (“MNEs”).

B. Case Study: National Contact Points

The OECD first introduced guidelines governing MNEs in the 1970s and has updated them a number of times.²³² In 2011, the OECD incorpo-

Frameworks for the Protection of Human Rights of People Affected by Corporate Activities, BUS. & HUM. RTS. RES. CTR. 1, 10 (2010), <http://business-humanrights.org/sites/default/files/media/documents/ruggie/core-submission-to-ruggie-nov-2010.pdf>.

²²⁷ U.N. Guiding Principles, *supra* note 3, at 24.

²²⁸ Caroline Rees, *Access to Remedies for Corporate Human Rights Impacts: Improving Non-Judicial Mechanisms: Report of a Multi-Stakeholder Workshop*, (Corp. Soc. Responsibility Initiative, John F. Kennedy School of Gov’t, Harvard Univ., Report No. 32, 2008), http://www.hks.harvard.edu/m-rcbg/CSRI/publications/report_32_consultation_report_november_08.pdf; Corporate Responsibility (CORE) Coalition, *supra* note 226, at 12.

²²⁹ *Id.* at 1.

²³⁰ *Id.* at 4.

²³¹ *Rights-Compatible Grievance Mechanisms: A Guidance Tool for Companies and their Stakeholders*, *supra* note 26, at 1-2.

²³² *The OECD Guidelines for Multinational Enterprises*, TRADE UNION ADVISORY COMM. 1, 4 (2012), <http://www.tuacoecdmneguidelines.org/Docs/TradeUnionGuide.pdf>.

rated human rights standards.²³³ Chapter IV of the Guidelines state that MNEs and other business enterprises should “respect human rights” with the aim to “avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”²³⁴ and that they should have a human rights policy.²³⁵ The MNEs are also obliged to ensure that they “carry out human rights due diligence appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.”²³⁶

The Guidelines oblige states to establish NCPs, which are meant to “further the implementation of the Guidelines.”²³⁷ The role of these NCPs ranges from providing information and raising awareness of Guidelines to handling enquiries.²³⁸ However, the most interesting aspect of this mechanism for our present purpose is its role in dealing with “specific instances.”²³⁹ A “specific instance” is the official term for a case or complaint about a company’s alleged breach of the Guidelines.²⁴⁰ The focus of this procedure is to resolve complaints through mediation and conciliation.²⁴¹ Many civil society organizations, like NGOs and trade unions, have raised complaints about human rights violations through this mechanism.²⁴² The addition of Chapter IV to the OECD Guidelines has expanded the scope of potential human rights complaints to NCPs as the Guidelines “now include all internationally recognized rights, not merely those a host government has ratified.”²⁴³

Specific instances are handled in three stages. First, once a complaint is formally submitted to the NCP, the NCP carries out an initial assessment

²³³ See generally OECD, *OECD Guidelines for Multinat’l Enterprises*, OECD iLIBRARY (2011), <http://dx.doi.org/10.1787/9789264115415-en> [hereinafter *OECD Guidelines*].

²³⁴ *Id.* at 31; see also U.N. Guiding Principles, *supra* note 3, at 13.

²³⁵ *OECD Guidelines*, *supra* note 233, at 31; see also U.N. Guiding Principles, *supra* note 3, at 15.

²³⁶ *OECD Guidelines*, *supra* note 233, at 20.

²³⁷ *Id.* at 3.

²³⁸ *Id.* at 68.

²³⁹ *Id.*

²⁴⁰ *Id.* at 72.

²⁴¹ *Id.* at 68.

²⁴² Since 2012, after the 2011 update of the OECD Guidelines, NGOs have filed 105 complaints, 84 of which concerned alleged human rights violations. See Antony Crockett, *Human Rights Complaints Against Multinationals Increasing*, HERBERT SMITH FREEHILLS (Oct. 29, 2015), <https://www.herbertsmithfreehills.com/latest-thinking/human-rights-complaints-against-multinationals-increasing>.

²⁴³ John Ruggie & Tamaryn Nelson, *Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges 1*, 14 (Corp. Soc. Responsibility Initiative, John F. Kennedy School of Gov’t, Harvard Univ., Working Paper No. 66, 2015), <https://www.hks.harvard.edu/index.php/content/download/76202/1711396/version/1/file/workingpaper66.pdf>.

to determine if the case warrants further examination.²⁴⁴ If the NCP determines that the complaint warrants further scrutiny, it will offer its “good offices” to the parties.²⁴⁵ Second, the NCP brings the parties together and tries to resolve the complaint through mediation and conciliation.²⁴⁶ The NCP can seek “advice from relevant authorities, and/or representatives of the business community, worker organizations, other NGOs organizations, and relevant experts,”²⁴⁷ in attempting to resolve the issues raised. Third, the NCP can issue a final statement on the specific instance, which should summarize the alleged breaches and detail the NCP’s dealings with the case.²⁴⁸ In this statement, the NCP can conclude that the issues raised do not warrant further consideration.²⁴⁹ The terms of any agreement reached by the parties will only be disclosed when both parties agree.²⁵⁰ The NCP may also decide to discontinue its investigation when a party to the complaint refuses to engage in the process.²⁵¹

