

**UNIVERSITY OF ESSEX****DISSERTATION****SCHOOL OF LAW****LLM/MA IN: International Human Rights Law****STUDENT'S NAME: Ogeno Jackson Ambrose Ladu****SUPERVISORS'S NAME: Dr. Tara Van Ho****DISSERTATION TITLE: Establishing and Implementing company-level grievance mechanism: An examined instrument for oil and gas corporations in the context of South Sudan.****COMMENTS: (PLEASE WRITE BELOW YOUR COMMENTS)****MARK:****SIGNATURE:****DATE:**

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DISSERTATION

(Establishing and Implementing Company-level Grievance mechanism: An examined Instrument for  
Oil and Gas Corporations in the context of South Sudan)

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## **Abstract**

Limited attention being given to establish and implement Company operational-level grievance mechanisms (“OLGMs”), has increasingly hindered the right to effective remedies to victims of human rights abuses linked to oil and gas companies in South Sudan. This study examines how oil and gas companies can establish and implement in the context of South Sudan, effective OLGMs ‘administered by the companies alone’.

Internationally, the UN Guiding Principles (“UNGP”), confirmed corporations’ responsibility to establish effective OLGMs. The international responsibility equally applies to oil and gas corporations in South Sudan. Nationally, the South Sudan’s Petroleum Act 2012 requires setting ‘dispute resolution mechanisms’, construed to include OLGMs analogous to the UNGP’s. The call and standards for having OLGMs thus, exist under the UNGP and Petroleum Act.

Using an analysis of primary and secondary sources, and best practices guidelines, the study reveals that the companies can achieve having and operating OLGMs through five essential phases, commencing with the phase of considering key issues, and ending with implementing. The phases are potentially realisable to companies of all sizes with minimum resources. Compliance with normative standards is achieved by reflecting the standards within the processes through articulation of action-guidance. Such creation arguably provides a more functional OLGMs because of the binding nature of national law and influential nature of international norms.

In realising the processes, the companies and users may respectively experience resources constraint and the barrier of accessing other mechanisms, that may affect the mechanism’s effectiveness unless addressed. The study recommends the mechanism be set within a company’s unit than setting to minimise resources burden, and access to alternative grievance mechanisms be guaranteed in the mechanism’s governance framework to mitigate against using the mechanism as a primary and final channel to resolve grievances.

The study firmly answered the question regarding how the oil and gas companies can achieve OLGMs in harmony with the required standards in the context of South Sudan. It contributes to ensuring access to effective remedies. Further studies are needed to examine OLGMs administered in collaboration with other stakeholders.

## CHAPTER ONE: INTRODUCTION; EFFORTS TO ENSURE CORPORATE ACCOUNTABILITY

### 1.0. The Background of the study

Company-level grievance mechanisms, commonly known as operational-level grievance mechanisms (“OLGMs”), are a crucial part of the right to effective remedies which complement and supplement judicial mechanisms to ensure corporate accountability for business-related human rights abuses.<sup>1</sup> Under international law, the obligation to provide remedies lies directly with the State as part of its obligation to protect against human rights abuses by third parties, including corporations.<sup>2</sup> However, it is acceptable under international law for States, through domestic law, to impose legal obligation on corporations to provide remedies to those affected by their activities.<sup>3</sup> Reliance on the States to establish or enforce national legislation to ensure corporate accountability for human rights abuses has increasingly proved less effective. Some States are unwilling or unable to enforce or enact the legislation because of ‘maintaining and attracting investments in their economies; complex structure of certain corporations; high-level corruption;’<sup>4</sup> or ‘investments agreements which may freeze the application of national legal regime.’<sup>5</sup>

The helplessness of international law to directly hold corporations accountable for human rights abuses prompted a move for a significant period at the international level to develop measures that could guarantee corporate accountability in the context of business activities and redress for victims.<sup>6</sup> *Cathal Doyle (2015)* explained that the concerns by then were whether corporations have, or should have, legal obligations to respect human rights, and whether “legally binding” obligations are necessary to guarantee corporate respect for human rights and redress for corporate human rights

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<sup>1</sup> Alex Newton, *The Business of Human Rights: Best Practice and the Un Guiding Principles* (Routledge 2019) 116.

