

Bridging the Data Gap: Exploring Pillar III and Victims' Access to Remedy

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Only robust and accurate statistics can establish the vital benchmarks and baselines that translate our human rights commitments into targeted policies, and only they can measure how effective those policies truly are.

*—Navi Pillay, United Nations High Commissioner for Human Rights,
May 10, 2013*

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The third pillar of the UN Guiding Principles on Business and Human Rights—access to remedy—seeks to ensure that when corporate human rights abuses do occur, victims have appropriate and effective remedy. Yet, some have observed that this pillar has received the least amount of attention from the scholarly and policy communities (McGrath 2015). Much of the extant literature has focused on whether corporations have or should have human rights obligations under international customary law (Martin and Bravo 2016; Karp 2014; Bird, Cahoy and Prenkert 2014; Deva and Bilchitz 2013; Gatto 2011) or how corporate responsibilities are shaped through specific state-level regulation (Bauer 2011; Knudsen and Moon 2017). To date, there is little systematic information about a number of foundational questions regarding when victims have access to grievance mechanisms and what type of mechanisms are used (cf. Olsen 2019). As such, the OHCHR’s Accountability and Remedy Project (Phase III) is a welcomed effort to bring greater awareness, improved advocacy, and more targeted policy responses to improve access to remedy for victims of corporate human rights abuse.

In this white paper, we present a novel dataset—the Corporations and Human Rights Database-Latin America (hereafter, CHRD). The CHRD is, to date, the most systematic and comprehensive source of data on allegations of corporate human rights abuse and victims’ access to grievance mechanisms in the Latin American region between 2000-2014. In response to a call by the OHCHR’s Accountability and Remedy Project (Phase III) for research proposals, we use these data to answer broad questions about access to remedy and to take a deeper dive into the use of non-judicial grievance mechanisms. In this paper, we ask: What types of corporate human rights abuse occur? Do victims have access to judicial and non-judicial remedy? Given the broad array of non-judicial grievance mechanisms, what types are most frequently used? And, in what ways are grievance mechanisms used in tandem? We also provide insights specific to ARP III as well as other lessons about business and human rights, more generally.

Our key findings are as follows:

- *Characteristics of Corporate Human Rights Abuse*
 - Of all corporate human rights abuses in Latin America, approximately one third are physical integrity violations and another third are related to environmental

claims. The remaining third are comprised of labor, development/poverty, and health claims.

- Two in five (40 percent) physical integrity violations involve human trafficking and child labor; while over one third (36 percent) are about the death or disappearance of (an) individual(s).
 - Allegations of abuse are most likely to occur in three primary industries: the extractive industry (31 percent), agriculture (21 percent), and the apparel and textile industry (14 percent).
- *Access to Remedy*
 - Victims in nearly one third (31 percent) of all corporate human rights allegations in the CHRD had access to some type of judicial action.³
 - Victims in one in four (25 percent) allegations in the CHRD had access to a non-judicial grievance mechanism. Of those, nearly half (45 percent) of the non-judicial grievance mechanisms are state-based mechanisms while the bulk (65 percent) are non-state-non-judicial grievance mechanisms. Four percent of allegations are met with both judicial and non-judicial remedy.
 - The extractives and agriculture industries experience much lower rates of non-judicial remedy (25 percent and 28 percent, respectively) than judicial action (36 percent and 35 percent, respectively). Whereas the apparel and textiles industry experiences much higher rates of non-judicial remedy (35 percent) compared to judicial action (12 percent).
 - The data reveal that, when multiple grievance mechanisms are used, non-judicial mechanisms are most frequently employed in the first instance. Victims, however, most frequently seek out non-state-based non-judicial mechanisms after they have sought remedy through the judiciary.
 - *A More Nuanced Story about Access to Remedy*
 - While multiple mechanisms are used, victims do so when previous mechanisms are unsatisfactory.
 - While remedy mechanisms are often about redressing past abuses, we find that few are designed to ensure abuses do not occur again in the future.
 - Finally, the data highlight the complicated role the state plays. While we know the state instrumental in administering state-based non-judicial remedy mechanisms, it also plays an important role in ensuring non-state-based mechanisms occur and that remedy is provided. Interestingly, the state sometimes has a dual role, as it may be a victim, a co-perpetrator, or both, simultaneously.

³ Note that this captures access to some formal process through the judiciary; it does not mean there was a trial or even an outcome that favored the victim(s).

THE CORPORATIONS AND HUMAN RIGHTS DATABASE FOR LATIN AMERICA

The Corporations and Human Rights Database is the first of its kind to systematically compile comprehensive data on corporate human rights allegations⁴ and remedy efforts. The CHRD includes information on the type of abuse, the location and date of the abuse, in addition to information about the groups or organizations that were involved in reporting the abuse and corporate responses. The CHRD also contains information about victims' access to judicial and non-judicial grievance mechanisms associated with each allegation of abuse.

The CHRD is comprised of data on corporate human rights abuse across Latin America. The sample of allegations are drawn from the online archive hosted by the Business and Human Rights Resource Center (BHRRC), the most inclusive collection of newspaper articles and reports on business and human rights (Wright 2008). The BHRRC currently employs three Latin American-based researchers and their website has links to over 124,000 news articles, press releases, and non-profit reports.⁵

While the CHRD team identified corporate human rights abuses through the BHRRC, our team scoured supplementary documents to complete a custom coding tool to gather additional systematic data on details of the abuse, the victims, corporate and/or state responses, and any judicial or non-judicial grievance mechanisms associated with the allegation of abuse (see Appendix A for a discussion about the sample and integrity of the CHRD). The database focuses on five types of violations: physical integrity abuse, development and poverty, environment, health, and labor. These violations are described in greater depth below. Since additional detail was generally available in Spanish- or Portuguese-language news sources, our students used LexisNexis and Google searches to access this information in local news outlets. The team referenced approximately 4,000 additional sources in creating the CHRD (see abridged coding guide in Appendix B).⁶

⁴ By allegation, we mean any instance, recorded by the BHRRC, in which some group and/or individual accuses a company of a human rights abuse.

⁵ We are incredibly grateful for the BHRRC's support of our work.

⁶ Dr. Olsen and the CHRD team at the University of Denver recently secured a multi-year grant from the US National Science Foundation that will fund the creation of a global database, covering all allegations of corporate human rights abuse worldwide between 2006-2018. For more information, please contact tricia.olsen@du.edu.

The temporal coverage of the CHRDR database is 2000-2014. From a practical perspective, it begins in 2000 because that is the year the BHRRC began its data coverage. This timing, however, is beneficial in that it allows us to observe corporate behavior over fourteen years, which includes periods of global economic growth, recession, and recovery throughout the Latin American region. It also encompasses over a decade of allegations prior to the passage of the UNGPs, so as to assess how corporate, state, or civil society practices have changed in the post-UNGPs era (see Bernal Bermúdez, et al. 2019). In total, the CHRDR records over 1,300 allegations of corporate human rights abuse in 29 countries.

The CHRDR makes important contributions to this field. First, systematic data on business and human rights has been quite limited. Policymakers and academics alike lament the lack of systematic, longitudinal data in this area. Key stakeholders, as noted above, call for “robust and accurate statistics [to] establish the vital benchmarks and baselines that translate our human rights commitments into targeted policies” (Pillay 2013; see also Ruggie 2013; Felice 2015). Second, most of the research focuses on publicly traded firms based in the U.S. or Western Europe (e.g. the Fortune 500), which skews the understanding and perspective about the occurrence of, and state and corporate responses to, corporations’ human rights violations. The CHRDR includes public and private firms of all sizes, which allows the CHRDR to provide a more comprehensive picture of allegations of corporate human rights abuse. Finally, the CHRDR’s focus on human rights abuses in Latin America presents an opportunity to learn about how firms with headquarters in Latin American and around the world respond to or address corporate human rights violations in the context of emerging or developing economies.

ALLEGATIONS OF CORPORATE HUMAN RIGHTS ABUSE

Given the dearth of systematic, empirical data on access to remedy, this section highlights basic descriptive data from the CHRDR. First, we discuss broad trends around the types of abuse that occur and in the subsequent section present more specific data on access to remedy. Note that while the database includes violations in microstates (those with populations under a million), the figures presented below are based on those countries with populations over a million, for a total of 1,007 allegations of corporate human rights abuse.

