

Effectiveness Framework for Home-State Non-Judicial Grievance Mechanisms

- Charis Kamphuis & Leah Gardner

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Abstract

After more than fifteen years of public debate, law reform proposals and pressure from international human rights bodies, the Canadian government announced in early 2018 that it intends to create the Canadian Ombudsperson for Responsible Enterprise (CORE). While the CORE mechanism is still in the developmental phase, it is expected that it will have the power to independently investigate allegations of human rights violations against Canadian companies operating abroad in the natural resources and garment sectors. As such, it will be the first home-state non-judicial grievance mechanism of its kind in the world. However, the concept of such a mechanism is not new, but has in fact been the subject of discussion among international human rights institutions for at least ten years, including with significant commentary on the Canadian context. This chapter compiles and analyzes existing statements of public international law with respect to these kinds of mechanisms. It then identifies points of consensus and argues that there is an emerging consensus with respect to the principles that such mechanisms should abide by in order to ensure their effectiveness and legitimacy. This analysis will be of significant interest to those in Canada who are working to ensure that the CORE will provide an effective remedy for affected individuals and groups, and to others around the world who hope to create similar mechanisms.

Table of Contents

1. Introduction.....	2
2. The Canadian Ombudsperson for Responsible Enterprise.....	4
3. International Law & Extra-Territorial Regulation.....	5
3.1 The Guiding Principles on Business & Human Rights.....	5
3.2 The Maastricht Principles on Extraterritorial Obligations.....	8
4. Home-State Non-Judicial Grievance Mechanisms.....	9
4.1 The Guiding Principles on Business & Human Rights.....	9
4.2 The Maastricht Principles on Extraterritorial Regulation.....	10
4.3 The UN Working Group on Business and Human Rights.....	11
4.4 The IGWG on Transnational Corporations and other Business Enterprises.....	12
4.5 Statements of UN Human Rights Bodies to Canada.....	14
5. Effectiveness Framework: The International Standard.....	16
6. Conclusion.....	20

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1. Introduction

The problem of impunity for transnational companies operating in developing countries is widely recognized by activists and academics around the world and various bodies of the United Nations. In 2003 a group of Canadian scholars coined the term “governance gap” to refer to law’s global and systemic failure to prevent, ensure accountability, and provide remedy for corporate human rights abuses in the developing countries that host their operations, often referred to as “host states”.¹ While the study of this problem no doubt pre-dates this first use of this term,² the contemporary governance gap concept has since been widely adopted.³ In particular, those concerned with the governance gap have identified resource extraction as one of the areas of corporate activity generating the most significant human rights concerns.⁴

After more than fifteen years of public debate in Canada about the governance gap, related law reform proposals and pressure from international human rights bodies,⁵ the Canadian government announced in early 2018 that it intends to create the Canadian Ombudsperson for Responsible Enterprise (CORE).⁶ While the CORE mechanism is still in the developmental phase, it is expected to have strong powers to independently investigate allegations of human rights violations against Canadian companies operating abroad in the natural resources and garment sectors.⁷ It will

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¹ G Gagnon, A Macklin & P Simons cited in Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 9.

² For some discussion of historical research on global arrangements of corporate impunity, see: Shedrack Agbakwa, “A Line in the Sand: International (Dis)Order and Impunity of Non-State Corporate Actors in the Developing World” in Antony Anghie, et. al., eds., *The Third World and International Order: Law Politics and Globalization* (Leiden: Brill Academic Publishers, Martinus Nijhoff, 2003) at 3-6.

³ For some authors expressing a preference for the concept of “impunity”, see Charis Kamphuis, “Foreign Investment and the Privatization of Coercion: A Case Study of the Forza Security Company in Peru” (2012) 37(2) *Brook. J. Int'l L.* 529 at 556; Catherine Coumans, “Alternative Accountability Mechanisms and Mining: The Problems of Effective Impunity, Human Rights, and Agency” (2010) 30(1-2) *Can J Dev Stud* 27.

⁴ John Ruggie cited in Catherine Coumans, “Mining and Access to Justice: From Sanction and Remedy to Weak Non-Judicial Grievance Mechanisms” (2012) 45:3 *UBC L Rev* 651 at 661, at fn 43.

⁵ For a full account of this history, see: Charis Kamphuis, “Home-State Grievance Mechanisms: Law Reform Strategies in the Canadian Resource Justice Movement” in Isabel Feichtner & Markus Krajewski, eds, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Springer, 2018).

⁶ Global Affairs Canada, “The Government of Canada brings leadership to responsible business conduct abroad”, Press Release, (17 January 2018) online: https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringingleadershiptoresponsiblebusinesscond.html.

⁷ Global Affairs Canada, “The Government of Canada brings leadership to responsible business conduct abroad”, Press Release, (17 January 2018) online: https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringingleadershiptoresponsiblebusinesscond.html; Global Affairs Canada, “Responsible business conduct abroad – Questions and answers”, (10 April 2018) online:

thus be the first home-state non-judicial grievance mechanism of its kind in the world. The term “home state” commonly refers to the country where a transnational corporation is incorporated, headquartered and/or lists its publicly traded stocks.

References to home-state non-judicial grievance mechanisms have been an integral part of the governance gap discussion among international human rights institutions for at least ten years. This debate has generated, and has centered around, two key texts: the UN *Guiding Principles on Business and Human Rights*⁸ and the *Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights*.⁹ Our analysis in this chapter departs from the assertion that, although they are non-binding, these documents nonetheless qualify as sources of international law under the *Statute of the International Court of Justice*.¹⁰ Adopted unanimously by the UN Human Rights Council, the *Guiding Principles* constitute “general principles of law recognized by civilized nations”. As a statement endorsed by over forty international law experts, the *Maastricht Principles* qualify as a “teaching of the most highly qualified publicists”, which are considered subsidiary means for the determination of international law.¹¹

The Canadian government’s 2018 decision to create the CORE represented a significant departure from its policy status quo in the area since 2009, consisting of a Canadian Corporate Social Responsibility (CSR) Counsellor and a Canadian National Contact Point (NCP). Both the CSR Counsellor and the NCP could receive grievances, but their power was limited to convening the parties to voluntary mediation. The CORE announcement represented a much-needed recognition of the inadequacy of this approach.¹² In the debate leading up to the CORE announcement, industry representatives strongly advocated for a mechanism that would be limited to “joint fact finding” together with all of the parties.¹³ While the Canadian government has stated that the CORE will be independent, at the time of writing the details have yet to be confirmed. Given this

<http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.

⁸ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf. The *Guiding Principles* were endorsed by the Human Rights Council in 2011: UNGA, Human Rights Council, Resolution 17/4, 17th sess., (16 June 2011) A/HRC/RES/17/4 at para. 1.