One of the key benefits offered by the OECD Guidelines system is that it applies to corporations not only in the OECD states, but also worldwide, meaning that the OECD Guidelines extend to territories of non-OECD states where the corporations registered in the OECD member state operate.²⁵² This gives the Guidelines global influence and the potential to reach into the supply chains of corporations operating transnationally. The network of contact points and the possibility of consulting NCPs in other states to assist in transnational violations is also a helpful feature of this system.²⁵³ The Guidelines also cover main areas of responsible business conduct, such as human rights, industrial and employment relations, and environmental impacts.²⁵⁴ The Guidelines have the potential to be a powerful mechanism because the NCPs have the capacity to issue public final statements and recommendations, which can have a significant impact on the reputations of companies.²⁵⁵ The Guidelines them-

²⁴⁴ OECD Guidelines, *supra* note 233, at 72.

²⁴⁵ *Id.* at 72.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 73.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² Jernej Letnar Cernic, *Corporate Responsibility for Human Rights: A Critical Analysis of the OECD Guidelines for Multinational Enterprises*, 4 HANSE L. REV. 71, 78 (2008); Juan Carlos Ochoa Sanchez, *The Roles and Powers of the OECD National Contact Points Regarding Complaints on an Alleged Breach of the OECD Guidelines for Multinational Enterprises by a Transnational Corporation*, 84 NORDIC J. INT’L L. 89, 91 (2015).

²⁵³ OECD Guidelines, *supra* note 233, at 72.

²⁵⁴ *Id.* at 4.

²⁵⁵ Ochoa Sanchez, *supra* note 252, at 90-91.

selves refer to a number of the effectiveness criteria already identified above. The NCPs are, for example, meant to resolve issues in a manner that is impartial, predictable, equitable, and compatible with the principles and standards of the Guidelines.²⁵⁶ The NCPs are supposed to ensure visibility, accessibility, transparency, and accountability in their work and deal with issues in an efficient and timely manner, in accordance with applicable law.²⁵⁷

i. Investigation and Fact-Finding

The NCPs have a diverse role and a great deal of flexibility is left to the states as to how the NCPs are organized.²⁵⁸ However, these factors generate problems with ensuring the independence and impartiality of the body. While each NCP is meant to be functionally equivalent,²⁵⁹ many authors have noted that the effectiveness of the NCP system in dealing with specific instance procedures and monitoring is largely dependent on its structure, which is left to the discretion of the contracting states.²⁶⁰ Because of this, there is a general lack of coherence and consistency in the organization of the NCPs.²⁶¹ Many NCPs are rooted in government departments.²⁶² This is a clear conflict of interest and generates questions over the objective impartiality of NCPs, given that the same department is simultaneously responsible for promoting the interests of national companies and acting as an impartial assessor of company behavior.²⁶³

²⁵⁶ *OECD Guidelines*, *supra* note 233, at 72.

²⁵⁷ *Id.* at 71.

²⁵⁸ *Id.*

²⁵⁹ Ochoa Sanchez, *supra* note 252, at 95; *OECD Guidelines*, *supra* note 233, at 78.

²⁶⁰ SEIBERTH, *supra* note 132, at 211. There is a breakdown of the organization structures of all of the NCPs in the 2014 Annual Report – OECD. *Annual Report on the OECD Guidelines for Multinational Enterprises 2014: Responsible Business. Conduct by Sector*, OECD iLIBRARY 1, 19-20 (2014), <http://dx.doi.org/10.1787/mne-2014-en> [hereinafter *Annual Report*].

²⁶¹ *Id.*

²⁶² Sorcha MacLeod & Scarlett McArdle, *International Responsibility and Accountability of the Corporation: International Initiatives for Holding Corporations to Account and their Viability with regard to Private Military and Security Companies* 13 (Acad. Eur. L., Working Paper No. 29, 2009), http://cadmus.eui.eu/bitstream/handle/1814/13575/AEL_2009_29.pdf?sequence=1. The NCPs are mainly located within governmental departments in charge of economic and financial issues, or of foreign affairs. *See Annual Report*, *supra* note 250, at 19-20.

²⁶³ Evaristus Oshionebo, *The OECD Guidelines for Multinational Enterprises as Mechanisms for Sustainable Development of Natural Resources: Real Solutions or Window Dressing*, 17 LEWIS & CLARK L. REV. 545, 577-78 (2013); Conference Report, OECD-ILO Conference on Corp. Soc. Responsibility, Review of NCP Performance: Key Findings 3, 13 (June 23-24, 2008), <http://www.oecd.org/corporate/mne/40807797.pdf> [hereinafter Review of NCP Performance].