The CHRDR captures information about the type of allegation, in accordance with one of the five categories used by the BHRRC. Since one violation could possibly fall into numerous categories (e.g. protests over labor abuses and environmental pollution), one senior coder completed the coding for the primary abuse category.

Physical Integrity Abuse. Allegations of physical integrity abuse include the most egregious instances of human rights abuse. There are eight subcategories of abuse: disappearances or abduction; arbitrary detention; death, forced/child labor or human trafficking; forced displacement; rape or sexual abuse; torture; or intimidation or threats to carry out any of the above physical integrity violations. Figure 1 illustrates that physical integrity abuses account for over one in four violations (29 percent).

Environment. The second set of allegations includes those events in which the company is alleged to have polluted or destroyed some natural resource. The subcategories for environmental abuses are organized in terms of the resource that was allegedly polluted, including: water contamination; air contamination; land contamination/erosion; or the destruction of natural resources. Figure 1 shows that environmental claims account for roughly one-quarter of all violations (26 percent).

Labor. The CHRDR also designates those violations of specific labor rights, which can be categorized in the following way: prison labor; denial of freedom of association or the right to unionize; denial of freedom of expression (specifically around labor organization); failure to meet basic labor standards; or discrimination. Nearly one in five violations revolve around labor issues (19 percent).

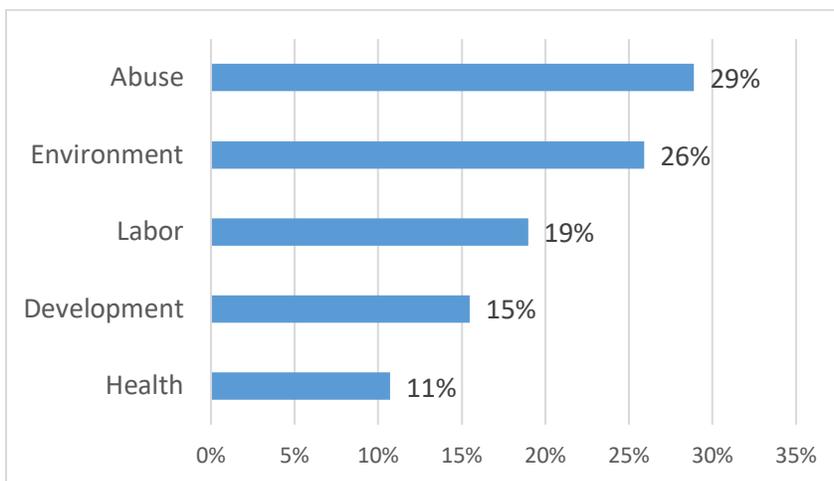


Figure 1. Categories of Corporate Human Rights Abuse (%)

Development. The fourth set of allegations broadly refers to violations of economic or social rights, including: denial of access to basic needs; destruction of local economies; displacement (without force, but against the will of the individuals); lack of investment in/exploitation of local economies; encroachment or exploitation of indigenous land or property; no right to prior consultation; denial of freedom of expression; or denial of freedom of association. Fifteen percent of the violations involve issues specific to development and poverty.

Health. The fifth set of allegations are those events in which the company is alleged to have negatively impacted the health of individuals and violated the fundamental element of the right to health. The subcategories for health include access to medicine or health problems, including those that are attributed to pollution. Approximately one in ten violations are related to negative health effects (11 percent).

Figure 2 provides a closer look at physical integrity abuses. Note that more than one category could be chosen; thus, the percentages here exceed one hundred. Of the 291 abuses of physical integrity, the modal category is related to human trafficking and child labor. Examples include an Argentinean agricultural company that allegedly abused eleven children and several teenagers as child laborers, and a Brazilian agricultural company that allegedly held more than one thousand workers in slave labor conditions on its sugar plantation. At this facility, workers were made to work excess hours and slept in crowded buildings without access to water or sanitation resources.

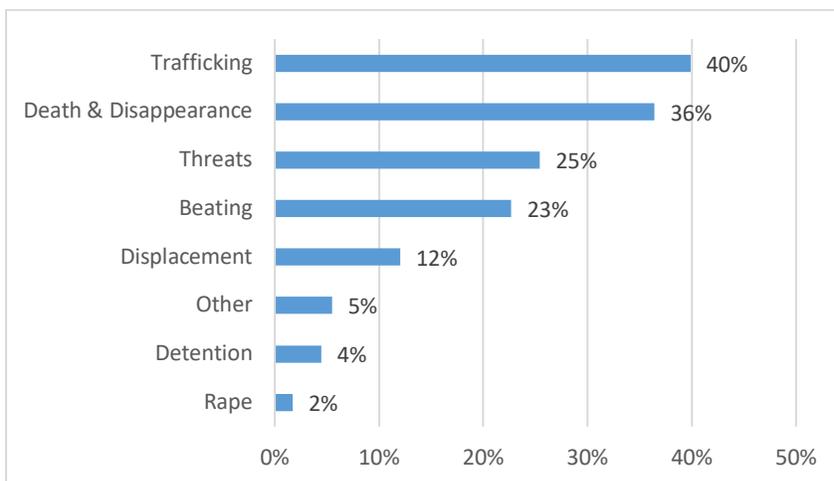


Figure 2. Subcategories of Physical Integrity Abuse (%)

The next category, death and disappearance, captures those events in which one or more person was killed. Some cases may involve workplace safety violations, where an employee is killed due to unsafe working conditions. The majority of these violations, however, involve the death or disappearance of individuals who oppose the company’s operations or practices. For example, a Canadian company operating a barite mine in Chiapas, Mexico, allegedly participated in the murder of an indigenous leader who opposed the mine. The remaining categories in Figure 2 include threats of physical integrity abuse, beating or torture, forced displacement, unlawful detention and rape.

Allegations vary substantially across industries (Figure 3). In the CHR, allegations of abuse are most likely to occur in three primary industries: the extractive industry (314 violations or 31 percent), agriculture (207 violations or 21 percent), and the apparel and textile industry (137 violations or 14 percent). For the extractive industry, environmental incidents are the modal category (approximately one in three), followed by physical integrity abuse and development (one in five for both). The prevalence of development claims for the extractive industry reflects corporate-community conflicts, lack of prior consultation or controversial use of indigenous land or property. In agriculture, physical integrity abuse is the modal category, comprising over 40 percent of the claims in that industry. For apparel and textiles, physical integrity abuse and labor comprise the two primary categories, each with approximately 40 percent of the cases.

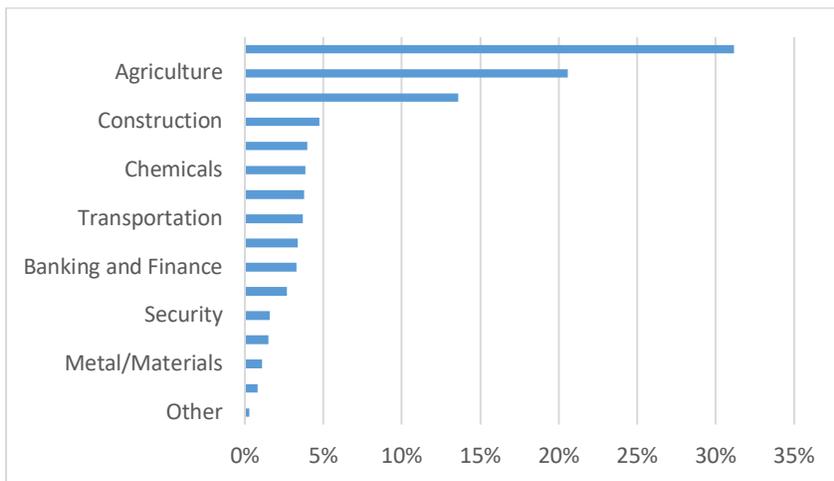


Figure 3. Corporate Human Rights Violations, by Industry (%)

The regulatory discussion at the global level has focused mainly on the extractive and the apparel and textiles industries, with several voluntary initiatives seeking to improve corporate behavior. However, the CHRDR suggests that agriculture in Latin America is also a stage of conflict that needs to be included in the discussion, particularly considering the move in the region to large, industrial agribusiness and increasing concern about the expansion of the agricultural frontier affecting the Amazon.