<sup>2</sup> Livio Zilli, *The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners Guide No.2* (ICJ Geneva 2018)15.

<sup>3</sup> Rodley Nigel, ‘Non-state actors and human rights’ in *Scott Sheeran and Nigel Rodley (eds), Routledge Handbook of International Human Rights Law* (Routledge 2014) 537.

<sup>4</sup> Skinner Gwynne, ‘Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries’ Violations of International Human Rights Law’ (2015) 72 *Wash. & Lee L. Rev.*1769, 1801-1802.

<sup>5</sup>Gehne Katja and Romulo Brillo, *Stabilization clauses in international investment law: beyond balancing and fair and equitable treatment* (Martin Luther University Halle-Wittenberg 2017) 6.

<sup>6</sup> Doyle Cathal M. (ed), *Indigenous Peoples’ Experiences with Access to Remedy. Case Studies from Africa, Asia and Latin America* (2015) 28.

abuses.<sup>7</sup> Following a considerable period, the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the 'Norms') were drafted in 1999, which sought to place direct obligation on corporations akin to the State's obligations under international law. Article 1 of the Norms expected corporations to 'promote, secure, respect, and protect human rights recognised in international and national law. In 2004, the UN Commission on Human Rights considered and described the Norms as containing useful ideas for reflection, however the Commission disapproved of the Norms on the basis that they 'lacked legal standing'.<sup>8</sup> After the flop of the Norms, Professor John Ruggie was appointed in 2005 to be the Special Representative of the UN Secretary-General on business and human rights. In 2008, John Ruggie introduced the UN "Protect, Respect and Remedy" Framework ("the UN Framework"), that contains three pillars: The State Duty to Protect, the Corporate Responsibility to Respect, and Access to Remedy. The UN Framework received greater acceptance because of its consistency with the principles of international law.<sup>9</sup> In June 2011, the UN Human Rights Council through a resolution solidly sanctioned the UN Guiding Principles on Business and Human Rights (" the UNGP") to guide the implementation of the three pillars of the UN Framework.

Among others, the UN Framework and the UNGP confirm that corporations have the responsibility to respect the internationally recognized human rights.<sup>10</sup> This confirmation is consistent with the human rights responsibility of 'every organ of society' referred to, in the preamble of the 1948 Universal Declaration on Human Rights (UDHR).<sup>11</sup>

However, the argument against the UNGP is that it is a 'soft-law instrument that lacks the force of law'.<sup>12</sup> Nevertheless, together with the UN Framework, they echo the most current findings and conclusions of the corporate accountability in the context of business activities internationally.<sup>13</sup> The

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<sup>7</sup> Cathal (n 6).

<sup>8</sup> ECOSOC Decision 2004/279, para.(c).

<sup>9</sup> Osiemo Lynette, '*Securing corporate accountability for violation of human rights: towards a legal and policy framework for Kenya*' (DPhil diss, Univ. of the Witwatersrand 2016)15.

<sup>10</sup> Principle 12.

<sup>11</sup> Cathal (n 6) 28.

<sup>12</sup> Deva Surya and David Bilchitz (eds), *Human rights obligations of business: beyond the corporate responsibility to respect?* (Cambridge University Press 2013) 144.

<sup>13</sup> Lynette (n 9)15.

UNGP is credited as an influential 'authority of normative value' which is consistent with the principles of international law.<sup>14</sup>

### 1.1. Application of the corporate responsibility to the Oil and Gas Companies

The corporate responsibility to respect human rights, applies to all companies world-wide.<sup>15</sup> As such, the responsibility applies to oil and gas corporations operating anywhere (including South Sudan). The responsibility is relevant to the companies because their activities can lead to realisation as well as violation of the internationally recognised human rights. A study indicates that whereas the economic investments of oil and gas companies significantly contribute to development in a country through the provision of energy and revenue, which in turn leads to realisation of human rights, their operations also lead to environment destruction and human rights abuses.<sup>16</sup>