The fact-finding activities of the NCPs have also been a cause for concern. There are questions over the capacity of many NCPs to engage in fact-finding activities. For example, the Mexican and American NCPs do not conduct thorough examinations of the facts before issuing final statements when a party does not agree to mediation or no agreement has been reached.²⁶⁴ By contrast, both the Norwegian and U.K. NCPs' regulations empower them to conduct a thorough investigation before issuing a final statement in the same circumstances.²⁶⁵ NCPs should have clear authority to conduct a thorough examination.²⁶⁶ They should have the capacity to determine the facts or identify perpetrators. However, OECD Watch has argued that even when NCPs do investigate, the standard of proof demanded by NCPs is often unduly high and inconsistent.²⁶⁷ NCPs are advised to determine whether a complaint raises a *bona fide* issue and whether the issue is "material and substantiated," but the Procedural Guidance does not define "substantiated," which has led to widely varying interpretations by different NCPs.²⁶⁸

ii. Accessibility

Non-judicial remedies are generally more accessible and cheaper than judicial remedies, as we noted above. However, barriers to accessibility can still exist. The OECD Guidelines, which apply to MNEs, recommend that NCPs should be properly resourced to carry out their work: "adhering countries shall make available human and financial resources to their National Contact Points so that they can effectively fulfill their responsibilities, taking into account internal budget priorities and practices."²⁶⁹ Yet, in practice, the majority of NCPs appear to be under-resourced for the jobs they are expected to carry out.²⁷⁰ For example, a survey of NCPs in 2014 revealed that out of the forty-five NCPs surveyed, twenty-five had no allocated budgets for their NCPs, while ten had no dedicated members of staff working on NCP issues, even on a part-time basis.²⁷¹ An array of accessibility issues can arise when a complainant from outside an OECD

²⁶⁴ Ochoa Sanchez, *supra* note 252, at 98.

²⁶⁵ Ochoa Sanchez, *supra* note 252, at 103-4; Oshionebo, *supra* note 263, at 580-81; Cernic also notes a high degree of inconsistency in how these powers are used in practice. Letnar Cernic, *supra* note 252, at 86.

²⁶⁶ Ochoa Sanchez, *supra* note 252, at 108.

²⁶⁷ CAITLIN DANIEL ET AL., REMEDY REMAINS RARE: AN ANALYSIS OF 15 YEARS OF NCP CASES AND THEIR CONTRIBUTION TO IMPROVE ACCESS TO REMEDY FOR VICTIMS OF CORPORATE MISCONDUCT 22 (2015).

²⁶⁸ *Id.* at 24; Letnar Cernic, *supra* note 252, at 85.

²⁶⁹ *OECD Guidelines*, *supra* note 233, at 68.

²⁷⁰ PATRICIA FEENEY, THE MODEL NATIONAL CONTACT POINT (MNCP): PROPOSALS FOR IMPROVING AND HARMONIZING THE PROCEDURES OF THE NATIONAL CONTACT POINTS FOR THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES 8 (2007).

²⁷¹ *Annual Report*, *supra* note 260, at 23.

country wishes to complain about a PSC domiciled in an OECD country, including linguistic barriers, difficulties with attending mediation sessions, travel and visa issues, and the lack of expertise.²⁷² The lack of resources available to NCPs can exacerbate these accessibility issues, as NCPs have in the past required impecunious complainants to pay for services that are a necessary part of the complaint process and should be provided by the mechanism itself, such as the translation of documents and travel to mediation meetings.²⁷³ The cost of bringing a claim under the NCP specific instance procedure has been estimated to amount to an average of 100 thousand British Pounds per claim,²⁷⁴ which clearly impacts the accessibility of the procedure as a whole. Overall, when one considers the diversity of complaints NCPs may have to handle, including claims on environmental law, human rights, financial services, labor relations, etc., it is difficult to see how poorly resourced NCPs could possibly cover all of these disparate areas successfully.

iii. Speed

The MNE Guidelines indicate that NCPs should deal with specific instances in a timely manner.²⁷⁵ Some further guidance on time is provided in the commentary on the implementation procedures and NCPs should provide information to the parties on the indicative timeframes that will be followed by the NCP.²⁷⁶ There are no hard and fast rules regarding times, but in general the OECD recommends that the initial assessment of a specific instance should be completed within three months of receipt.²⁷⁷ In practice it regularly takes the NCPs too long to decide admissibility issues, and in some cases the delays are quite excessive. For instance, the Irish NCP spent over three years on initial assessment in one case.²⁷⁸ As a general principle, NCPs should strive to conclude the procedure within twelve months from receipt of the specific instance.²⁷⁹ Yet, again in practice, specific instances are taking longer to conclude. Most cases that make it to mediation remain pending before the NCP for at least one to two years, and OECD Watch noted that one

²⁷² Oshionebo, *supra* note 263, at 582.

²⁷³ Daniel et al., *supra* note 267, at 21-22.

²⁷⁴ JORIS OLDENZIEL ET AL., 10 YEARS ON: ASSESSING THE CONTRIBUTION OF THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES TO RESPONSIBLE BUSINESS CONDUCT 11 (2015).