In summary, the descriptive statistics reveal that more than half of corporate human rights allegations of abuse are environmental abuses or physical integrity abuses. Further, while human rights in the extractive and apparel sectors have gained the most headlines, substantial abuses also occur in the agricultural sector. In the next section we discuss the attempts to remedy corporate human rights abuses.

ACCESS TO GRIEVANCE MECHANISMS

The UNGPs seek to encourage states and businesses to do what they can to avoid abuse, but when it does occur, remedy should be provided. Remedy falls into two, basic camps: judicial and non-judicial grievance processes. The CHRDR includes data on any judicial action taken as a result of the claim, including an investigation initiated by prosecutors or trial activity initiated (even if later dismissed). For judicial action, we also capture whether the claim has reached an outcome (e.g., criminal sentence, civil ruling, resolutions associated with non-judicial remedy, formal or informal settlements). For each judicial action, we capture the year in which proceedings began, the last known action, and the jurisdiction in which the court activity took place.

Non-judicial grievance mechanisms (e.g., roundtables, multi-stakeholder initiatives, legislative, administrative or reparations) also holds a prominent place in the UNGPs, as indicated by the OHCHR's Accountability and Remedy Project.⁷ Non-judicial grievance mechanisms can be state-sponsored (e.g., grievance processes established through the National Contact Points (NCPs) or claims made through ombudsperson offices or

⁷ See: ARP I https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/32/19; ARP II https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/20

government-run complaints offices, for example). Non-judicial remedy can also be created through non-state-based mechanisms. Such mechanisms may be “mediation-based, adjudicative or follow other culturally-appropriate and rights-compatible processes – or involve some combination of these – depending on the issues concerned, any public interest involved, and the potential needs of the parties” (Ruggie 2011, p. 24). Non-state-based non-judicial grievance mechanisms may be initiated by industry or multi-stakeholder groups.

As illustrated in Figure 4, nearly one third (31 percent) of all corporate human rights abuses in the CHRD was met with some type of judicial action (315 of 1,007 instances). Judicial action includes civil, administrative, constitutional or criminal proceedings. Not all judicial activity, of course, results in a trial. Of the 315 cases of judicial action, just over half (168) went to trial. Of those cases, 110 were heard in civil court, while another 38 became part of a criminal investigation and trial. Two cases involved both civil and criminal judicial proceedings.

Twenty five percent of allegations in the CHRD are met with a non-judicial grievance mechanism, while four percent have both judicial and non-judicial grievance mechanisms. Approximately 45 percent of the non-judicial grievance mechanisms are state-based mechanisms while the majority are non-state-non-judicial grievance mechanisms.

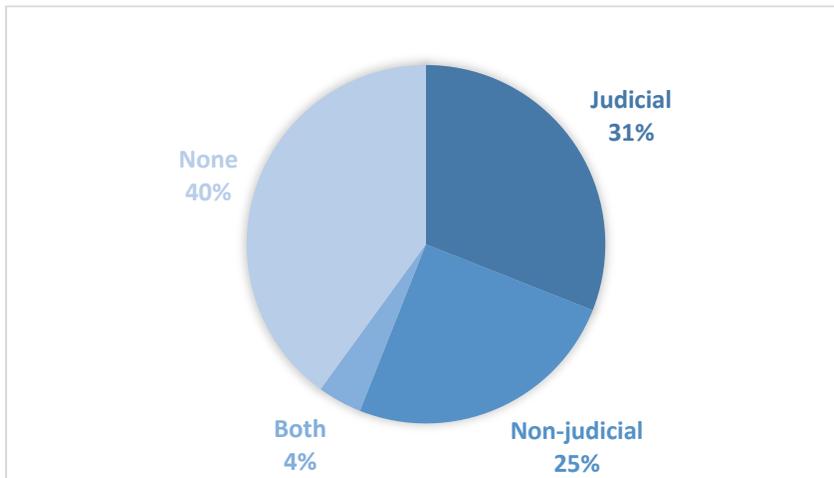


Figure 4. Access to Grievance Mechanisms for Corporate Human Rights Violations (%)

Judicial Grievance Mechanisms

The rate of judicial action varies by violation type, as shown in Figure 5. The rate of judicial response is relatively similar among abuses of physical integrity (32 percent), economic,

social and civil rights (31 percent), environment (25 percent) and labor (28 percent). The remaining category—violations of individuals’ health or right to health—elicits a higher rate of judicial action than the others at 49 percent.

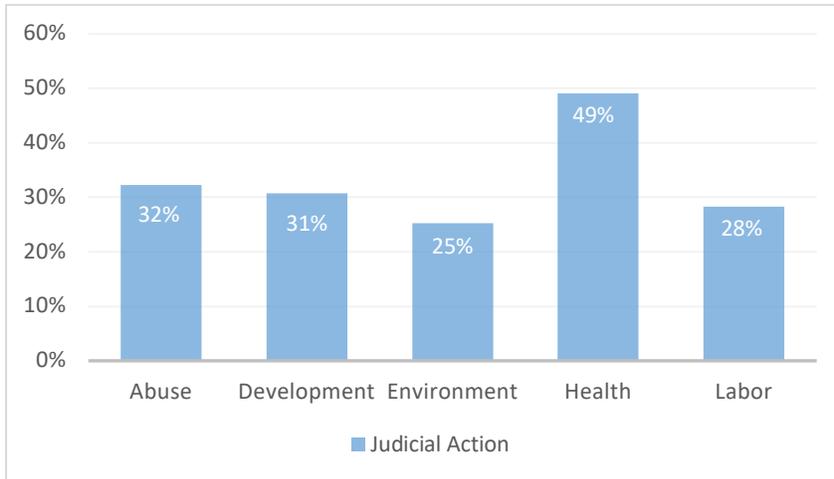


Figure 5. Judicial Grievance Mechanisms, by violation type (%)

There is interesting variation across industries, however (Figure 6). Of the three most prominent industries—extractive, agriculture, and apparel and textiles—we can observe that, in the majority of violations, victims do not have access to remedy. Even so, what is perhaps most notable, we do see accountability efforts in the extractive and agriculture industries, where many might expect to observe little to no judicial activity. The apparel and textile industry, however, appears to remain under the radar. Only 12 percent of incidents in this industry are met with formal, judicial mechanisms. Such basic descriptive data have important practical and policy implications.

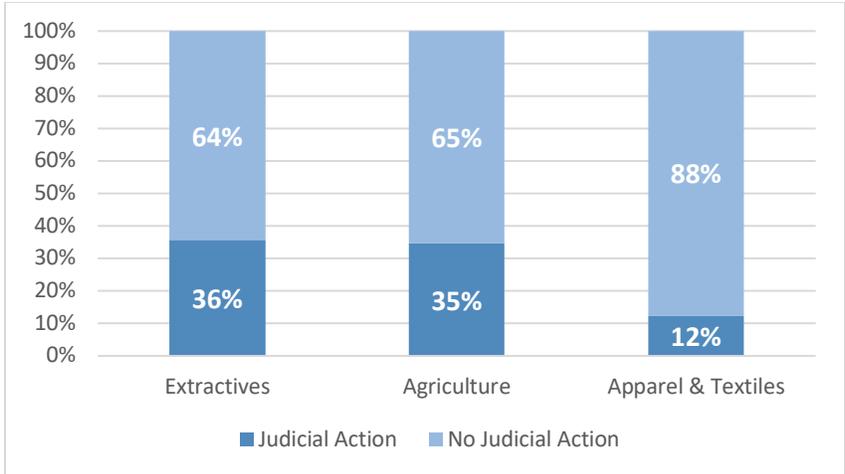


Figure 6. Judicial Grievance Mechanisms, by key industries (%)

Non-Judicial Grievance Mechanisms

Non-judicial grievance mechanisms, as illustrated in Figure 4, are used in 25 percent (or 256 of 1,007 violations) of the corporate human rights abuses in the CHR. Interestingly, Figure 7 illustrates that we do not observe great variation in terms of the context in which non-judicial grievance mechanisms are used. Though they are used in nearly one third of environmental violations, victims of violations in all other categories have access to non-judicial remedy between 20-25 percent of the time. This indicates that regardless of the type of abuse, victims, states, and corporations use non-judicial grievance mechanisms regularly.