⁹ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 3.

¹⁰ UN, *Statute of the International Court of Justice*, (18 April 1946), art. 38(1), online: https://www.icj-cij.org/en/statute#CHAPTER_II. The Statute is considered to be a definitive statement of the sources of international law, and an integral part of the United Nations Charter via Article 92: *Charter of the United Nations*, (26 June 1945), Can TS 1945 No 7, art. 92, online: <http://www.un.org/en/sections/un-charter/chapter-xiv/index.html>.

¹¹ The *Maastricht Principles* signatories came from universities and organizations located in all regions of the world and include current and former members of international human rights treaty bodies, regional human rights bodies, and former and current Special Rapporteurs of the United Nations Human Rights Council: see ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 3.

¹² For a summary of Canada’s voluntary approach from 2009 to 2018, and the widespread national and international criticism of its inadequacies, see Charis Kamphuis, “Home-State Grievance Mechanisms: Law Reform Strategies in the Canadian Resource Justice Movement” in Isabel Feichtner & Markus Krajewski, eds, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Springer, 2018).

history, along with the novelty of the anticipated CORE mechanism, a credible framework for analyzing its effectiveness is needed. This analysis will be of significant interest to those in Canada who are working to ensure that the CORE is a success, and to others around the world who hope to create similar mechanisms in their own jurisdictions.

In this chapter we analyze relevant sources of international law in order to generate an “effectiveness framework” for evaluating the design of home-state non-judicial grievance mechanisms with extra-territorial jurisdiction. Our empirical point of reference is the Canadian context and so we begin in part two of this chapter by conveying Canada’s public commitments to date in relation to its proposed CORE mechanism. Next, in part three we turn to review the development of the *Guiding Principles* and *Maastricht Principles*, and their approaches to extra-territorial regulation. In part four we extract the relevant statements contained in these principles on the issue of home-state non-judicial grievance mechanisms. We complement this exercise by referring to more recent statements from UN human rights bodies, directed at Canada, that specifically address the deficiencies of Canada’s previous voluntary grievance mechanisms (CSR Counsellor and NCP).

With all of this material in the background, in part five we analyze these statements and argue that there is an emerging international consensus that state-based non-judicial grievance mechanisms are an important, if not essential, component of home-state measures to ensure access to remedy in the transnational business and human rights context. Moreover, we argue that the statements of international law on point strongly converge on three necessary features of such mechanisms. We refer to this as an “effectiveness framework”, which dictates that extra-territorial home-state non-judicial grievance mechanisms will only be considered effective where they: 1) have the power to provide a range of remedies, including restitution, rehabilitation, compensation, guarantees of non-repetition and interim measures to avoid future harm; 2) are independent from the parties and from governments; and 3) provide full disclosure of the grievance process and findings to victims and the public, unless a sufficiently important countervailing interest would be put at risk. In conclusion we discuss how this framework might apply to the proposed CORE mechanism, along with some future areas of research that may help further identify the necessary administrative and institutional features of such mechanisms.

2. The Canadian Ombudsperson for Responsible Enterprise

On 17 January 2018 the Minister of International Trade announced his intention to create the Canadian Ombudsperson for Responsible Enterprise (CORE) as part of the Liberal government’s “progressive trade” agenda.¹⁴ While the announcement involved few specific details, the government did state that the forthcoming Ombudsperson will be mandated to independently investigate allegations of human rights abuses overseas against Canadian companies operating in

¹⁴ Global Affairs Canada, “The Government of Canada brings leadership to responsible business conduct abroad”, Press Release, (17 January 2018) online: https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringingleadershiptoresponsiblebusinesscond.html.

the mining, oil and gas, and garment industries.¹⁵ This will include the power to compel documents, report publicly, recommend remedy and monitor implementation.¹⁶

The future Ombudsperson will have the power to make recommendations for compensation, corporate policy changes and apologies, where appropriate.¹⁷ The Ombudsperson will also have the power to recommend changes to government policy, including the withdrawal of trade advocacy support, as well as Export Development Canada financial support for a company.¹⁸ Although not specifically addressed in the government's announcement, presumably at least some of the government's decisions in response to the CORE's recommendations will be subject to judicial review in Canadian courts. Finally, to assist in the development of the Ombudsperson's mandate and operating procedures, the government has put into place a Multi-Stakeholder Advisory Body (MSAB) of experts from business, labour and civil society.¹⁹ The MSAB's mission is to counsel the government on the further development of its laws, policies and practices with respect to business and human rights.²⁰

3. International Law & Extra-Territorial Regulation

This section will introduce the development of the *Guiding Principles* and the *Maastricht Principles*. It identifies the claim in each document that it represents an authoritative codification of standing international human rights law. This section also fleshes out each text's competing view on the nature of the home state duty to take steps to address the extra-territorial human rights impact of businesses domiciled in their jurisdiction.

3.1 The Guiding Principles on Business & Human Rights

The debate over the Canadian government's response to the governance gap seems to have unfolded almost in lockstep with the global debate over the appropriate international law response. In 2003, the former United Nations Sub-Commission on the Promotion and Protection of Human Rights proposed *Norms on the Responsibilities of Transnational Corporations and other Business*

¹⁵ Global Affairs Canada, "Responsible business conduct abroad – Questions and answers", (10 April 2018) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.

¹⁶ Global Affairs Canada, "Responsible business conduct abroad – Questions and answers", (10 April 2018) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.

¹⁷ Global Affairs Canada, "Responsible business conduct abroad – Questions and answers", (10 April 2018) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.

¹⁸ Global Affairs Canada, "Responsible business conduct abroad – Questions and answers", (10 April 2018) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.

¹⁹ Global Affairs Canada, "Responsible business conduct abroad – Questions and answers", (10 April 2018) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.

²⁰ Global Affairs Canada, "Responsible business conduct abroad – Questions and answers", (10 April 2018) online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/other-autre/faq.aspx?lang=eng>.

Enterprises with Regard to Human Rights.²¹ These draft *Norms* would have imposed direct international human rights obligations on transnational corporations with enforcement mechanisms, including through state monitoring. The *Norms* were controversial and the member states of the then UN Human Rights Commission ultimately rejected them,²² opting instead in 2005 to create a new expert mandate, the United Nations Special Representative of the Secretary-General (SRSG) on the Issue of Human Rights and Transnational Corporations and other Business Enterprises. American political science professor John Ruggie was appointed to the position with a mandate²³ that culminated in the UN *Guiding Principles on Business and Human Rights*, unanimously adopted by the Human Rights Council in 2011.