²⁷⁵ *OECD Guidelines*, *supra* note 233, at 72.

²⁷⁶ *Id.* at 80.

²⁷⁷ *Id.* at 87.

²⁷⁸ OECD WATCH, ASSESSMENT OF NCP PERFORMANCE IN THE 2013-2014 IMPLEMENTATION CYCLE 22 (2014) [hereinafter ASSESSMENT OF NCP PERFORMANCE].

²⁷⁹ *OECD Guidelines*, *supra* note 233, at 87.

case has been pending for over six years.²⁸⁰ While some of these are extreme examples and the conduct of the parties will clearly have a bearing on the length of time it takes to remedy, when significant delays arise the NCPs have other options other than waiting on the parties. For example, the NCPs could appoint a dedicated mediator to handle the case or issue a final statement with recommendations based on existing information, but this does not typically happen in practice.

iv. Transparency

The OECD Guidelines state that the NCPs should be “proactive” to ensure the Guidelines are well known and understood, especially by national business representatives.²⁸¹ However, the limited uptake of the specific instance procedure, with only thirty-one out of forty-two NCPs actually having dealt with a specific instance and considerable variations in the workloads of different NCPs,²⁸² reveals that knowledge of the NCP system is inconsistent. The OECD Guidelines also encourage transparent information disclosure, stipulating that the results of specific instances should be made publicly available.²⁸³ In practice this is far from universally observed. From 2013 to 2014, for example, while NCPs published final statements in twenty-eight different specific instances, three others were not published.²⁸⁴ Levels of transparency also vary from country to country with some NCPs, particularly the U.S. NCP, appearing reluctant to prepare and publish final statements.²⁸⁵ As of 2013, the U.S. NCP had only issued a statement or report on three of the thirty-two specific instances that arose.²⁸⁶ Even when the results are disclosed, the documents issued by NCPs can be very unclear. In some cases the names of the parties to specific instances are not disclosed.²⁸⁷ Some NGOs have criticized these confidentiality measures within the mediation process, especially where the matters dealt with are of public interest.²⁸⁸ In other instances, the documents disclosed fail to clearly identify the issue which gave rise to the complaint in the first place.²⁸⁹ This limited transparency as to outcomes also negatively impacts public scrutiny of the activities of

²⁸⁰ ASSESSMENT OF NCP PERFORMANCE, *supra* note 278, at 22.

²⁸¹ *OECD Guidelines*, *supra* note 233, at 69.

²⁸² Leyla Davarnejad, *In the Shadow of Soft Law: The Handling of Corporate Social Responsibility Disputes under the OECD Guidelines for Multinational Enterprises*, 2011 J. DISP. RESOL. 351, 366 (2011).

²⁸³ *OECD Guidelines*, *supra* note 233, at 73.

²⁸⁴ *Annual Report*, *supra* note 260, at 27.

²⁸⁵ Oshionebo, *supra* note 263, at 579.

²⁸⁶ *Id.* at 579-80.

²⁸⁷ MacLeod & McArdle, *supra* note 262, at 14.

²⁸⁸ Claes Cronstedt & Robert C. Thompson, *An International Arbitration Tribunal on Business and Human Rights*, *LAWYERS FOR BETTER BUS.* 1, 7 (2015), <http://www.l4bb.org/news/TribunalV5B.pdf>.

²⁸⁹ Davarnejad, *supra* note 282, at 367.

NCPs and, in particular, whether they are being consistent in how they handle specific instances.²⁹⁰

v. Redress

The variety of redress available and the adequacy and prompt payment of compensation are two key factors determining the effectiveness of redress. The NCP system arguably satisfies the first criterion by offering mediation, which can create bespoke solutions to particular problems and offer more flexibility, in terms of outcomes, than a court order. The OECD has been keen to stress that mediation activities among the NCPs are increasing and that the capacity of the NCPs to facilitate mediation and dialogue is improving.²⁹¹ However, a key shortcoming of the NCP system is its inability to provide compensation and make specific awards on that front.²⁹²

A further criterion of effective redress is an ability to demand general and specific measures of redress and monitor implementation of the outcomes. The final statements of NCPs and mediation agreements offer a means through which NCPs can undertake these activities. However, in practice, many NCPs refuse to make a statement on whether or not the Guidelines have been breached in the specific instance before them.²⁹³ Furthermore, they rarely follow up on whether the agreements have been implemented or recommendations followed,²⁹⁴ even though this is expressly recommended by the U.N. Guiding Principles.²⁹⁵ When NCPs do issue final statements, these often aim to protect companies rather than drawing a clear distinction between acceptable and unacceptable corporate conduct.²⁹⁶ In the rare instances that NCPs find that the Guidelines have been infringed, NCPs cannot impose any sanction on the company, as the companies themselves are not legally obliged to abide by the Guidelines, which are merely recommendations.²⁹⁷ In practice, NCPs should determine whether there has been a breach of the Guidelines and offer recommendations to the companies on how to better implement the Guidelines in future.²⁹⁸ There is value in establishing a breach of the

²⁹⁰ *Id.* at 368.