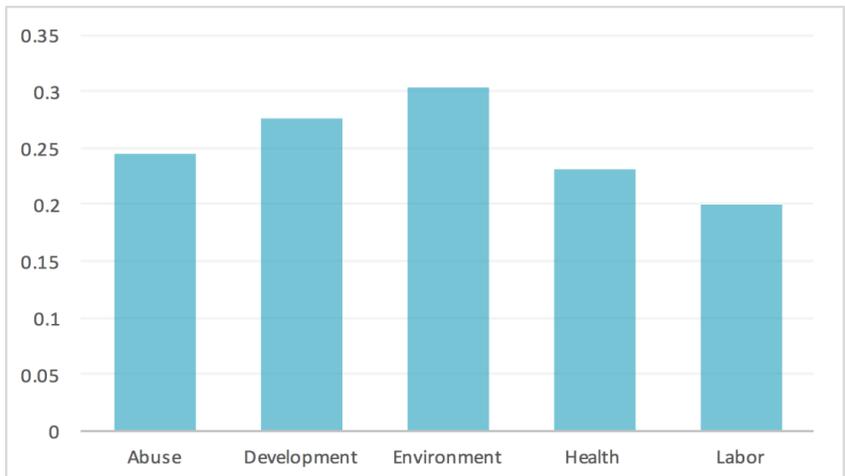


Figure 7. Non-judicial Grievance Mechanisms, by violation type (%)

Figure 8 illustrates that the state is most likely to be involved in non-judicial grievance mechanisms when the company has committed a physical integrity abuse (65 percent). The state participates in non-judicial grievance mechanisms as frequently as other parties for development or environmental claims (47 percent). The state becomes less frequently involved than non-state parties when the allegation is a labor violation (26 percent) or a health violation (16 percent).

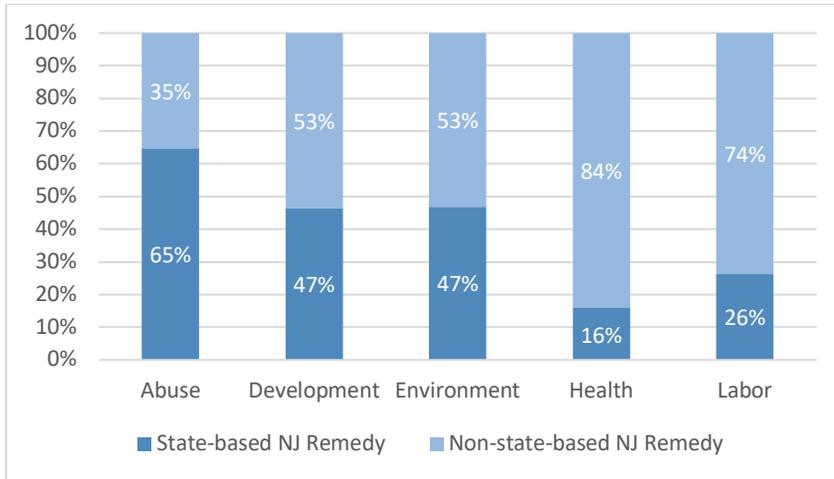


Figure 8. State-based Non-judicial Grievance Mechanisms, by violation type (%)

Whereas different industries display variation in terms of judicial action (see Figure 6), Figure 9 shows little variation across industries when it comes to non-judicial remedy. The three most prominent industries—extractives, agriculture, and apparel/textiles—experience similar rates of non-judicial remedy in response to violations: 25 percent for extractives, 28 percent for agriculture, and 32 percent for apparel and textiles. A comparison of these three industries judicial and non-judicial action response rates shows interesting outcomes. The extractives and agriculture industries experience much lower rates of non-judicial remedy (25 percent and 28 percent, respectively) than judicial action (36 percent and 35 percent, respectively). Whereas the apparel and textiles industry experiences much higher rates of non-judicial remedy (35 percent) compared to judicial action (12 percent).

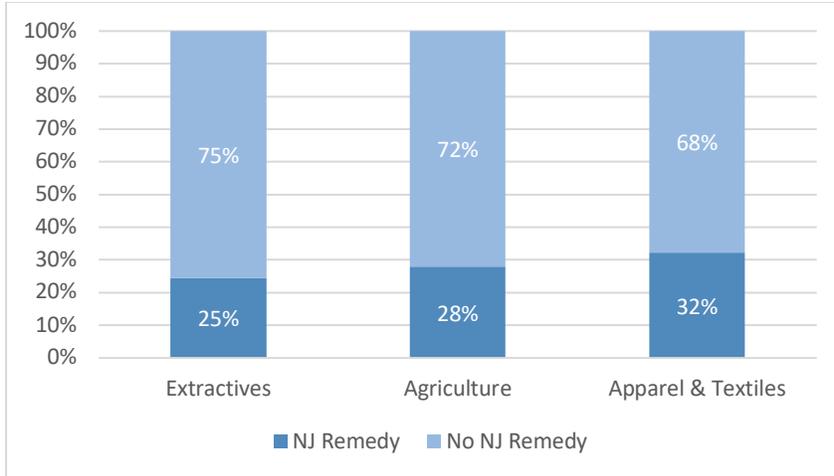


Figure 9. Non-judicial Grievance Mechanisms, by key industries (%)

LESSONS ABOUT ACCESS TO GRIEVANCE MECHANISMS RELATED TO ARP III

There are numerous lessons to be learned from the data presented here. We orient our discussion below with the ARP III Project in mind, while the penultimate section highlights some additional insights that are important to consider when seeking to reduce corporate human rights abuse and/or improve access to remedy.

Grievance Mechanisms Used in Tandem

Given the more expansive notion of access to remedy, there is great interest—and little empirical data—as to how mechanisms are utilized concurrently. In the CHRD, 42 incidents of corporate human rights abuse were met with multiple types of grievance mechanisms, meaning judicial and non-judicial mechanisms were used to seek redress for the same corporate human rights abuse. In a majority (73 percent or 31 incidents) of those claims, stakeholders sought remedy through two separate mechanisms. In the remaining 11 incidents, stakeholders utilized three to five separate grievance mechanisms (see Figure 10). Affected parties were willing to seek remedy through multiple channels but the number drops off significantly after two mechanisms have been utilized, regardless of the outcome.

In many cases, even if the two attempts at remedy are unsatisfactory, stakeholders seem to make no further attempts.⁸

The 42 incidents analyzed in this section are associated with 69 judicial or non-judicial remedy efforts. These incidents also span violation types: 10 are claims of physical integrity abuse; 9 are environmental claims; 6 are development and poverty claims; 7 are for labor; and 10 related to health. These claims also span industries: 12 occurred in the agriculture industry; 2 in the chemical industry; 2 in construction; 1 in the finance sector; 22 in the extractive industry; 1 in the services sector; and 2 in transport. It is interesting to note that the extractive industry is the modal category, which may be the result of this industry's interest in, or willingness to, use non-judicial grievance mechanisms.