Despite the adverse human rights impacts linked to oil and gas companies, oil-rich countries tend to encourage petroleum companies to invest in their countries in the hope of improving their economy.<sup>17</sup> South Sudan, for instance, like other oil-rich nations, upon gaining independence from Sudan in 2011, prioritised investments in her oil industry. It is reported that some of the major oil companies that have invested in the country's oil industry in a joint venture with the State-owned Nile Petroleum Corporations, are the Malaysian oil company Petronas, China national petroleum corporation, and the India's oil and natural gas corporation.<sup>18</sup> A study demonstrates that while the investments in the oil sector contributes to about 95% of country's revenue, the oil or petroleum activities have also caused and continue to cause environmental pollution which result to abuses of the internationally recognised human rights.<sup>19</sup> The adverse consequences of the petroleum activities have been "causing mistrust and deep resentment against oil companies in many oil-rich parts of South Sudan," yet less or no

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<sup>14</sup> Surya and Bilchitz (n 12) 144.

<sup>15</sup> Commentary to Principle 11.

<sup>16</sup> SHIFT and IHRB, *Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights* (European Commission 2011) 8 <[https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/O&G/EC-Guide\\_O&G.pdf](https://www.ihrb.org/pdf/eu-sector-guidance/EC-Guides/O&G/EC-Guide_O&G.pdf)> accessed 14 August 2019.

<sup>17</sup> Shinsato Alison, 'Increasing the accountability of transnational corporations for environmental harms: The petroleum industry in Nigeria' (2005) 4 *Nw. Univ. J. Int'l Hum. Rts.* 186, 187.

<sup>18</sup> Cumming-Bruce, 'Oil Companies May Be Complicit in Atrocities in South Sudan, U.N. Panel Says' *The New York Times* (New York, 20 February 2019) <[www.nytimes.com/2019/02/20/world/africa/south-sudan-oil-war-crimes.html](http://www.nytimes.com/2019/02/20/world/africa/south-sudan-oil-war-crimes.html)> accessed 20 August 2019.

<sup>19</sup> Moro L., J. A. Akec, and M. B. Bol, 'Scrutiny of South Sudan's oil industry: Community relations, labour practices and impact on land use patterns' (*ECOS and PAX* 2014) 13.

efforts are made by the corporations to remediate the adverse impacts.<sup>20</sup> It is the intention of the responsibility to respect human rights, and the remedy pillar under the UNGP, that such adverse corporate human rights impacts are remediated.

## **1.2. Legal obligation under national law**

Under Article 172(2)(n) of the Transitional Constitution of the Republic of South Sudan, 2011 (as amended), it is required that petroleum and gas development and management be guided by the principle that ensures accountability for violations of human rights and degradation to the environment caused by petroleum and gas-related operations. As part of the means to achieve the accountability, section 94 (1) of the Petroleum Act 2012 (Laws of South Sudan), requires the corporations contracted by the government to deal in petroleum activities, to establish a dispute resolution mechanism to address grievances against the corporations, in accordance with the *regulations*.

The *regulations* referred to under the Petroleum Act, are meant to be issued by the Minister responsible for petroleum in line with the power to issue regulations under section 99 of the Act. At the time of the study, there was no evidence of the regulations in place. However, if the regulations were in place, they would reflect the stipulation of section 94 of the Petroleum Act because a subsidiary legislation follows the prescription in the parent legislation.

## **1.3. Research problem**

It is revealed that through their activities, the oil and gas companies operating in South Sudan adversely affect human rights of individuals and communities living around or near the oil fields.<sup>21</sup> Both the UNGP and Petroleum Act require remediation of the adverse business-related impacts through effective OLGMs that should be established per the standards of the UNGP, Petroleum Act, and other best practice principles. The requirement to establish and implement OLGMs is a fair requisition because 'where there is human rights harm, there should be a remedy.'<sup>22</sup> Usefully, OLGMs ensure access to effective remedy to victims of business-related human rights abuses.<sup>23</sup>

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<sup>20</sup> Moro, Akec and Bol (n 19).

<sup>21</sup> Moro, Akec and Bol (n 19).

<sup>22</sup> The UN Committee on the Rights of the Child, GC No. 5 (2003), para.24.