²⁹¹ *Annual Report*, *supra* note 260, at 18.

²⁹² Daniel Augenstein, *Study of the Legal Framework on Hum. Rts. and the Env't Applicable to European Enterprises Operating Outside the European Union*, UNIV. EDINBURGH REP. 1, 78 (2015), http://en.frankbold.org/sites/default/files/tema/101025_ec_study_final_report_en_0.pdf; Davarnejad, *supra* note 282, at 364.

²⁹³ Ochoa Sanchez, *supra* note 252, at 98, 105-06; Oshionebo, *supra* note 253, at 581.

²⁹⁴ OLDENZIEL ET AL., *supra* note 274, at 23.

²⁹⁵ See U.N. General Principles, *supra* note 3.

²⁹⁶ FEENEY, *supra* note 270, at 5.

²⁹⁷ Oshionebo, *supra* note 263, at 573, 582.

²⁹⁸ OLDENZIEL ET AL., *supra* note 274, at 22.

Guidelines and naming and shaming the perpetrator.²⁹⁹ Overall, MacLeod and McArdle argue that the NCP procedure does not provide for punishment and redress and can, at best, only act as a deterrent.³⁰⁰ As a result, Seiberth concludes that the specific instance procedure cannot be an effective remedy in the context of PSC activities.³⁰¹

vi. Complaints Against PSCs

The specific instance procedure does not handle a large number of complaints when compared to the potential human rights abuses carried out by companies throughout the world. In 2014, for example, there were only thirty-four specific instances brought before the entire network of NCPs.³⁰² Of these, a very small number were complaints lodged against PSCs, with only three involving allegations of insufficient human rights due diligence by companies in the security sector.³⁰³ Despite the limited number, it appears that these types of cases are particularly difficult for NCPs to deal with. The 2014 Annual Report stated:

NCPs often face complaints that transcend many borders and encounter multiple conflicting interests from business, government, and stakeholders. For example, during the 2013-2014 reporting period three allegations of insufficient human rights due diligence by companies in the security sector were raised, all of which involved sensitive information and compelled NCPs to carefully examine both the obligations and boundaries of their responsibility.³⁰⁴

This appears to be a long running issue for the NCPs going back to the early 2000s with a specific instance complaint against a U.K.-based PSC named Avient. This complaint was dealt with prior to the introduction of the specific chapter of the Guidelines on human rights in 2011.³⁰⁵ The Guidelines at that time, however, did contain a clause, which stated that “[enterprises should] respect the human rights of those affected by their activities consistent with the host government’s international obligations and commitments.”³⁰⁶ The U.N. Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth in the Democratic Republic of the Congo (“DRC”) reported in 2002 that Avient was one of

²⁹⁹ Ochoa Sanchez, *supra* note 252, at 110-11; OLDENZIEL ET AL., *supra* note 274, at 22.

³⁰⁰ MacLeod & McArdle, *supra* note 262, at 15.

³⁰¹ SEIBERTH, *supra* note 132, at 211.

³⁰² *Annual Report*, *supra* note 260, at 18.

³⁰³ *Id.* at 41.

³⁰⁴ *Id.* at 18.

³⁰⁵ *OECD Guidelines*, *supra* note 233, at 31-34.

³⁰⁶ *2011 Update of the OECD Guidelines for Multinational Enterprises: Comparative Table of Changes Made to the 2000 Text*, OECD 3, 13 (2011), <https://www.oecd.org/corporate/mne/49744860.pdf>.

a number of companies fueling the conflict in the DRC.³⁰⁷ It was alleged that Avient provided military supplies to the Congolese Army and Zimbabwean Defense Forces, provided crews for aircraft that engaged in indiscriminate bombing and had brokered the sale of military equipment to parties to the conflict.³⁰⁸ The report stated that Avient was suspected of violating the OECD Guidelines and called on governments to investigate.³⁰⁹ As a result, the U.K. NCP opened a specific instance.

The NCP's subsequent actions have been widely criticized. First, it refused to allow an NGO, Rights and Accountability in Development ("RAID"), to participate in the complaint or to consider RAID's complaint about Avient in parallel with the U.N. panel's complaint.³¹⁰ Second, although the NCP claimed that "the Panel supplied very little evidence to support the allegations made,"³¹¹ the NCP did not seem to make any concerted effort to gather evidence itself or pursue leads. The evidence against Avient included bank records linking it to a notorious arms dealer, a contract signed by a director of Avient and Joseph Kabila, the President of the DRC, to provide a crew to operate aircraft owned by the Congolese Air Force.³¹² This crew would "operate on behalf of the Military on Operational Missions" and were "operating along and behind enemy lines in support of Ground Troops and against the invading forces."³¹³ OECD Watch also claims that the NCP had a letter from the DRC Air Force in its possession, which clearly implicated Avient in military campaigns on behalf of the DRC government.³¹⁴ Third, the final statement issued by the NCP was deeply problematic as it "essentially record[ed] Avient's response to the allegations."³¹⁵ The complaint that

³⁰⁷ Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, S.C. Rep. 2002/1146, para. 55, U.N. Doc. S/2002/1146 (Oct. 16, 2002) [hereinafter Final Report].