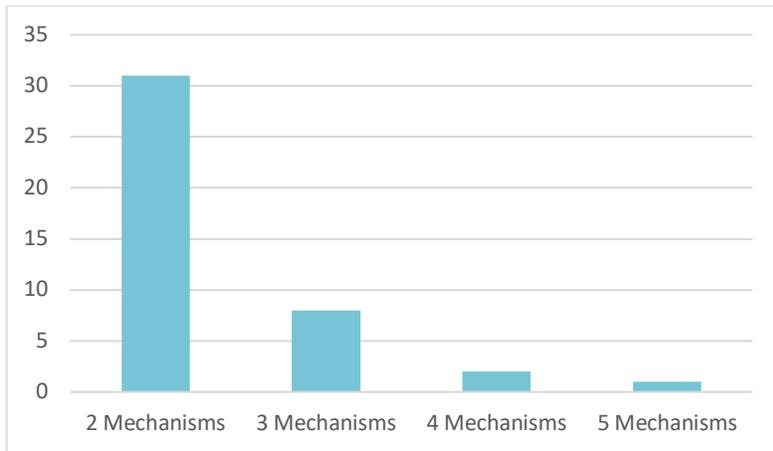


Figure 10. Number of Grievance Mechanisms Utilized per Violation (count)

Of the 42 incidents that resulted in the use of two or more grievance mechanisms, victims or their advocates first turned to judicial mechanisms in 14 instances. In 24 cases, alternatively, the allegation is associated first with non-judicial remedy before turning to a second mechanism. In four cases, judicial and non-judicial mechanisms were used in close enough temporal proximity to be described as simultaneous use (see Figure 11).

The data reveal that, when multiple grievance mechanisms are used, non-judicial mechanisms are most frequently employed in the first instance. This finding is not surprising considering that non-judicial mechanisms are expected to be less costly and more efficient.

⁸ Note that we are not claiming that victims' issues were addressed in those cases in which only one grievance mechanism was used. Instead, we are interested in better understanding how and why multiple mechanisms come into play.

One interpretation is that affected parties are engaging in non-judicial grievance mechanisms in a relatively timely fashion. Another interpretation could also be that in these cases non-judicial grievance mechanisms are largely unsatisfactory, as many victims subsequently seek remedy through formal, judicial processes.

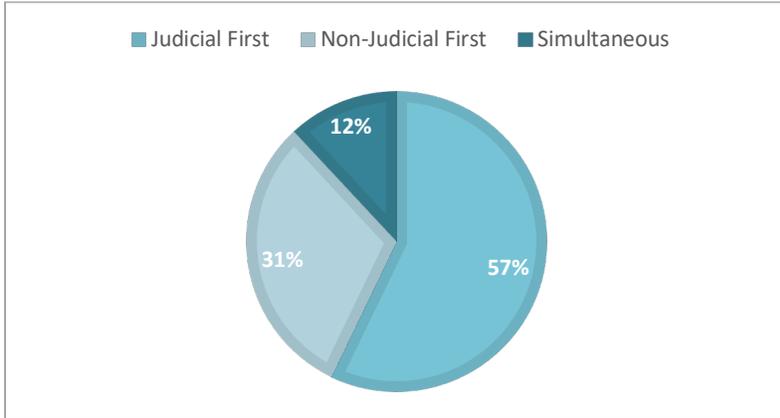


Figure 11. First Instance of Grievance Mechanism Used for Allegations with >1 Mechanism (%)

Once we move past the first grievance mechanism utilized which, as described above, is more often non-judicial, there is no clear pattern as to how judicial and non-judicial grievance mechanisms proceed. Non-judicial grievance mechanisms, it seems, are used in greater numbers than judicial remedy mechanisms. Only 5 cases led to the pursuit of two or more separate judicial grievance mechanisms, whereas 13 saw the use of two or more separate non-judicial grievance mechanisms.

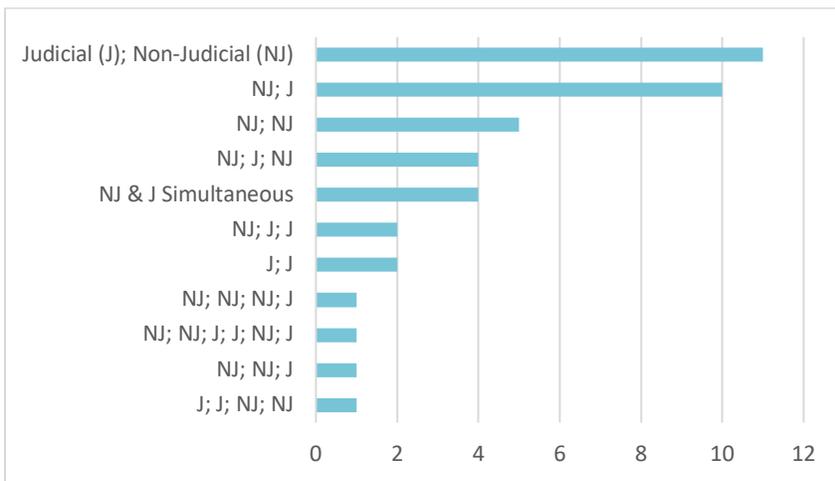


Figure 12. Use of Grievance Mechanisms Chronologically

Sixty-nine grievance mechanisms were used in the incidents that employed more than one mechanism, as noted above, and of these, 38 were non-state-based non-judicial mechanisms. Of the 38 non-state based non-judicial grievance mechanisms, seven were used *after* a judicial mechanism, and the rest were used before, or simultaneously with, a judicial mechanism. This suggests that victims are most likely to seek non-state-based non-judicial mechanisms after they have sought remedy through the judiciary. Of the state-based non-judicial remedies, five were used after a judicial mechanism and 13 were used before or simultaneously with a judicial mechanism.

Remedy Administration vs. Remedy Provision

While the state oversees all judicial grievance mechanisms and related outcomes, non-judicial grievance mechanisms can be administered by any number of actors. As we researched non-judicial remedy efforts, however, it became clear that while one actor might administer the non-judicial remedy mechanism, another actor might control whether the related remedy outcome is actually achieved. We analyzed 69 separate non-judicial remedy efforts utilized in the 42 incidents with more than one remedy included in the CHR. We sought to determine which entity—the state, the company, an international organization, or another—administers the non-judicial mechanisms and which entity ultimately controls whether the remedy is provided.

We found the state administers 46 percent (32) of the non-judicial grievance mechanisms (e.g., Labor Directorate, Local Board of Conciliation and Arbitration) while firms administer 24 percent (17) of the mechanisms analyzed (e.g., company-led negotiations, company-led settlement attempts). Yet, when we assessed which actor actually controlled the provision of remedy, we found an opposite pattern. The state only controlled the remedy provision in 20 percent (14) of the non-judicial grievance mechanisms, including outcomes such as administrative orders imposed by state ministries and impact assessments (human rights, environmental, etc.) conducted by state authorities. Firms, alternatively, controlled the provision of remedy in 45 percent (31) of the non-judicial grievance mechanisms, even if the mechanism was administered by the state or another actor.

Company-controlled remedy provision was usually associated with financial compensation paid to victims and families, which were often ordered by the state (10

incidents). For example, in the case of the Chilean hypermarket chain Líder, which was accused of implementing anti-union practices and discriminating between union and non-union employees, the Chilean Labor Directorate reportedly issued fines to the company on three separate occasions. This remedy—financial compensation—is company-administered because Líder paid the fines, but the mechanism is state-based and, thus, the state was central to the non-judicial remedy. Furthermore, of the 22 firm-administered remedies, the state was central to the design and/or mandate of 18 of them, some of which addressed environmental rehabilitation projects. In addition to the previous Líder example, consider also the case of Baterías de El Salvador (BAES), whose operations in San Juan Opico allegedly resulted in lead and acid contamination of the area around its factory. In 2012, the government and the company reportedly began developing mitigation measures that the company later implemented over the course of 16 weeks under the order of the Ministry of Environment and Natural Resources (MARN 2012). Similarly, the Peruvian company Minera Caudalosa operated a mine that collapsed in June 2010, spilling 25,000 cubic meters of toxic waste and contaminating natural water sources for local communities. As a result, the state reportedly ordered the company to implement a 90-day remediation plan that included activities such as replanting of pastures, providing water troughs and fences along riverbanks to prevent livestock from drinking the polluted water, and providing medical assistance to the effected population (Salazar 2010). These examples illustrate the ways in which company-implemented remedy occurs as a result of close coordination with the state.

Twenty-four percent (17) of the non-judicial mechanisms used were administered by international organizations, including the Inter-American Commission of Human Rights, the Organization for Economic Cooperation and Development, and the International Labor Organization. We encountered one use of the World Bank Group's Compliance Advisor Ombudsman mechanism, which oversaw an independent investigation into corporate abuse and ultimately created a multi-stakeholder conflict resolution roundtable. Only in four percent (3) of the non-judicial mechanisms were such actors responsible for the provision of the remedy outcome.