The *Guiding Principles* are based on a three-part framework: states have the duty to protect human rights, corporations have the responsibility to respect human rights, and victims have a right to access effective remedies for violations. Notably, in this framework corporate responsibilities in international law are voluntary, originating in societal expectations, rather than international law.²⁴ The *Guiding Principles*' fundamental starting point is to affirm that states have a legal duty in international law to protect against human rights abuses in their territory and/or jurisdiction.²⁵

However, the definition of a home state's jurisdiction where its companies are operating overseas remains a significant point of controversy. In this regard, the *Principles* clearly indicate that states should set out the expectation that all businesses domiciled in their territory and/or jurisdiction respect human rights throughout their global operations. However, the *Principles* also add the following critical statement: "at present states are not generally required under international human rights law to regulate the extraterritorial activities" of these businesses, "nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis".²⁶ At the same time, the *Principles* require states to ensure that, when abuses occur within their territory and/or jurisdiction, those affected have access to remedy.²⁷

²¹ UNESCOR, "Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights" (2003) UN Doc E/CN.4/Sub.2/2003/12/Rev.2.

²² There is significant study of the lobbying efforts of corporations against the Draft Norms: Jens Martens, *Corporate Influence on the Business and Human Rights Agenda of the United Nations* (New York: Global Policy Forum, June 2014); Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 3.

²³ Ruggie consulted extensively with states, civil society groups and corporations. Some academics have tracked the ways in which his final proposal was influenced by the submissions of corporate lawyers: Sara L. Seck, "Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights" (2011) 49 Can YB Int'l Law 51.

²⁴ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 13.

²⁵ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 3.

²⁶ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 3-4.

²⁷ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 27.

Efforts to reconcile these statements reveal that the *Guiding Principles* contain a curious and perhaps even contradictory approach to states' extra-territorial human rights obligations. According to the *Principles*, states must protect against human rights abuse in their territory and/or jurisdiction, but they have no obligation to regulate the extra-territorial activities of their companies, even if elements of these activities are in fact in their territory/jurisdiction. At the same time, states have a firm duty to provide remedies for human rights violations, including those that occur in their jurisdiction. Seeking a harmonious interpretation of this ambiguous situation, expert commentators have argued that the combination of the duty to protect and the duty to ensure access to remedy, when read in the context of the *Guiding Principles* as a whole, could be interpreted as creating obligations on states to exercise jurisdiction to protect against, and remedy, the extra-territorial human rights impacts of their corporate national.²⁸

Although the *Guiding Principles* claim to codify standing international law in the area²⁹, this proposition remains controversial among some civil society organizations, activists and academics.³⁰ Perhaps not surprisingly, questions about the scope of the state's duty to regulate in its jurisdiction to protect human rights are at the heart of the controversy. For example, the *Guiding Principles* declined to impose a clear legal duty on states to exercise due diligence before offering economic and political support to their corporate nationals, and they similarly failed to acknowledge that current state-based extraterritorial grievance mechanisms are inadequate.³¹ This helps explain why reputable international human rights organizations publicly criticized the *Guiding Principles* for failing to adequately address the core causes of the governance gap.³² This provoked public and equally critical responses from Ruggie, who accused his detractors of lacking political realism.³³

²⁸ See for example: Sara L. Seck, "Canadian Mining Internationally and the UN Guiding Principles on Business and Human Rights" (2011) 49 Can YB Int'l Law 51 at 111, 113; Sara L. Seck, "Conceptualizing the Home State Duty to Protect Human Rights" in Karin Buhmann, Lynn Roseberry and Mette Morsing, eds, *Corporate Social and Human Rights Responsibilities: Global Legal and Management Perspectives* (Hampshire, UK: Palgrave Macmillan, 2010).

²⁹ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 1.

³⁰ For further academic commentary on the *Guiding Principles*, see: Florian Wettstein, "Normativity, Ethics and the UN Guiding Principles on Business and Human Rights: A Critical Assessment" (2015) 42:2 J Hum Rts 162; Karin Buhmann, "Business and Human Rights: Understanding the UN Guiding Principles from the Perspective of Transnational Business Governance Interactions" (2015) 6:2 Transnat'l Leg Theory 399.

³¹ Penelope Simons & Audrey Macklin, *The Governance Gap: Extractive Industries, Human Rights, and the Home State Advantage* (New York: Routledge, 2014) at 95-96.

³² See Chris Albin-Lackey, "Without Rules: A failed Approach to Corporate Accountability" *2013 World Report* (Human Rights Watch, 2014); *Joint Civil Society Statement to the 17th Session of the Human Rights Council* (30 May 2011), online: <https://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council>; Human Rights Watch, "Human Rights Council: Resolution on International Business Needs Strengthening" (15 June 2011), online: <https://www.hrw.org/news/2011/06/15/human-rights-council-resolution-international-business-needs-strengthening>.

³³ John Ruggie, "Progress in Corporate Accountability" (Institute for Human Rights and Business, 2014); *Joint Civil Society Statement to the 17th Session of the Human Rights Council* (30 May 2011), online: <https://www.hrw.org/news/2011/05/30/joint-civil-society-statement-17th-session-human-rights-council>; John Ruggie, "Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises", online: (Business & Human Rights Resource Centre) <https://www.business-humanrights.org/sites/default/files/media/documents/ruggie/ruggie-response-to-letter-by-arvind-ganesan-28-jan-2011.pdf>.

3.2 The Maastricht Principles on Extraterritorial Obligations

Ruggie's position failed to dissuade dissent in the international human rights community. Just a few months after the UN Human Rights Council adopted the *Guiding Principles*, a group of forty international experts and academics, including current or former members of UN Committees, regional human rights bodies and UN Special Rapporteurs, issued the *Maastricht Principles on Extraterritorial Obligations in the area of Economic, Social and Cultural Rights*. These experts contend that the *Maastricht Principles* reflect an accurate codification of standing international human rights law after more than a decade of careful research.³⁴ Their fundamental point of departure is that states have unequivocal extraterritorial obligations to regulate, to respect, protect and fulfill human rights.³⁵

The *Maastricht Principles* elaborate on the scope of this duty in great detail. They assert that extraterritorial obligations apply where states have authority or effective control; where state actions or omissions bring about foreseeable effects on human rights, within or outside its territory; or where a state is in a position to exercise decisive influence or to take measures to realize human rights extraterritorially.³⁶ In this regard, the *Principles* also establish that states must take necessary measures, including administrative, legislative and diplomatic, to ensure that the non-state actors which they are in a position to regulate do not impair human rights.³⁷ According to the *Principles*, a state is in a position to regulate where the harm or threat of harm originates or occurs on its territory; where the non-state actor has the nationality of the state concerned; where the company, parent or controlling company, has its center of activity, is registered or domiciled, or has a place of business or substantial business activities, in the state concerned; or where there is a reasonable link between the state and the conduct it seeks to regulate, including where relevant aspects of company activities are carried out in the state.³⁸

In sum, while the *Maastricht Principles* clearly indicate that states have unequivocal extraterritorial obligations to regulate companies under their influence, the *Guiding Principles* are much less clear. While on one hand, the *Guiding Principles* assert that extra-territorial regulation is “not generally required under international human rights law,” on the other, they recognize states' fundamental duties to protect human rights and ensure access to remedy for harms that occur in their jurisdiction. In light of all this, experts have argued that a holistic reading of the *Guiding Principles* logically supports the existence of a state obligation to protect against, and

³⁴ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 3-4.