³⁰⁸ Final Statement, OECD United Kingdom National Contact Point, Statement on Avient at 1 (last visited Oct. 30, 2016), http://oecdwatch.org/cases/Case_40/148/at_download/file [hereafter Statement on Avient].

³⁰⁹ Final Report, *supra* note 307, at para. 178.

³¹⁰ Specific Instance Request, Rights and Accountability in Development (RAID), AVIENT Ltd. 2 (Feb. 1, 2005), http://oecdwatch.org/cases/Case_40/380/at_download/file; OLDENZIEL ET AL., *supra* note 274, at 32. Involving NGOs in the activities of the NCPs has been an ongoing problem at the OECD. MacLeod & McArdle, *supra* note 262, at 11-12.

³¹¹ Statement on Avient, *supra* note 308, at 2.

³¹² Final Report, *supra* note 307, at 12; Antony Barnett & Paul Harris, *How a perfect English gent in a rural idyll profits from a bloody African war*, THE GUARDIAN (Nov. 24, 2002), <https://www.theguardian.com/world/2002/nov/24/politics.uk>; Rights and Accountability in Development (RAID), *supra* note 310, at 1.

³¹³ *Id.* at 2-3.

³¹⁴ OLDENZIEL ET AL., *supra* note 274, at 32.

³¹⁵ *Id.*

Avient had participated in indiscriminate bombing raids in the DRC was not even addressed by the NCP in the final statement.³¹⁶ The statement did not make a conclusion as to whether the allegations were true or not, or whether the Guidelines had been breached.³¹⁷ Fourth, the recommendations of the NCP were particularly insipid and vague and offered no practical benefit to the company or meaningful guidance on how the company should change its commercial activity.³¹⁸ Avient was invited, for example, to carefully consider the recommendation that it should “contribute to economic, social and environmental progress with a view to achieving sustainable development.”³¹⁹ Thus, many of the shortcomings in effectiveness, such as ineffectual investigation, a weak final statement, and problems with accessibility of the remedy, are all evident in this example.

Although improvements have been made to the OECD Guidelines and the operations of the NCPs themselves since,³²⁰ even recent NCP activity on PSCs has been inconsistent. In February 2013, a number of NGOs submitted a complaint against a company named Trovicor, which offers intelligence solutions to states.³²¹ It was alleged that Trovicor had taken over maintenance responsibilities for mass surveillance technology for the Bahraini government in 2009, which in turn contributed to human rights violations by the Bahraini state.³²² The complainants alleged that the Bahraini government was using German-made surveillance technology to target and suppress pro-democracy activists.³²³ The technology was, in their view, instrumental in violations of the right to privacy, free expression, freedom of association, liberty and security of the person, and the prohibition on torture, inhuman and degrading treatment or punishment.³²⁴

A number of problems with effectiveness are identifiable in this specific instance. First, the initial assessment of the complaint took six

³¹⁶ Statement on Avient, *supra* note 308, at 2.

³¹⁷ *Id.*

³¹⁸ Daniel Leader, *Business and Human Rights - Time to Hold Companies to Account*, 8 INT'L CRIM. L. REV. 447, 459 (2008).

³¹⁹ *Id.*

³²⁰ MacLeod & McArdle, *supra* note 262, at 13.

³²¹ *About Us*, TROVICOR (last visited Oct. 30, 2016), <http://trovicor.com/wp-content/uploads/trovicor-corporate-brochure-en.pdf>.

³²² Final Statement, German National Contact Point, Statement on Trovicor (May 21, 2014), <http://www.bmw.de/English/Redaktion/Pdf/oecd-ac-final-statement-ecchr,property=pdf,bereich=bmwi2012,sprache=en,rwb=true.pdf> [hereinafter Statement on Trovicor].

³²³ *German OECD NCP Unwilling to Investigate Role of German Company in Human Rights Violations in Bahrain*, PRIVACY INT'L. (Dec. 20, 2013), <https://www.privacyinternational.org/?qN°de/169>.