Of the 32 non-judicial grievance mechanisms administered by the state, plus three mechanisms administered jointly by the state and (an)other entity(ies), 10 were used in the

agriculture industry and 14 in the extractive industry.⁹ Of the 17 mechanisms administered by firms, plus the four mechanisms administered by the company and an(other) entity(ies), more than half (12) were used in the extractive industry. The extractive industry also utilized the majority of the non-judicial mechanisms administered by international organization—13 of the 17.

Another finding worth noting is that there were no discernable patterns of non-judicial grievance mechanisms initiated by corporations. While many advocates seek to emphasize utilizing corporate grievance mechanisms or internal processes, the data do not reflect this. The majority of firm-led non-judicial mechanisms utilized appear to be largely *ad hoc*—very few of the corporate mechanisms are established or part of extant policy. Instead, firms design remedies in response to a specific allegation, and mostly in the form of financial compensation for affected workers, families, and/or communities, as well as plans to rehabilitate the environment and/or mitigate environmental damages. The lack of evidence we encountered may reflect a lack of transparency and/or public awareness about such mechanisms, as opposed to their non-existence.

Of the few pre-existing non-judicial grievance mechanisms utilized, the majority were administered by international organizations such as the IACHR or the OECD. Greater transparency around established corporate-led non-judicial grievance mechanisms could increase awareness of them among the public and potential stakeholders and, potentially, increase their legitimacy.

Do Corporations Resist Grievance Mechanisms and/or Intimidate Victims?

We encountered multiple instances of corporate pushback against remedy attempts. The first, and least extreme, is corporate non-compliance, which also happens to be the most common type of pushback. The CHRD includes instances of companies refusing to abide by recommendations created by non-judicial grievance mechanisms, such as when a National Council for the Prevention of Discrimination found that an accused company had acted in a

⁹ When a mechanism is jointly-administered it suggests that both the company and another entity play a role in ensuring that remedy is provided (e.g., the state and company developing an environmental mitigation measures to address lead and acid pollution; a company, the OECD Watch Group, the OECD, and other stakeholders designing a new labor rights strategy for the company to implement).

discriminatory manner and ordered it to engage in a conciliation process with the victim; an order which the company outright rejected. In response to another claim, two national Ministries ordered a company to build a treatment plant for liquid and gas waste produced in its factory, which the company failed to do for several years. In other cases, however, companies actively resist remedy outcomes. We found several instances of such pushback, including when a company complied with portions of an environmental remedial plan but refused to relocate community residents, claiming that the environmental pollution did not warrant relocation.

Finally, we encountered a handful of cases involving the most extreme form of pushback, when companies threaten stakeholders. In one instance, a company filed a SLAPP lawsuit against local communities that were holding community consultations to review the company's new mining concession as a result of the company failing to conduct prior consultations with the local indigenous communities. Another example entails a company that reportedly harassed and threatened the lawyers representing the plaintiffs in a case against the company. In response to the threats, the lawyers successfully sought precautionary measures from the IACHR to guarantee their safety.

Difficulty Measuring Effectiveness or Stakeholder Involvement

We found very little information relevant to the effectiveness criteria outlined in Guiding Principle 31 and which are covered in work stream 1 of OHCHR's ARP III work.¹⁰ We believe this follows from the previously discussed lack of transparency (coincidentally, a criterion) associated with non-judicial grievance mechanisms, specifically. Reporting on corporate human rights abuse and resultant grievance mechanisms is very unlikely to describe the stakeholders involved in the design of the remedy, for example, which makes it difficult to determine the legitimacy and accessibility of the mechanism. Furthermore, given the previously described *ad hoc* nature of most corporate-led non-judicial grievance mechanisms that we analyzed, predictability is very unlikely. If new grievance mechanisms are utilized with every new abuse, victims are unable to look at previous cases to understand

¹⁰ These criteria are legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility, a source of continuous learning, and based on engagement and dialogue.

the process or foresee a set of possible outcomes. Lack of transparency and predictability make it challenging to assess the legitimacy, equitability, or rights-compatibility of non-judicial grievance mechanisms. The limitations, one can imagine, would certainly shape how stakeholders view the legitimacy of any non-judicial grievance mechanism, as well.

ADDITIONAL INSIGHTS ABOUT ACCESS TO REMEDY MECHANISMS

Given the richness of the CHRDR, we gained many additional insights throughout this inquiry, which are shared here. These insights center around how grievance mechanisms are used (is there evidence of escalation?) and what types of grievance mechanisms we observe (does the grievance mechanism redress past abuses or try to avoid future wrongdoing?). Perhaps most important, however, is a point often overlooked—the central and multifaceted role of the state. Grievance mechanisms (even non-judicial mechanisms) rely on state action; yet, the state is also sometimes the victim (e.g., environmental spills the state must pay to address). How does the state shape access to remedy? Each subsection below includes examples from the CHRDR to illustrate the points made below and to give the reader an idea of the rich detail available in the CHRDR.

Evidence of Escalation?

As described in the previous section, victims frequently seek remedy through more than one grievance mechanism, which creates several pertinent questions. What necessitates pursuing more than one grievance mechanism? In what ways might one mechanism fail to satisfy all demands for remedy? How might one grievance mechanism repair some victims and not others? We believe this is an important yet under-researched aspect of access to remedy. While each case is unique, we offer for consideration two common reasons why additional grievance mechanisms are used, subsequent to the original attempt. The first, and perhaps most obvious, reason is that the original attempt fails to secure remedy. Be it a lawsuit that a judge dismisses, failed arbitration, or company non-compliance with environmental rehabilitation plans, a grievance mechanism can fail in a variety of ways, leading victims to try something different.

Example 1.

In February 2006 the Pasta de Conchos coalmine in Coahuila, Mexico exploded as a result of a methane gas buildup. The explosion trapped and killed 65 miners and injured 13 others. Only two bodies were recovered. This incident led to multiple remedy attempts through a variety of mechanisms over the next decade plus. The mine owner, Grupo México, agreed to pay the victims' families three times the monthly salaries of the miners until social security services determined the pensions to be paid out. However, the company reportedly paid the monthly salaries for only one year (Torres Ruiz 2008). One year later, in April 2007, the state prosecuted low-level Labor Department officials, but the trial did not result in any convictions (Mendez and Garduno 2007). The simultaneous manslaughter trial of Grupo México executives resulted in payment of US \$16,500 to each of the victims' families (Reuters 2010). In early 2008, the Mexican federal government led an attempt at settlement between the company and the families, which the families later rejected. Three years later, in February 2010, three widows sued Grupo México and its Phoenix-based subsidiaries in a US District Court in Arizona under the federal Alien Tort Claims Act (Reed Ward 2010). In 2011 the court dismissed the case for lack of subject matter jurisdiction. In the same month that the claim was filed in US court, a collection of Mexican human rights and labor NGOs presented before the Inter-American Commission of Human Rights a petition against the state of Mexico for the violation of the rights to life, a fair trial, judicial protection, and humane treatment (Centro Prodh 2019). In March 2018, the Commission recognized the responsibility of the Mexican State and its non-compliance with its obligations to guarantee the fundamental rights of the miners, given that the State did not oblige Grupo México to respect security necessities (Peace Brigades International 2019). Lastly, in May 2019, the Mexican president pledged to recover the bodies of the miners.

The victims of Pasta de Conchos and their families attempted to access remedy through several judicial and non-judicial channels. According to the IACHR admissibility report, "the petitioners hold that despite their constant activity to further the investigations, a situation of impunity exists... They emphasize that it has been 10 years since the tragedy occurred, yet no state agent has been criminally punished, that the administrative sanctions set are not appropriate to bring to justice and punish those responsible for the serious human rights violations..., that the dead miners' bodies have not been rescued, and that the miners' family members have not been granted reparation measures" (IACHR 2019). This excerpt highlights the failure of the various remedy mechanisms utilized. It also emphasizes the importance of taking seriously the demands of victims. In this case, the miners' families have been demanding the return of their bodies since the beginning. It is worth considering whether attempts at remedy would have continued on unsuccessfully for as long as they have had the bodies been recovered right away.