³⁵ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 6.

³⁶ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 6-7.

³⁷ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 9.

³⁸ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 9.

remedy, the extra-territorial effects of corporate nationals. However, unlike the *Maastricht Principles*, the *Guiding Principles* declined to directly and explicitly recognize such a duty.

4. Home-State Non-Judicial Grievance Mechanisms

While the *Guiding Principles* and the *Maastricht Principles* may diverge on the scope of a state's legal duties in international law, they both affirm that states nonetheless have a duty in international law to ensure that the victims of business-related human rights violations have access to an effective remedy. They further agree that the absence of access to remedies is at the heart of the governance gap and the problem of impunity. They also both identify the creation of home-state non-judicial grievance mechanisms as an important legal innovation that would assist, together with other reforms and systems of remedies, in addressing the multifaceted governance gap. Several UN human rights bodies have also issued commentary that refers to home-state non-judicial grievance mechanisms. Some of these statements have been directed at Canada, either in the context of its implementation of the *Guiding Principles*, or in relation to Canada's fulfillment of its obligations under UN human rights treaties. In this section, we survey these statements in order to identify key themes and points of convergence.

4.1 The Guiding Principles on Business & Human Rights

The *Guiding Principles* define a grievance mechanism as “any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.”³⁹ Remedies are further defined as potentially including: apologies, restitution, rehabilitation, financial or non-financial compensation, punitive sanctions, injunctions or guarantees of non-repetition.⁴⁰ Principle 25 further concludes that state-based grievance mechanisms may be administrated by a branch or agency of the State, or by an independent body on a statutory or constitutional basis.⁴¹

The *Guiding Principles* establish in Principle 27 that, alongside judicial mechanisms, states should facilitate access to state-based non-judicial grievance mechanisms.⁴² The commentary affirms that these mechanisms play an “essential role in complementing and supplementing judicial mechanisms” and in filling gaps in the provision of remedy.⁴³ Principle 27 also emphasizes that the *Guiding Principles*' “effectiveness criteria” apply to all mechanisms for remedy, including

³⁹ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 27.

⁴⁰ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 27.

⁴¹ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 27.

⁴² United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 30.

⁴³ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 30 [emphasis added].

state-based non-judicial mechanisms. According to these criteria, grievance mechanisms should be legitimate, accessible, predictable, equitable, transparent, rights compatible and a source of continuous learning.⁴⁴

These criteria of legitimacy, transparency, equitable and rights-compatible are of particular relevance to the Canadian debate. According to Principle 31, *legitimacy* refers to the mechanism's capacity "to enable trust from the stakeholder groups" for whom it is intended. It also refers to the mechanism's "accountability for the fair conduct of the grievance processes". This includes ensuring that parties cannot interfere with the process.⁴⁵ The criterion of *transparency* is linked to legitimacy. It is defined as informing the parties to a specific grievance about its progress, as well as providing general and specific information about the mechanism's performance to the public, in order to build public confidence.⁴⁶

Building on this, Principle 31 defines *equitable* as reasonable access by the aggrieved party to sources of information, advice and expertise in order to participate in the grievance process on fair, informed and respectful terms. Principle 27 adds to this, advising that states should find ways to address "imbalances between the parties" and barriers to access for vulnerable or marginalized groups.⁴⁷ This includes imbalances in financial resources, access to information and experts.⁴⁸ Finally, Principle 31 states that grievance mechanisms should be *rights-compatible*, meaning that their outcomes and remedies should accord with international human rights law.

4.2 The Maastricht Principles on Extraterritorial Regulation

The concepts of remedy, state-based non-judicial grievance mechanisms and effectiveness also figure prominently in the *Maastricht Principles*. Like the *Guiding Principles*, the *Maastricht Principles* affirm the duty of the state to provide effective remedies. However, they add in Principle 37 that states must provide an effective remedy before an independent authority.⁴⁹ Notably, to fulfill this obligation states should, *inter alia*, ensure access to non-judicial remedies at the national level, as well as the participation of victims in the determination of appropriate remedies. Principle 38 defines effective remedies as "capable of leading to a prompt, thorough, and impartial

⁴⁴ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 33.

⁴⁵ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 34.

⁴⁶ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 34.

⁴⁷ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 30.

⁴⁸ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 35.

⁴⁹ ETOS for Human Rights beyond Borders, "Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 12.

investigation; cessation of the violation if it is ongoing; and adequate reparations, including restitution, compensation, satisfaction, rehabilitation and guarantees of non-repetition, as well as interim measures to avoid irreparable harm.”⁵⁰ The *Maastricht Principles* further affirm that victims have a right to the truth about the facts and circumstances surrounding the violations and that such information should also be disclosed to the public, unless disclosure would cause further harm to the victim.⁵¹

4.3 The UN Working Group on Business and Human Rights

Since the creation of the *Guiding Principles* and the *Maastricht Principles*, at the UN level two key institutions have undertaken sustained activity in the area of business and human rights. One of these institutions is the Working Group on Business and Human Rights, established by the Human Rights Council upon endorsing the *Guiding Principles* in 2011.⁵² Among other things, the Working Group’s mandate is to encourage and support states to develop National Action Plans (NAPs) to disseminate and implement the *Guiding Principles*.⁵³

In May 2017 members of the Working Group paid a 10-day visit to Canada. During their stay, they met with government officials, business representatives and civil society organizations to “examine efforts to prevent and address the adverse human rights impacts of business operations.”⁵⁴ At the end of their visit, the Working Group issued a statement with significant commentary on Canada’s approach to extractive industries abroad. It found that “the victims of human rights abuses continue to struggle to seek adequate and timely remedies against Canadian businesses”.⁵⁵ To address this issue, the Working Group encouraged Canada to take steps “to ensure that individuals and communities impacted by the overseas operations of Canadian businesses are able to obtain effective remedy in Canada in appropriate cases.”⁵⁶

The Working Group further stated that in order for an Ombudsperson-like mechanism to be effective, it should be “independent, well-resourced, and [empowered] to investigate allegations,

⁵⁰ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23 at 12.

⁵¹ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23 at 12.