<sup>23</sup> Newton (n 1) 116.

Despite the invitation of the UNGP and Petroleum Act to establish and implement OLGMs, the significance of having OLGMs, and the corporate adverse human rights impacts that necessitate remediation, the oil and gas companies in South Sudan have given less or no attention to develop and implement the OLGMs. As such, the victims' right to access to effective is increasingly being hindered. A possible reason for the limited attention is limited understanding of how to establish and implement the mechanisms. Conceivably, a study which examines this could assist in alleviating the challenge. Consequently, this study explores the question: 'how can the Oil and Gas companies establish and implement effective OLGMs in compliance with the standards of the Petroleum Act, the UNGP, and other best practice principles in the context of South Sudan?' The research question is answered by identifying and examining the phases or processes through which the companies can achieve the creation and operation of the OLGMs in line with the required standards.

#### **1.4. Significance of the study.**

The study is significant to creating and implementing a complaint resolution mechanisms (OLGMs) operated by the companies, crucial to providing access to remedies in cases of human rights abuses involving petroleum companies in the context of South Sudan.

The study is useful to the oil and gas corporations to influence performance of their responsibility to respect human rights and provide remedies. It is also relevant to the victims of corporate human rights harms to realise their right to access to effective remedies. It is also valuable to the Government of South Sudan to guide the formulation of the petroleum regulations envisaged under Section 94(1) of the Petroleum Act.

It is as well vital to the academicians, professional researchers and the legal fraternity to gain a better understanding of company-level grievance mechanisms to address human rights abuses involving petroleum industry in the context of South Sudan. Most prominently, the study contributes to the global effort to implement the UNGPs as a way to improve access to effective remedies through establishing and implementing effective non-State-based grievance mechanisms.



### **1.5. Objectives of the study**

To achieve the main aim of the research, the study: a) explains the standards under the UNGP and the Petroleum Act, for creating effective OLGMs; b) reviews the literature relevant to the establishment and implementation of OLGMs; c) reviews the right to remedy and OLGMs; d) examines the phases or processes involved in establishing and implementing OLGMs; e) articulates action-guidance to achieve the required standards in the phases or processes; f) explains the benefits and challenges with regards to the mechanisms; and g) develops recommendations to guarantee or improve the mechanism's effectiveness.

### **1.6. Methodology**

The methodology of this study is qualitative and legal dogmatic. The study is done by scrutinising primary sources relevant to access to remedy and the establishment and implementation of OLGMs. The research reviews and applies the provisions of the Transitional Constitution of South Sudan 2011 (as amended); Petroleum Act 2012; and the main International human rights instruments which South Sudan subscribed to honour. Namely: The International Covenant on Civil and political Rights (ICCPR), the International Convention on the Rights of the Child (CRC), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments (CAT).

The study is also developed through the examination of secondary sources. These are text books; journal articles; case studies, international guiding principles (including the authoritative UNGP); General Comments of UN treaty bodies; reports; and study materials conducted in other countries relevant to the topic. The study also relies on guidance practices on OLGMs developed by reputable institutions such as the Global Oil and Gas Industry Association for Environmental and Social Issues (IPIECA); the Compliance Advisor/Ombudsman (CAO) of the World Bank; the International Council on Mining and Metals (ICMM); and the International Finance Corporation (IFC). The guidelines are used because of the difficulty to find international standards on the processes involved in establishing and implementing OLGMs. The guidelines of the listed institutions represent some of the best international practices and their utilisation is consistent with the Petroleum Act which recognises the application of highest international standards.

## **1.7. Scope of the study**

The study is restricted to the establishment and implementation of OLGMs administered by the company alone. It does not cover OLGMs administered by companies in collaboration with other stakeholders because the 'processes, form, and remedy outcomes' of such OLGMs may considerably differ from the ones administered by the company alone.<sup>24</sup>

## **1.8. Overviews of Chapters**

This study is made of six chapters. Chapter One is the introduction. It presents the background information of the study; application of the corporate responsibility to the oil and gas companies; the legal obligation of the companies under the national law; significance of the study; objectives of the study; the methodology used; scope of the study; and overviews of the chapters.