³²⁴ *Id.*

months longer than the indicated timeframe.³²⁵ Second, the problems with fact-finding and investigation identified above are evident. Trovicor refused to provide “information on business relations meaning that it was impossible to determine whether the company had any business relations with Bahrain.”³²⁶ This led the NCP to reject the complaint that Trovicor was partly responsible for the violations of human rights in Bahrain. The complainants claimed they had provided sufficient information to substantiate the claim and refused to engage in mediation proposed by the NCP to resolve the complaint.³²⁷ This ultimately led the NCP to close the case. Third, the NCP accepted that the complaint that Trovicor did not operate a management system to analyze human rights risks of its business activities warranted further examination, but did not make any recommendations in the final statement with regard to this apparent shortcoming.³²⁸

Interestingly, a very similar complaint was made to the U.K. NCP, which highlights the inconsistencies in the approach different NCPs take to similar complaints. In the U.K., a number of NGOs complained that a company called Gamma International had supplied a spyware product to agencies of the Bahrain government, which had used it to target pro-democracy activists.³²⁹ The spyware infiltrated their electronic devices and was used to track their communications.³³⁰ Again the NCP failed to provide a swift remedy, mediating the case for almost seventeen months.³³¹ In a similar vein to Trovicor, Gamma refused to confirm or deny to which states they supplied the software.³³² Even though neither party provided direct evidence proving or disproving the claims, the complainants made a strong circumstantial case and the U.K. NCP continued the process.³³³ When mediation eventually failed, the NCP notified the parties that it would continue examining the complaint.³³⁴ In its final statement, despite its inability to verify key facts relating to the complaint, the NCP concluded that “based on the information reviewed and shared by the U.K. NCP, the NCP considers that it is reasonably certain

³²⁵ ASSESSMENT OF NCP PERFORMANCE, *supra* note 278, at 31-32.

³²⁶ Statement on Trovicor, *supra* note 322, at 1.

³²⁷ *Id.* at 2.

³²⁸ *Id.* at 1.

³²⁹ Initial Assessment, United Kingdom National Contact Point, Initial Assessment by the UK National Contact Point: Complaint from Privacy International and Others against Gamma International UK Ltd, at 2 (June 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/208112/bis-13-947-complaint-from-privacy-international-and-others-against-gamma-international-uk-ltd.pdf [hereinafter Initial Assessment].

³³⁰ *Id.* at 2.

³³¹ ASSESSMENT OF NCP PERFORMANCE, *supra* note 278, at 22.

³³² Initial Assessment, *supra* note 329, at 8.

³³³ *Id.*

³³⁴ *Id.* at 6.

that the product reported by the activists as having been sent to them was Gamma's."³³⁵ It went on to conclude that Gamma International U.K. Limited had not acted consistently with provisions of the OECD Guidelines requiring enterprises to carry out appropriate due diligence, to encourage business partners to observe the Guidelines, to have a policy commitment to respect human rights, and to provide for or cooperate through processes to remediate human rights impacts.³³⁶

These two cases perfectly illustrate some of the key shortcomings in the effectiveness of the NCP process. The first and most obvious shortcoming is that the complaint mechanism remains inconsistent. When virtually identical complaints are presented to two different NCPs, the results were wildly different. Much of this has to do with the NCPs willingness to engage in *proprio motu* fact-finding, which corresponds with the issue identified earlier in the Avient case and shows the problem persists to this day. The fact that PSCs often operate in very challenging environments where the rule of law is weak will likely mean that the fact-finding capacity of the NCPs is further impaired. The OECD Guidelines, for example, recommend contacting embassies and government officials in third states in their investigations.³³⁷ However, this will be difficult in the context of an ongoing conflict. Field visits, which some NCPs have been known to undertake,³³⁸ seem equally challenging and highly unlikely. Furthermore NCPs are unable to compel disclosure of information that is necessary for them to carry out their work.³³⁹ There is a need for further guidance on these issues and Cernic argues that recommendations should be drafted as to what fact-finding activities the parties can expect the NCP to undertake once a specific instance has been deemed admissible.³⁴⁰

Another severe shortcoming of this process is the extent to which it depends on the voluntary participation of companies and NGOs. When either party does not fully engage, it can result in the process stalling or ending completely. Some NCPs simply drop cases where the company limits its engagement in some way, such as by declining to participate in mediation.³⁴¹ The NCPs' activities should not be completely dependent on voluntary participation and even if a party declines to participate, the NCP should still carry out an investigation. As it stands there is no real

³³⁵ Final Statement, OECD United Kingdom National Contact Point, Privacy International & Gamma International UK Ltd: Final Statement After Examination of Complaint (Dec. 2014), para. 56, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/402462/BIS-15-93-Final_statement_after_examination_of_complaint_Privacy_International_and_Gamma_International_UK_Ltd.pdf [hereinafter Final Statement].

³³⁶ *Id.* at 16.

³³⁷ *OECD Guidelines*, *supra* note 233, at 86.

³³⁸ Ochoa Sanchez, *supra* note 252, at 105.

³³⁹ Oshionebo, *supra* note 263, at 570; OLDENZIEL ET AL., *supra* note 274, at 50.

³⁴⁰ Letnar Cernic, *supra* note 252, at 86.