⁵² UNGA, Human Rights Council, “Resolution 17/4”, 17th sess., A/HRC/RES/17/4 (16 June 2011) at para. 6.

⁵³ UN Working Group on Business and Human Rights, “Guidance on National Action Plans on Business and Human Rights” (Geneva, November 2016), online: http://www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

⁵⁴ UNOHCHROR, “Statement at the end of Visit to Canada by the United Nations Working Group on Business and Human Rights”, (Ottawa: 1 June 2017), online: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E>.

⁵⁵ UNOHCHROR, “Statement at the end of Visit to Canada by the United Nations Working Group on Business and Human Rights”, (Ottawa: 1 June 2017), online: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E>.

⁵⁶ UNOHCHROR, “Statement at the end of Visit to Canada by the United Nations Working Group on Business and Human Rights”, (Ottawa: 1 June 2017), online: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E>.

conduct fact finding, and enforce its orders, in line with other similar institutions in Canada.”⁵⁷ In the Working Group’s subsequent report to the Human Rights Council presented a year later, it reiterated this position, adding that Canada’s proposed CORE “should be able to provide effective and timely remedies and recommendations” and “should have total independence from the Government, undertake meaningful investigations and have the investigatory power to summon witnesses and compel stakeholders to produce documents and any other powers as are necessary to fully address human rights abuses”.⁵⁸

4.4 The IGWG on Transnational Corporations and other Business Enterprises

The other major initiative at the UN level is the open-ended Inter-Governmental Working Group (IGWG) on Transnational Corporations and other Business Enterprises, created by the Human Rights Council in 2014, a few years after the adoption of the *Guiding Principles*. This heralded a renewed effort to explore the possibility of a multilateral state-based treaty on these issues. The IGWG’s mandate is to elaborate an international legally binding instrument to regulate, in international human rights law, corporate activities.⁵⁹ In spite John Ruggie’s explicit rejection of a treaty approach at the beginning of his mandate, the IGWG’s supporters argue that the proposed treaty would be complementary to the *Guiding Principles*.⁶⁰ Notably, some home state countries voted against the 2014 creation of the IGWG and the initiative continues to be spearheaded primarily by developing countries.

Between 2015 and 2017 the IGWG convened three sessions of work, hearing from human rights experts, civil society and states on a broad range of issues. Following these discussions, in July 2018 the Chairmanship of the IGWG released the Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*.⁶¹ The Zero Draft is intended to inform ongoing consultations and discussion, including at the IGWG’s fourth session of work, held in October 2018.⁶² While the Zero Draft is evidently not a source of international law, it is of interest because it results from significant discussion at the international level and comments directly on the topic at hand.

⁵⁷ UNOHCHROR, “Statement at the end of Visit to Canada by the United Nations Working Group on Business and Human Rights”, (Ottawa: 1 June 2017), online: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21680&LangID=E>.

⁵⁸ UN Human Rights Council, “Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Canada” (April 2018) A/HRC/38/48/Add.1, at para. 79(a), online: <http://undocs.org/A/HRC/38/48/Add.1>.

⁵⁹ Human Rights Council, “Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights”, (25 June 2014) A/HRC/26/L.22/Rev.1 at para. 1, online: http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/26/L.22/Rev.1

⁶⁰ Sara Blackwell and Nicole Vander Meulen, “Two Roads Converged: The Mutual Complementarity of a Binding Business and Human Rights Treaty and National Action Plans on Business and Human Rights” (2016) 6:1 *Notre Dame J. Int’l Comp. L.* at 60-69.

⁶¹ Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, “Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*”, (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>.

⁶² Chairmanship of the Open-Ended Intergovernmental Working Group, “Note Verbale 4-7 158/2018”, (19 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/NoteVerbaleLBI.PDF>.

In its preamble, the Zero Draft refers directly to the scope of states' duties to ensure access to remedy, affirming that states "must protect against human rights abuse by third parties, including business enterprises, within their territory or otherwise under their jurisdiction or control".⁶³ The text of the proposed treaty is clear that home states have jurisdiction over claims brought against companies who are domiciled in their country.⁶⁴ While a significant purpose of the proposed treaty would be "to ensure an effective access to justice and remedy to victims of human rights violations in the context of business activities of transnational character"⁶⁵ it does not distinguish between judicial and non-judicial mechanisms and often seems to presume a focus on judicial remedies.

Nonetheless, the Zero Draft makes a number of important and relevant statements about the nature of right to remedy. The draft states that "victims shall have the right to fair, effective and prompt access to justice and remedies in accordance with international law."⁶⁶ It adds that remedies for victims should include "restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition for victims", as well as "environmental remediation and ecological restoration where applicable, including covering of expenses for relocation of victims, and replacement of community facilities."⁶⁷ Moreover, the document asserts that states "shall investigate all human rights violations effectively, promptly, thoroughly and impartially"⁶⁸ and that they "shall provide proper and effective legal assistance to victims throughout the legal process," including by providing them with appropriate information, guaranteeing their right to be heard at all stages of proceedings, and avoiding unnecessary formalities and costs.⁶⁹

⁶³ Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, "Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*", (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 1.

⁶⁴ Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, "Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*", (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 5. Domicile is defined as the place where a company has its statutory seat, central administration, substantial business interests or subsidiary, agency, instrumentality, branch or representative office.

⁶⁵ Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, "Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*", (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 2(b).

⁶⁶ Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, "Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*", (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 8.

⁶⁷ Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, "Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*", (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 8(1).

⁶⁸ Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, "Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*", (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 8(3).

⁶⁹ Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, "Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*", (16 July 2018) online:

4.5 Statements of UN Human Rights Bodies to Canada

In the course of reviewing Canada's implementation of its binding treaty obligations, numerous international human rights bodies have pronounced on the social and environmental effects of Canadian resource extraction companies' foreign operations, and the concomitant responsibilities of the Canadian state.⁷⁰ Some of this commentary has specifically referred to the shortcomings of Canada's CSR Counsellor and NCP grievance mechanisms, and has called on Canada to improve its home-state non-judicial mechanisms. As such, these statements provide an essential benchmark for evaluating the proposed CORE mechanism. This section reviews four relevant statements.

In 2015 the UN Human Rights Committee (UNHRC) undertook a periodic review of Canada's compliance with the *International Covenant on Civil & Political Rights*. In its "Concluding Observations," the Committee expressed concern for alleged human rights abuses by Canadian companies operating abroad and expressed regret at "the absence of an effective independent mechanism" in Canada.⁷¹ It urged Canada "to enhance the effectiveness of existing mechanisms to ensure that all Canadian corporations, in particular mining corporations, under its jurisdiction respect human rights standards when operating abroad." It also urged the Canadian government to establish an independent mechanism with powers to investigate human rights abuses by Canadian companies abroad. Finally, the UNHRC called for the development of a legal framework in Canada that affords legal remedies to victims.⁷²

In 2016 two more UN bodies added their views. The Committee on Economic, Social and Cultural Rights (CESCR) expressed concern that corporations registered or domiciled in Canada and operating abroad have negatively affected the rights of local populations as protected by the *International Covenant on Economic, Social and Cultural Rights*.⁷³ Among other things, the CESCR recommended that Canada introduce "effective mechanisms to investigate complaints

<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 8(4), 8(5)(a)-(c).