Chapter Two, presents the literature review to provide theoretical basis of the study. The literature review covers: the understanding of OLGMs; OLGMs's resolution approaches; the steps in establishing and implementing OLGMs; experiences with regards to the mechanisms; effectiveness criteria of the OLGMs; and the justification for OLGMs.

Chapter Three provides the overview of the right to remedy and the OLGMs. It examines the indirect obligation of corporations to provide effective remedies under international law; the corporate responsibility to respect human rights and provide remedy under the UNGP; and the standards under the UNGP, Petroleum Act, and other best practices for effective OLGMs. The chapter further explains the procedural and substantive aspects of the right to remedies, and the relationship between remedies and underlying rights.

Chapter Four explores how to establish and implement effective OLGMs in compliances with the standards of the Petroleum statute, UNGP, and other best practice principles. It explores five essential phases through which it can be achieved.

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<sup>24</sup> Scheltema Martijn, 'Assessing the effectiveness of remedy outcomes of non-judicial grievance mechanisms' (2013) *DQ* 190, 190-191.

Chapter Five explains the potential benefits of OLGMs, the key possible challenges the companies and users may experience in relation to the OLGMs.

Chapter Six concludes the study. It provides the main findings of the research, presents a conclusion, recommendations to overcome the challenges under Chapter Five, and potential future research areas.

## CHAPTER TWO: LITERATURE REVIEW

### 2.0. Introduction

There are a large number of studies on OLGMs which cover a wide aspect of OLGMs in different contexts. However, this review of literature focuses on five major themes which appear across the literature reviewed, and are applicable to the establishment and implementation of OLGMs. The themes are: (I) understanding of OLGMs; (II) grievance resolution models of the mechanisms; (III) designing and implementing the mechanisms; (IV) experiences with regards to the mechanisms, (V) the effectiveness criteria for the mechanisms; (VI) justification for the mechanisms; and a conclusion.

### 2.1. The major themes

#### I. Understanding company OLGMs

The first key area of this review concerns the definition of OLGMs. *Newton Alex (2019)* who provided research on access to remedy and grievance mechanisms, referred to OLGMs as a form of non-State-based grievance mechanism administered by a business either alone or in collaboration with stakeholders, through which grievances are settled.<sup>25</sup> While this definition reveals OLGMs as a crucial process to receive and settle grievances, the definition does not clarify the level at which the mechanism could be established and its scope.

However, *Knuckey Sarah, and Jenkin Eleanor (2015)*, whose research concerned Company-created remedy mechanisms for serious human rights abuses, offered a comprehensive definition. The authors defined the mechanisms as ongoing procedures which can be established at the 'corporate-level or project level' to address 'low-level' complaints such as employee complaints, property damage, and relocation issues to those harmed by the company's operations through dialogue and flexible dispute resolution (ADR) processes before they escalate.<sup>26</sup> Whereas the work clarifies the where to institutionalize OLGMs, the work is criticized for refuting the use of the mechanisms to

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<sup>25</sup> Ibid (n 1) 116.

<sup>26</sup> Knuckey Sarah and Eleanor Jenkin, 'Company-created remedy mechanisms for serious human rights abuses: a promising new frontier for the right to remedy?' (2015) 19.6 IJHR 801, 802.

remedy grave or widespread human rights impact or abuses, and for suggesting that the mechanisms are incapable of being used to address past human rights abuses.<sup>27</sup> The study failed to consider the relevance of defining the scope of OLGMs. *Christina Hill (2010)*, supports that the ability of company-level mechanisms to address human rights abuses depend on the scope of the mechanisms.<sup>28</sup>

From the review of the literature, it is drawn that an OLG is a non-State-based formal channel established to resolve disputes between the company and the intended users. The mechanism can be instituted at corporate or business site, and the mechanism's ability to address any nature of adverse impacts may depend on its scope.