A second recurring reason is that the original grievance mechanism does not actually constitute reparation. This is commonly seen in cases where the state seeks "remedy" that does not align with the needs of the victims, such as the state issuing a fine to the company

for its violation. Company payment to the state does little to nothing to repair victims, depending on if and how the state redistributes the money. In these cases, victims often pursue separate paths to remedy.

Example 2.

In January 2011, Argentinean labor authorities investigated and ultimately accused Nidera of violating the rights of seasonal workers by holding at least 130 people in forced labor-like conditions in San Pedro, a province of Buenos Aires (Maria Sjödin 2012). That same month, the National Labor Ministry submitted a formal request to a local court to investigate and open a case against Nidera. However, the judge denied the request to investigate, thereby precluding all judicial proceedings. Later that year, in June 2011, the non-governmental organization OECD Watch, in coordination with a group of Argentine and Dutch NGOs, filed a complaint with Nidera's corporate office in the Netherlands. The complaint alleged that Nidera had abused the human rights of temporary workers at its corn seed processing operations, detailing poor living and working conditions at the plant. The company and OECD Watch participated in negotiations led by the OECD National Contact Point Netherlands. The parties agreed on a number of terms to improve the working conditions at the site in Argentina. Notably, Nidera committed to implement an operational-level grievance mechanism. Members of the OECD Watch group visited the site one year after the implementation of the new regulations and confirmed that Nidera had indeed complied with the terms of the agreement (OECD Watch, n.d.).

These first two reasons highlight the failure of the original grievance mechanism to succeed or to satisfy victims. Rather than give up, victims more often maintain their demands for remedy through new channels. In some cases, this could be described as an escalation approach. If a non-judicial grievance mechanism fails to repair victims, they might turn to a judicial mechanism, where legally binding determinations place more weight behind the demand. On the other hand, domestic judicial grievance mechanisms might fail, leading victims to lose hope in all domestic mechanisms and, thus, seek regional or international channels. The use of multiple grievance mechanisms does not always indicate escalatory measures, but at the very least, it is clear that dissatisfaction or failure on the first attempt does not necessarily put an end to victims' attempts to access remedy.

Are Grievance Mechanisms Used for Redress or for Avoiding Future Wrongdoing?

Throughout our research, another theme emerged—the importance of distinguishing between actions for redress and actions for an improved future. In theory, a remedy is a

means of redress in response to an undesirable situation. Victims of corporate human rights abuse must receive redress that attempts to set right a specific wrong. In this sense, remedy is technically backward-looking. However, a sole focus on backward-looking remedy fails to guarantee that a certain abuse will not recur, which can lead to a never-ending cycle of abuse, grievance mechanisms, and remedy. It is obvious that corporations must also take steps to ensure the prevention of future abuses. The question, however, is whether forward-looking actions count as remedy.

The majority—63 out of 69—of non-judicial grievance mechanisms that we analyzed align with the technical definition of remedy as redress. These grievance mechanisms were designed to respond to specific abuses and repair victims. Examples include financial compensation, payment of fines to the state, medical treatment, and environmental cleanup, among others. On the one hand, it is positive that the majority of grievance mechanisms address specific abuses and, thus, seek to repair victims. On the other hand, these grievance mechanisms do little to nothing in terms of prevention, leaving victims vulnerable to future abuses.

We found four instances of non-judicial grievance mechanisms that are strictly forward-looking. These include the implementation of a new corporate labor rights strategy, a state mandate for a new corporate-run waste management system, and the exclusion of a company from the national social security system. These forward-looking remedy attempts seek to change company behavior through new regulations or the use of incentive-punishment structures. While certainly not infallible, forward-looking measures provide guarantees of prevention. At the same time, these measures are designed for would-be victims—they attempt to minimize the pool of future victims. As a result, forward-looking “remedy” attempts only address victims of past abuses to the extent that they are protected from future abuses. Forward-looking measures do not repair the harms already done to victims.

Example 3.

For several years, the Chilean Labor Directorate (Dirección del Trabajo) accused the national “hypermarket” chain Líder (parent company Walmart) of implementing anti-union practices, including exerting pressure and threats against union members and discriminating between union and non-union employees (Trabajadores Adelante; Centro Derechos Humanos UDP; Dirección del Trabajo 2006). As a result, Líder was reportedly

fined and judicially sanctioned multiple times. Union leaders have stated that the fines imposed are extremely low and do not prevent Líder from committing further abuses (Sentidos Comunes 2011). In 2008, the National Federation of Líder Workers (Federación Nacional de Trabajadores Líder) initiated a campaign to change the company's labor policies (Centro de Derechos Humanos UDP). Eventually, the union and the company came to a collective bargaining agreement that included a 15 percent increase in the salaries of union workers, a bonus to end the conflict, and a modification of working conditions for union employees (Valencia 2012). This non-judicial remedy represents a marked improvement for union workers and a decreased risk of future anti-union practices. However, this remedy is solely forward-looking and does nothing to repair the workers who previously received threats, suffered discrimination, lost their jobs, and more.

Ideally, non-judicial grievance mechanisms would include both backward- and forward-looking components. Or, solely-backward-looking grievance mechanisms would accompany actions for the future that occur outside of the realm of remedy. We found only two such instances in which the grievance mechanism could be viewed as addressing both the past and the future. Ensuring reparations for the past as well as guarantees of non-recurrence may lead to greater legitimacy. Without implementing forward-looking measures, companies may write off remedies for wrongdoing as the “cost of doing business” and avoid the necessary changes to respect human rights. Additionally, victims may see remedy as a pay-off in exchange for silence or acquiescence and not a guarantee that their rights will be respected in the future.

Example 4.

In February 2010, Argentinian labor authorities, together with human rights and migration officers, inspected the farm of Gipsyes S.A. They found poor and insecure working conditions as well as children working in the fields (Diario Jornada 20120). As a result, the Directorate for the Protection of Human Rights announced that it would file a criminal complaint for slavery against Gipsyes before the Santa Rosa Fiscal Unit (Unidad Fiscal) of the Attorney General's Office (Ministerio Público) (Pfaab 2012). The labor authorities reportedly sanctioned the company and urged it to improve its working conditions and cease using child labor (Diario Jornada 2012). While the effectiveness of simply urging a company to change its behavior is doubtful, this remedy attempt at least acknowledged the need to curb potential future abuses while also attending to past ones.

Centrality of the State

The final theme that emerged here and elsewhere in our work is the centrality of the state. Above, we discussed how the state is often a key figure in access to company-led non-judicial grievance mechanisms. Examples include various ministries of health and environment

conducting assessments on the impact of corporate activity, or state-company negotiations over rehabilitation plans. The state plays a large role regardless of the type of grievance mechanism.

State centrality also arises out of the dual role played by the state: victim and/or co-perpetrator of corporate abuse (see Olsen 2015). The state as a co-perpetrator, and the implications for victims' access to grievance mechanisms, is largely ignored. In addition, the state as a victim is also under-researched. Several cases of corporate abuse recorded in the CHRD indicate that the state pursued remedy seemingly separate from victims directly affected by the abuse. The most common form of remedy for the state comes from the company paying a fine, often in response to environmental damages such as in the example above. This raises the question whether access to grievance mechanisms and remedy is related to the extent that the state is considered a victim of corporate abuse or to the extent that the state is acting on behalf of victims. From a corporate perspective, however, it is reasonable to assume business leaders would consider such payments as remedy. Victims, however, may not view it as such.

Thus, state access to "remedy" can compete with or complement victims' access to grievance mechanisms and/or remedy. If a company pays a state-issued fine, should the violation be considered remedied? Does it depend on whether the state, in turn, provides redress to its citizens? Is victims' access to remedy helped or hindered when the state is also pursuing criminal claims or financial sanctions against the corporation? These questions are important to consider when addressing victims' access to remedy.

Example 5.