⁷⁰ Between 2002 and 2017, seven UN bodies issued at least ten separate statements to Canada on these issues. Between 2013 and 2017, the Inter-American Commission on Human Rights dedicated three thematic hearings to the issue and commented twice on Canada's obligations in this area. For a full reference to these statements, see Charis Kamphuis, "Home-State Grievance Mechanisms: Law Reform Strategies in the Canadian Resource Justice Movement" in Isabel Feichtner & Markus Krajewski, eds, *Human Rights in the Extractive Industries: Transparency, Participation, Resistance* (Springer, 2018).

⁷¹ UNHRCOR, "Concluding observations on the sixth periodic report of Canada", (2015) UN Doc CCPR/C/CAN/CO/6 at para. 6, online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fCO%2f6&Lang=en.

⁷² UNHRCOR, "Concluding observations on the sixth periodic report of Canada", (2015) UN Doc CCPR/C/CAN/CO/6 at para. 6, online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fCAN%2fCO%2f6&Lang=en.

⁷³ UNESC, Committee on Economic, Social and Cultural Rights, "Concluding observations on the sixth periodic report of Canada", (2016) UN Doc E/C.12/CAN/CO/6, online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2fCO%2f6&Lang=en (last accessed 11 December 2017), at para. 15.

filed against those corporations, and adopt the legislative measures necessary to facilitate access to justice before domestic courts by victims.”⁷⁴

That same year the Committee on the Elimination of Discrimination Against Women (CEDAW) issued “Concluding Observations” on Canada’s compliance with the *Convention on the Elimination of All Forms of Discrimination Against Women*.⁷⁵ CEDAW expressed concern with the human rights impacts of the overseas operations of Canadian companies, particularly in the mining sector. It further observed that in Canada there is an inadequate legal framework for holding these companies to account for abuses and that there is limited access to judicial remedies. CEDAW went on to recommend that Canada “introduce effective mechanisms to investigate complaints filed against those corporations, including by establishing an extractive sector ombudsperson with the mandate to, among other things, receive complaints and conduct independent investigations.”⁷⁶ Finally, it recommended that Canada take additional measures to facilitate access to justice for women in particular and ensure that such mechanisms have a gender perspective.⁷⁷

In 2017 the Committee on the Elimination of Racial Discrimination (CERD) reviewed Canada’s compliance with the *Convention on the Elimination of All Forms of Racial Discrimination*.⁷⁸ It issued concluding observations reiterating previous recommendations to Canada that it take appropriate legislative or administrative measures to prevent acts of transnational corporations registered in Canada, which negatively affect the enjoyment of rights of indigenous peoples in territories outside Canada.⁷⁹ CERD made it clear that this would include exploring ways to hold transnational corporations registered in Canada accountable. Finally, CERD added a recommendation that Canada “swiftly establish an independent Ombudsman mandated to receive and investigate human rights complaints against Canadian corporations operating in other countries.”⁸⁰

⁷⁴ UNESCO, Committee on Economic, Social and Cultural Rights, “Concluding observations on the sixth periodic report of Canada”, (2016) UN Doc E/C.12/CAN/CO/6, online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2fCAN%2fCO%2f6&Lang=en (last accessed 11 December 2017), at para. 16.

⁷⁵ UNCEDAWOR, “Concluding observations on the combined eighth and ninth periodic reports of Canada”, (2016) UN Doc CEDAW/C/CAN/CO/8-9, online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2fCO%2f8-9&Lang=en.

⁷⁶ UNCEDAWOR, “Concluding observations on the combined eighth and ninth periodic reports of Canada”, (2016) UN Doc CEDAW/C/CAN/CO/8-9, online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2fCO%2f8-9&Lang=en. at para. 19.

⁷⁷ UNCEDAWOR, “Concluding observations on the combined eighth and ninth periodic reports of Canada”, (2016) UN Doc CEDAW/C/CAN/CO/8-9, online: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CEDAW%2fC%2fCAN%2fCO%2f8-9&Lang=en. at para. 19.

⁷⁸ UNCERDOR, “Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada”, (2017) UN Doc CERD/C/CAN/CO/21-23.

⁷⁹ UNCERDOR, “Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada”, (2017) UN Doc CERD/C/CAN/CO/21-23 at para. 21.

⁸⁰ UNCERDOR, “Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada”, (2017) UN Doc CERD/C/CAN/CO/21-23 at para. 21.

5. Effectiveness Framework: The International Standard

This section undertakes a synthesis of the content of the *Guiding Principles*, the *Maastricht Principles*, and relevant statements by UN human rights bodies in relation to the role of state-based non-judicial grievance mechanisms in fulfilling the right to remedy. The goal here is to identify the critical features of non-judicial grievance mechanisms that will ensure they are effective. Where the *Maastricht Principles* and statements from international human rights bodies reflect a higher standard, the analysis identifies the extent to which the higher standard is nonetheless consistent with, or implicitly and logically required by, the *Guiding Principles*.⁸¹ In our view, this synthesis reveals that there is in fact much consensus on the contents of an “effectiveness framework” for evaluating Canada’s proposed CORE, and other mechanisms like it. Three essential features of extra-territorial home-state non-judicial grievance mechanisms emerge from this exercise, and we argue that together they constitute the minimum standard for effectiveness in international law.

Before turning to describe this minimum standard, it is worth noting that there is also common ground among the sources of international law surveyed here with respect to the nature of the state’s obligation to create non-judicial mechanisms. On this point, the *Maastricht Principles* and the *Guiding Principles* adopt very similar language. They agree that state-based non-judicial grievance mechanisms are an important element of states’ larger efforts to fulfill their duty in international law to protect, prevent and remedy human rights violations committed by non-state actors. This is consistent with statements by UN human rights bodies. At the same time, no source describes the creation of this particular variety of mechanism as a strict duty. Rather, they articulate that states “should” create them, framing this recommendation in strong terms. The *Maastricht Principles* advise that states should ensure access to non-judicial mechanisms in order to fulfill their duty to provide effective remedies.⁸² For its part, the *Guiding Principles* describe these mechanisms as “essential” to filling the governance gap.⁸³ In sum, these statements strongly endorse state-based non-judicial mechanisms as part of a larger strategy.