## II. Grievance resolution models of OLGMs

*Knuckey Sarah and Jenkin Eleanor (2015)* identified that the best approach to handling grievances under the OLGs is generally through dialogue process and sometimes through ADR processes where necessary.<sup>29</sup> On dialogue process, the authors concluded that it is the initial approach which has the potential to foster affected stakeholder's trust in the OLGs.<sup>30</sup> However, *Emma Wilson (2009)*, argues that the dialogue or 'decide together' is not a flawless approach, it may turn oppressive where the company suppresses information relevant to the grievance and does not manage the complaint transparently and honestly.<sup>31</sup> *Emma Wilson's* argument signifies that the dialogue approach is appropriate in so far as it is meaningfully done. The result of meaningful dialogue as *Doyle Cathal (2015)* explained, leads to acceptable outcome by both parties.<sup>32</sup>

Regarding ADR, *Karin Lukas, et al. (2016)*,<sup>33</sup> mentioned that ADR is a form of dispute resolution that involved the active engagement of the parties involved, encompassing negotiation, mediation and

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<sup>27</sup> Sarah and Jenkin (n 26) 802.

<sup>28</sup> Hill Christina, 'Community-Company Grievance Resolution: Guide for the Australian Mining Industry' (Oxfam Australia, Melbourne, Australia 2010) 9.

<sup>29</sup> Sarah and Jenkin (n 26) 802.

<sup>30</sup> Sarah and Jenkin (n 26) 802.

<sup>31</sup> Wilson Emma, 'Company-led approaches to conflict resolution in the forest sector. Forest Dialogue' (2009) 44.

<sup>32</sup> Cathal (n 6) 46.

<sup>33</sup> Lukas Karin, et al, *Corporate accountability: The role and impact of non-judicial grievance mechanisms* (Edward Elgar Publishing 2016) 8-9.

arbitration.<sup>34</sup> The authors indicated that integrating ADR in OLGMs gives the complainant and company further opportunity to resolve the grievance or concern in question outside litigation arena where the initial dialogue-based approach could not settle the complaint.<sup>35</sup> However, the study never defined the disadvantages associated with using ADR mechanisms. But, *Todd B. Carver and Vondra A. Albert (1994)* made the arguments against using ADR. They may be unfair especially to the complainant where there is power imbalance between the parties, may also produce unsatisfactory outcome to either party, and the binding nature of arbitration decisions may encumber the parties from proceeding to Court.<sup>36</sup>

Assessment of the literature points out that dialogue constitutes a primary approach to resolving grievances. However, it may fail sometimes. Therefore, there is need to incorporate ADR to provide additional fora outside courts. Whereas ADR is not perfect, studies argued that 'companies can overcome the risk associated with ADR through commitment. Consequently, companies that give ADR top priority realize immense savings of time, money, and relationships.<sup>37</sup> To the victims, ADR guarantees access to remedies outside the adversarial, costly, and bureaucratic court systems.<sup>38</sup>

### **III. Designing and implementing OLGMs**

The work of *Stefan Zagelmeyer, Bianchi Lara, and Shemberg A. R. (2018)*, on non-State-based non-judicial grievance mechanisms, reveals that the initiative to establish and implement company mechanism ranges from informal discussions with stakeholders to complaints management, resolution, outcome implementation and evaluation procedures.<sup>39</sup> The study also revealed that the important aspects of the design of mechanism are: defining the scope of the mechanism; determining the purpose; and creating the practical processes of the mechanism.<sup>40</sup> This study is significant in

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<sup>34</sup> Karin (n 33) 8-9.

<sup>35</sup> Karin (n 33) 8-9.

<sup>36</sup> Carver Todd B., and Albert A. Vondra, 'Alternative dispute resolution: Why it doesn't work and why it does' (1994) 72 *Harvard Business Review* 120, 120.

<sup>37</sup> Shavell Steven, 'Alternative dispute resolution: an economic analysis' (1995) 24(1) *The Journal of Legal Studies* 1, 3-4.

<sup>38</sup> Karin (n 33) 8-9

<sup>39</sup> Zagelmeyer Stefan, Lara Bianchi, and A. R. Shemberg, 'Non-state based non-judicial grievance mechanisms (NSBGM): An exploratory analysis' (2019) 21-25.