In May 2003, an oil spill occurred at Unidad de Propósitos, a Texaco facility in Nicaragua. The spilled oil contaminated the local community's underground water sources (Garcia 2004). Two years later, in July 2005, the Attorney General (Procuraduría General) represented the Nicaraguan State against Texaco in a domestic civil court proceeding. The state claimed that Texaco had not mitigated or repaired the environmental damage caused by the oil spill and asked the court to order Texaco to comply with previously issued environmental orders and to financially compensate the state (Silva 2005). This judicial action brought by the state happened three years before and seemingly without connection to the May 2008 civil claim against Texaco brought by 90 members of the local community (Garcia 2008; Hernandez 2008; Marengo 2010).

CONCLUSION

This overview of findings from the CHRD identifies trends, developments and patterns related to the grievance mechanisms and remedy efforts associated with corporate human rights violations. Some of these findings highlight areas deserving further inquiry, such as the high volume of violations in the agriculture sector. Other patterns belie widely held assumptions regarding best practices for remedy. For example, the dearth of corporate-based grievance mechanisms challenges the idea that such procedures are the most favorable mechanism for victims to receive swift justice. Another overlooked aspect of the business and human rights agenda is the complex and multifaceted nature of the state—as it can play the victim, perpetrator, and purveyor of justice, among other roles.

While a great deal of scholarly inquiry on business and human rights has a case-specific precedential approach, such research is complemented by empirical data that highlights broader patterns through the systematic gathering and analysis of longitudinal data on human rights violations and their associated grievance mechanisms. Database research in this field will be benefitted by greater transparency related to abuse and associated grievance mechanisms. Future scholarly inquiry using empirical research methods and the CHRD can help build our knowledge base and answer more of the foundational questions important to the work of advocates, business leaders, and scholars seeking to improve the human rights of individuals around the globe.

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Appendix A: A Word on Databases

Database projects, like this one, that are based on media reporting have limitations that are important to note. First, given the reliance on news sources, some might be concerned about underreporting or bias. Newspapers may focus on large, globally recognized brands over smaller firms, and thus underreport violations of less notable firms. Despite our concerns about underreporting, we found that the BHRRC (the source of our sample) covered more allegations of abuse for more firms across more countries than existing secondary literature and existing data sources.¹¹ Bias in coverage was also a concern. We conducted two country-specific tests in which researchers recreated our database, but only using domestic sources. From this process, we estimate the BHRRC includes approximately 80-85 percent of the cases; that is, our coders identified 15-20 percent more cases than the BHRRC. This oversight, however, is likely a result of staff time and resources.

The other potential worry is that violations included in the database are unsubstantiated or false. There are three points to consider. First, in part to avoid libel lawsuits, the BHRRC evaluates each incident to ensure its validity prior to posting it on their website. BHRRC employees, based around the globe, rely on reputable news sources with high journalistic integrity. If anything, relying on the BHRRC may be a cause of concern about underreporting due to the high standards they hold prior to publicizing corporate human rights violations. Second, the CHRD team searched for additional information, using only reputable news sources (LexisNexis Academic; reputable local news sources), thereby triangulating the violations found in the BHRRC.

Finally, it is important to underscore that such incidents are not made public without risk—human rights advocates and victims are often the most vulnerable, especially in developing and emerging economies. In 2017 alone, more than 300 human rights defenders were murdered globally (Frontline Defenders 2018). In Latin America, for example, two

¹¹ Before deciding to use the BHRRC, we explored other sources on corporate human rights abuse. The coverage, however, was even more limited and often included only publicly traded firms based in Europe or the US. Proprietary databases, such as Sustainalytics, Asset4, or MSCI, include aggregate measures about corporate social responsibility and include information on “controversies” or “concerns.” Even so, the coverage of those controversies is often inconsistent and only skims the surface of the nature of the violation and, importantly, excludes information on related remedy mechanisms.

winners of the prestigious Goldman environmental prize were murdered—Isidro Baldenegro López, a leader of the Tarahumara community in Mexico and Berta Cáceres, a Honduran indigenous leader—despite their peaceful efforts to raise awareness against illegal mining and the dangers of an internationally-financed hydroelectric dam, respectively (Lakhani 2018). In addition to victims, journalists are also at risk. Reporters Without Borders highlight the seemingly constant threats, some deadly, journalists face across the globe (RWB 2017). Those who bring such incidents to light often take great risks in doing so.

Appendix B

CORPORATIONS & HUMAN RIGHTS DATABASE CODING GUIDE (ABRIDGED)

SECTION 1. PROJECT OVERVIEW

- The goal of the Corporations & Human Rights Database Project is to systematically code alleged corporate human rights abuses, using information on the BHRRC and information found in reputable national and international news sources.
- The unit of analysis is a Company Abuse Allegation (CAA). A CAA is an instance in which some group and/or individual accuses a company of a human rights abuse.

SECTION 2. THE CODING PROCESS

- In addition to coding sources that originate from the BHRRC website, coders are encouraged to review additional sources found through UNHCR REFworld, Lexis Nexis Academic All News database, Google/Google Scholar, and websites for company-specific information, as well as other online sources, as appropriate.

SECTION 3. THE QUALTRICS SURVEY

- The Qualtrics Survey is the coding tool used for capturing information about each Company Abuse Allegation (CAA) in the database.
- The survey includes questions that require “Yes”, “No”, and “UTD” responses. Coders choose “No” if, after searching all the sources, there was no evidence to support an affirmative answer. Coders choose “UTD” when there was mention in an article that the answer might be yes, but there was not enough to make a “Yes” selection. Coders choose “Yes” when there is evidence that supports this answer.

SECTION 3.1 COMPANY AND ALLEGATION DESCRIPTION

- Company Name
 - Parent Company
 - Company Consortia
 - Joint Ventures
- Unique ID
- Company Website
- Company Allegation Description
- Company Sector
 - Company Sub-Sector

SECTION 3.2 VIOLATIONS CHARACTERISTICS

- Violation Type
- Related Violation(s)
- Violation Location
- Company Sector and Sub-sector
- Violation City or Region
- Violation Start Date
- Violation Start Date Description

- Violation Ongoing?
- Date the Allegation Was First Reported
- Allegation Date vs. Violation Start Date
- Allegation Date Description

SECTION 3.3 PARTIES INVOLVED

- Affected Party/Parties
- Degree of Company Involvement in Violation
- State Involvement
- Description of State Involvement/Response
- Name of Violation Reporter
- Other Group(s) Involved in the Case
- Type of Involvement by Other Group(s)
- Third Party Verification of the Abuse

SECTION 3.4 RESPONSE

- Company Response When Allegation First Made
- Company Response Date
- Company Response Type
- Description of Company Response

SECTION 3.5 JUDICIAL ACTION

- Who Initiated the Judicial Action?
- Judicial Action Type
- Judicial Action Reached a Court
- Defendant Type
- First Date of Judicial Action Filing
- Current Status of Judicial Action
- Last Known Court Level
- Date of Last Decision
- Court Name
- Court Location
- Description of Judicial Action
- Damages
- Sentence Length

SECTION 3.6 NON-JUDICIAL REMEDY

- Were Non-Judicial Remedy Attempts Made?
- Who Initiated the NJ Remedy Attempts?
- Names and Actions of Organizations that Participated in the NJ Remedy Attempt
- Remedy Outcome
- Type of NJ Activity or Mechanism
- Remedy Start Date
- Is the Non-Judicial Remedy Ongoing?
- Remedy Description

SECTION 3.7 PROTESTS, STRIKES, AND DEMONSTRATIONS

- Evidence of the Following Events Associated with the CAA:
 - Organized Demonstration
 - Spontaneous Demonstration
 - Organized Violent Riot
 - Spontaneous Violent Riot
 - General Strike
 - Limited Strike
 - Anti-Government Violence
- Event Was Violent or Non-Violent
- Location of Event
- Duration of Event
- Description of Event
- Evidence and Description of Company Retaliation Against Alleged Victims or Their Advocates

SECTION 3.8 SOURCE LIST

APPENDICES IN THE CODING GUIDE

Appendix A: Legal Terms

Appendix B: Company Sectors and Subsectors

Appendix C: Violations Types