With this in mind, we turn then to our proposed effectiveness framework. The first standard that emerges relates to the nature of the remedy that states are required to secure for victims of human rights violations. On this point, the *Guiding Principles* and the *Maastricht Principles* are quite compatible. They both define remedies to include restitution, rehabilitation, compensation,

⁸¹ The *Guiding Principles* recommend a holistic and purposive interpretive approach. In their introduction entitled “General Principles” they state that “These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities”: United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online:

https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 1.

⁸² ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23 at 12.

⁸³ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 30.

guarantees of non-repetition and interim measures to avoid future harm.⁸⁴ The *Guiding Principles* are actually somewhat more robust than the *Maastricht Principles* on this point in that they add the concept of punitive sanctions to this list.⁸⁵ Moreover, neither the *Guiding Principles* or the *Maastricht Principles* exclude the possibility that a state-based non-judicial mechanism could potentially be empowered to order this full range of remedies.

This raises an important question: can a home-state non-judicial mechanism be considered effective if it is not empowered to order and enforce remedies? On this point, the *Maastricht Principles* are clear in that they refer repeatedly to “non-judicial remedies” (instead of “grievance mechanisms”), therefore presuming that non-judicial mechanisms will have the power to ensure remedies. For their part, the *Guiding Principles* are slightly less direct. Recall that the term “remedy” does not appear in their effectiveness criteria for grievance mechanisms. However, they define grievance mechanism to include a process through which a human rights grievance “can be raised and *remedy can be sought*”.⁸⁶ Adding to this, they indicate that state-based non-judicial mechanisms should form “the foundation of a wider system of remedy”. Taking these statements together, there is a strong inference in the *Guiding Principles* that non-judicial mechanisms should have the power to secure remedy for harms.

Turning to recent statements from UN treaty bodies, while they all urge Canada to improve access to remedies, they are silent on the specific question of whether or not Canada’s non-judicial mechanisms should have the power to order remedies. However, the report of the UN Working Group after its visit to Canada is unequivocal on this point. It states that the proposed CORE should have the power to “enforce its orders, in line with other similar institutions in Canada” and that the CORE “should be able to provide effective and timely remedies and recommendations”. Given that the Working Group is charged with furthering the implementation of the *Guiding Principles*, these statements send a clear message that the power to order and enforce remedy is a necessary component of an effective state-based non-judicial grievance mechanism.

The second standard addresses the independence of non-judicial grievance mechanisms from the parties and from government. On this point, the *Guiding Principles* outline a set of options, referring to an entity that is “either a branch or agency of the state, or an independent body created

⁸⁴ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 27; ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 12.

⁸⁵ Of note, the IGWG Zero Draft proposed treaty includes this full list of specific remedies and expands upon them: Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, “Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*”, (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 8(1).

⁸⁶ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 27 [emphasis added].

by statute”.⁸⁷ This formulation seems to imply that the mechanism should be independent from the parties and possibly also from the government. Notably, the *Guiding Principles* do not explicitly include the concepts of independence and impartiality in their definition of a grievance mechanism’s effectiveness and legitimacy. However, they contain several statements that arguably push in this direction.

For example, the *Guiding Principles*’ concept of legitimacy involves ensuring accountability for the fair conduct of the grievance process, meaning in part that the parties cannot interfere in the process.⁸⁸ This would suggest that the body administering the process must, at the very least, be independent from the parties. However, where the company in question receives political or economic support from its home state, there is a strong argument that the body administering the process should also be independent from the home state for the reason that the state has too close a relationship with one of the parties (the company). In other words, in this scenario, a mechanism administered by a branch or agency of the state would not suffice. Added to this, where a state is pursuing a policy agenda to promote and prioritize a particular sector of its economy, as the Canadian state has clearly done with respect to Canadian resource extraction abroad, a grievance mechanism that is independent from the government is arguably necessary to ensure public trust in the mechanism, another key aspect of legitimacy according to the *Guiding Principles*.

The other relevant sources of international law strongly recommend that home-state non-judicial mechanisms be independent from the parties and the home-state government. The *Maastricht Principles* clearly assert that states “must ensure...the right to...effective remedy before an independent authority”.⁸⁹ This phrasing suggests that effective remedies, by definition, require an independent authority. This point is emphasized by the *Maastricht Principles*’ further statements that this authority should be capable of undertaking a thorough and impartial investigation.⁹⁰ All of the UN human rights bodies reviewed here strongly and directly assert that Canada’s home-state non-judicial mechanisms must be independent, with the UN Working Group asserting that it “should have total independence from the Government”.

In sum, it is common ground between the *Guiding Principles*, the *Maastricht Principles* and other expert statements by UN human rights bodies that home-state non-judicial grievance mechanisms should be independent from the parties and protected from interference. The *Guiding Principles* contemplate that they *may* also be independent from the state, but do not explicitly *require* this as the *Maastricht Principles* clearly do. Arguably though, the requirements of public trust and non-interference expressed in the *Guiding Principles* would require a grievance mechanism to be

⁸⁷ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 27.

⁸⁸ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 34.

⁸⁹ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23 at 12.

⁹⁰ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23 at 12.

independent from the state. The Working Group’s recent report resoundingly confirms that independence from the parties *and* the home state is part of the effectiveness standard required by international law.

The third standard relates to transparency and disclosure in the investigation and outcome. Both the *Maastricht* and the *Guiding Principles* make pronouncements regarding disclosure. The commentary to the “effectiveness criteria” in the *Guiding Principles* states that keeping the parties to the process informed about its progress “can be essential for retaining confidence in the process”.⁹¹ At first look, the *Maastricht Principles* approach this issue quite differently. Whereas the *Guiding Principles* deal with the issue of disclosure as part of the effectiveness criteria, in the *Maastricht Principles*, it is directly linked to the right to remedy. The *Maastricht Principles* are unequivocal, stating that victims have the right to the truth about the facts and circumstances surrounding the violations and that states should ensure the participation of victims in the determination of appropriate remedies.⁹² There are no equivalent provisions in the *Guiding Principles*. The recommendation to keep the parties informed about the progress of the grievance is obviously a far weaker standard than that of the victim’s right to the truth.