³⁴¹ Ochoa Sanchez, *supra* note 252, at 98-100.

incentive for companies to submit themselves to the NCP process when the result of their non-engagement is that the case is dropped without further comment.³⁴² There are no consequences for companies who fail to comply with the Guidelines or refuse to engage in mediation,³⁴³ which severely undermines the capacity of the NCP to deliver remedies. The authority to conduct a thorough examination of the facts, and to make a conclusion on whether or not the concerned company has breached the Guidelines should be standard powers among all NCPs.³⁴⁴ Exercising this power would also incentivize company participation as the reputational damage that could arise from an adverse statement generates leverage for the NCP.

vii. Preliminary Findings

MacLeod and McArdle argue that NCPs are only as effective as their structure allows and that is certainly the case when it comes to delivering effective remedies.³⁴⁵ The NCP system undoubtedly has a number of strengths—it covers a wide range of areas and offers a network of potential investigators and the prospect of tracking violations through the supply chain. However, as Ruggie points out, the NCPs have not yet realised their potential as an effective remedy against corporate human rights abuse.³⁴⁶ Many NCPs lack sufficient independence from the government and business to offer a credible outlet for human rights complaints, while their inadequate investigatory and fact-finding facilities limit their overall effectiveness, especially where violations by PSCs are concerned. The NCPs themselves have conflicting views on what their role and function is or should be and the desired objective of functional equivalence is far from realization.³⁴⁷ Amnesty International stated that many NCPs grossly under-perform and that this is largely due to the defects and shortcomings of the institutional architecture within which NCPs operate.³⁴⁸ OECD Watch for their part noted that NCP handling of specific instances has been erratic, unpredictable, and largely ineffectual.³⁴⁹ They went on to state that using the OECD Guidelines is a “timeconsuming [sic], resource-intensive process that, even in the best case scenario, results in

³⁴² Oshionebo, *supra* note 263, at 582.

³⁴³ Amnesty International, *The 2010-11 Update of the OECD Guidelines for Multinational Enterprises has come to an end: The OECD must now turn into effective implementation* at 2, AMNESTY INT’L. (May 23, 2011), <https://www.amnesty.org/en/documents/IOR30/001/2011/en/> [2010-11 Update of OECD].

³⁴⁴ Ochoa Sanchez, *supra* note 252, at 108.

³⁴⁵ MacLeod & McArdle, *supra* note 262, at 12.

³⁴⁶ John Ruggie, *Updating the Guidelines for Multinational Enterprises* 5 (10th OECD Roundtable on Corp. Resp., Discussion paper, 2010).

³⁴⁷ Ochoa Sanchez, *supra* note 252, at 114.

³⁴⁸ 2010-11 Update of OECD, *supra* note 343, at 2.

³⁴⁹ OLDENZIEL ET AL., *supra* note 274, at 11.

only minor improvements.”³⁵⁰ In light of these criticisms and the analysis above, we can conclude that the NCP system in general does not currently provide an effective remedy for human rights abuses perpetrated by PSCs.

V. CONCLUSION

Non-judicial remedies have the capacity to address human rights violations in novel and more flexible ways than judicial remedies. They should, in principle, offer more accessible, cost-effective and quicker remedies. The ICoC, for example, guarantees remedial mechanisms that are closer to the victims by making sure each signatory to the ICoC provides a company-level grievance mechanism. The network of NCPs has the capacity to bridge gaps between different jurisdictions and the gaps in the oversight of different judicial bodies. The ICoCA’s multi-stakeholder approach ensures a more collegiate approach to solving industry problems. Additionally, the MNE Guidelines and the ICoC could offer overarching general standards, which transcend national judicial rules. Unfortunately, the remedies analyzed here have not lived up to their potential. Despite some promising attributes, such as the inter-connectedness of the NCP system and the multi-stakeholder approach of the ICoCA, the analysis above shows that each has failed to provide an effective remedy for human rights violations perpetrated by PSCs.

The remedial mechanisms themselves could be much more effective with some minor changes in approach and behavior. The NCPs could, for example, make better use of their fact-finding capacity, by investigating even where the companies allegedly at fault refuse to co-operate. Their capacity to issue final statements with recommendations represents one of the few genuine sources of leverage that the NCP system has over companies. NCPs could exploit this leverage to name and shame companies and offer detailed and specific recommendations in furtherance of human rights.

At the ICoCA increasing the investigatory capacity of the Secretariat would go some way toward assuaging the doubts about its ability to keep track of all the companies signing up to the ICoC. At the same time, the ICoCA should force PSCs to strictly justify any refusals to disclose information or measures of confidentiality in its reports to the ICoCA. The ICoCA could also work on setting out clear parameters for how different types of complaints will be handled by the ICoCA. These measures represent the low hanging fruit within the existing structure that could facilitate greater effectiveness. Deeper institutional reforms could look at retrofitting the ICoCA with some coercive sanctions or punitive measures to induce compliance, while the institutional reforms of the NCPs should

³⁵⁰ *Id.* at 23.

ensure more resources are made available to the NCPs and greater separation between them and government departments.

Overall, the non-judicial remedies examined here have a great deal of unrealized potential. In their current form and modus operandi they do not provide effective remedies. But, if some marginal changes to behavior and form are effected, these non-judicial remedies could make a significant difference in holding businesses to account for human rights abuses.