In addition, both the *Guiding* and *Maastricht Principles* articulate transparency and disclosure in relation to the public. The commentary to the *Guiding Principles* refers to providing information about the mechanism’s performance to wider stakeholders, including through statistics, case studies or detailed information about specific cases. The commentary states that this type of disclosure “can be important” for legitimacy and trust.⁹³ However, the commentary also inserts a vague exception, namely that confidentiality should be provided “where necessary”.⁹⁴ No further explanation of this critical point is proffered. This approach again contrasts with the *Maastricht Principles*, which state that the truth about the violations should be disclosed to the public, linking this once again to the right to remedy. In this approach, the only concern that might limit public disclosure is potential harm to the victim.⁹⁵

On their face, the *Guiding Principles* and the *Maastricht Principles* appear to be furthest apart on the issue of disclosure and transparency in the investigation and findings. However, in light of the full list of effectiveness criteria in the *Guiding Principles*, there may again be a strong argument in favor of ratcheting up its transparency and disclosure standards. Two criteria in particular are relevant, namely that grievance mechanisms should be rights-compatible and a source of

⁹¹ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 35.

⁹² ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 12.

⁹³ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 35.

⁹⁴ United Nations Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights*, (2011) HR/PUB/11/04, online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf at 35.

⁹⁵ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23 at 12.

continuous learning. Disclosure of the truth of the violations, both to the victim and to the public, is arguably an essential pre-condition for ensuring that the mechanism is rights-compatible. Without full disclosure of the truth, it is impossible for anyone to determine if rights have in fact been protected and violations appropriately remedied. Likewise, full disclosure of the truth is essential for evaluating the performance of the mechanism and creating a situation of continuous learning. As such, on this third issue of disclosure and transparency, it appears that the *Guiding Principles* implicitly require, for the sake of their own internal coherence, incorporation of the higher standard from the *Maastricht Principles*.

There is a final difference between the *Guiding Principles* and the *Maastricht Principles* that merits mention. As stated previously, unlike the *Guiding Principles*, a point of departure for the *Maastricht Principles* is the state's duty in international law to regulate non-state actors extraterritorially. Building on this, Principle 36 requires states to establish effective mechanisms to provide for accountability in the discharge of their own extraterritorial obligations.⁹⁶ This includes systems for monitoring state compliance. Thus, in addition to affirming the state's duty to ensure access to remedies, the *Maastricht Principles* envision a system that would also hold states accountable for fulfilling this duty.⁹⁷ While this concept of state accountability is absent from the *Guiding Principles*, it would be consistent with their assertion that state-based non-judicial grievance mechanisms should be a source of continuous learning for all actors.

6. Conclusion

In this chapter we have analyzed expert statements of international law to develop a single analytic lens, an “effectiveness framework”, for evaluating home-state non-judicial mechanisms that endeavor to respond to the problem of the governance gap. We began by reviewing what is known about the proposed CORE mechanism in Canada. We then discussed the development of the *Guiding Principles* and the *Maastricht Principles* and acknowledged the competing claims that each document represents an authoritative codification of standing international law. In this context, we highlighted each text's differing views on extra-territorial regulation and the scope of states' duty to provide access to effective remedy. Without attempting to resolve this issue, we moved on to identify the statements contained in each document with respect to the effectiveness of home-state non-judicial grievance mechanisms. We further collected relevant statements by UN human rights bodies commenting at Canada's non-judicial mechanisms.

On the basis of this body of research, we argue that the *Guiding Principles*, the *Maastricht Principles* and statements by UN human rights bodies converge on the critical importance of home-state non-judicial mechanisms for fulfilling the state's duty to investigate and ensure access to remedy for transnational business-related human rights violations. What emerges from this discussion is a single “effectiveness framework”, rooted in sources of international law, for evaluating home-state non-judicial grievance mechanisms. According to this framework, these mechanisms must: 1) have the power to provide remedies, which could include restitution, rehabilitation, compensation, guarantees of non-repetition and interim measures to avoid future

⁹⁶ ETOS for Human Rights beyond Borders, “Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights” (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23 at 11.

⁹⁷ Notably, the orientation of the UNWG Zero Draft is toward state accountability for ensuring access to remedy.

harm; 2) be independent from the parties and from the home-state government; and 3) ensure full disclosure of their findings to victims and the public, unless a sufficiently important countervailing interest would be put at risk, such as the victims' privacy, security or well-being.

In developing this framework, our analytical methods have been totally transparent. In some instances, the text of the *Guiding Principles* contained a lower standard than both the *Maastricht Principles* and statements from UN human rights bodies. In these cases, we undertook a holistic reading of the *Guiding Principles* in order to identify the extent to which its contents are supportive of the higher standard, either implicitly or as a matter of logical and internal consistency. We have noted that this interpretive approach is explicitly recommended in the *Guiding Principles* document. Moreover, we identified instances where the UN Working Group, charged with furthering the implementation of the *Guiding Principles*, has made statements to Canada that elevate the standard, thus reinforcing our interpretive approach and our final conclusions with respect to the effectiveness framework.

A full analysis of Canada's anticipated CORE mechanism is beyond the scope of this chapter, and would be premature given the fact that it has not yet been constituted. However, the effectiveness framework described here should form the minimum standard for Canada's development and implementation of the CORE mechanism. At the same time, this should not preclude Canada from raising the standard and incorporating other important features, such as for example robust victims' participation rights, as laid out in the *Maastricht Principles*,⁹⁸ and a gender sensitive approach as recommended by CEDAW. A full analysis of Canada's CORE mechanism once constituted, using the effectiveness framework and any other relevant principles, is certainly a necessary area of future research that flows from this work.

There is also a need for future research to flesh out the components of the effectiveness framework. For example, further research is needed to identify the specific institutional features required to ensure independence, access to remedy and transparency. Another observation that emerges from our analysis is that the sources of international law reviewed here do not clearly distinguish between the effectiveness criteria that should apply to judicial and non-judicial state-based mechanisms in the context of extra-territorial human rights violations. Further discussion and consideration of this issue should be an area of future academic research and comment by international bodies.

In this regard, these discussions in the governance gap context could benefit from cross-fertilization with a related area of international norm development, one with a much longer history. International organizations have dedicated considerable effort to fleshing out the essential features of national human rights institutions, with these efforts culminating in, and then building on, the

⁹⁸ETOS for Human Rights beyond Borders, "Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (January 2013), online: https://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUId%5D=23 at 12; See also: Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, "Zero Draft of the *Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises*", (16 July 2018) online: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf> at art. 8(4)(5)(a-c).

1993 *Paris Principles*.⁹⁹ Like home-state non-judicial grievance mechanisms, national human rights institutions are typically non-judicial with an established grievance process. The key difference is that they focus on human rights issues within a state's territory. Further research is required to identify how the lessons learned and best practice with respect to national human rights institutions might benefit the development of extra-territorial non-judicial mechanisms.

⁹⁹ See: United Nations, *Paris Principles: Principles relating to the status of national institutions, Competence and responsibilities*, (20 December 1993) UN General Assembly Resolution 48/134, online: <http://www.un.org/documents/ga/res/48/a48r134.htm>. We thank Amissi Manirabona for calling our attention to this important area of future research.