<sup>40</sup> Stefan, Bianchi, and Shemberg (n 39) 21.

showing the outline of the steps and processes. However, the study could have been more satisfactory if it were to explain in detail the steps and processes.

However, the leading guidelines of the CAO (2008),<sup>41</sup> and the IPIECA (2012)<sup>42</sup> and (2015),<sup>43</sup> offer detail explanation of the steps and processes ranging from initial step to monitoring. But, the CAO and IPIECA guidelines provide the information on a general perspective, leaving a knowledge gap in establishing and implementing OLGMs in the context of specific countries and local environment. *Caroline Rees* (2008) elucidated, establishment and implementation of OLGMs is a tailored process, it must be customized to specific country, culture and stakeholders for which it is designed.<sup>44</sup>

From the evaluation of the studies, it is apparent that the establishment and implementation of OLGMs involve several steps and processes. However, OLGMs must be created and administered in the context of a specific business field, country and the local environment. Disregarding the contextual factors may result in a poorly established mechanism. The consequences, the *UN Interpretive Guide* (2012) explained, may raise expectations without providing the processes to meet the expectation.<sup>45</sup>

#### **IV. Experiences with regards to OLGMs**

Studies have revealed both positive and negative experiences with the process and outcome of OLGMs. *Knuckey Sarah and Jenkin Eleanor* (2015), explained that the mechanism allows easy accessibility at no cost to complainants and creates the possibility of comparatively speedy and effective remedies for the victims who may otherwise have limited access to national or foreign

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<sup>41</sup> Wildau Susan, *et al.*, 'A Guide to Designing and Implementing Grievance Mechanisms for Development Projects' (Office of the Compliance Advisor/Ombudsman 2008) <<http://www.cao-ombudsman.org/howwework/advisor/documents/implemgrieveng.pdf>> accessed 19 August 2019

<sup>42</sup> IPIECA, 'Operational-level Grievance Mechanisms: Good Practice Survey' (London 2012) <<http://www.ipieca.org/resources/good-practice/operational-level-grievance-mechanisms-good-practice-survey/>> accessed 25 August 2019

<sup>43</sup> IPIECA, 'Community grievance mechanisms in the oil and gas industry; A manual for implementing operational-level grievance mechanisms and designing corporate frameworks' (London 2015). <<http://www.ipieca.org/resources/good-practice/community-grievance-mechanisms-in-the-oil-and-gas-industry/>> accessed on 25 August 2019.

<sup>44</sup> Rees Caroline, 'Rights-Compatible Grievance Mechanisms: Guidance Tool for Companies and Their Stakeholders. *Corporate Social Responsibility Initiative*' (Cambridge, MA: John F Kennedy School of Government Harvard University 2008) 2.

<sup>45</sup> OHRHC, *The Corporate Responsibility to respect human rights; An interpretive Guide* (United Nations Publications 2012) 74.

judicial systems.<sup>46</sup> The authors illustrated the positive experience with a type of OLG established and implemented by a Canadian miner, Barrick Gold Corporation at Papua New Guinea (PNG) mine in 2012, to remediate cases of sexual violence committed by the company's security guards and other employees. That between 2014 and 2015, about 137 eligible complaints were received, out of which 119 were settled.<sup>47</sup> The authors further reported that numerous claimants expressed dissatisfaction about the monetary compensation offered, arguing that they did not reflect the severity of the abuses.<sup>48</sup>

On the negative encounter with the mechanisms, *Jonathan Kaufman and McDonnell Katherine (2016)*, voiced that users are often frustrated with OLGs because the majority of the mechanisms are designed and implemented by the target companies themselves, a clear conflict of interest, which discredit the independence of the mechanisms.<sup>49</sup> The *RAID study (2019)* on Acacia Mining's grievance mechanism in Tanzania, further detailed the negative experiences. The study illustrated that the mechanism was adversarial in its approach to settling disputes in that complainants were required to argue and present evidence before the process exclusively controlled by the company. In addition, there is no equality of arms; the company controls relevant information but could not share with the claimants nor allow claimants to be assisted by lawyers before the mechanism.<sup>50</sup>

The case studies show the opportunities and challenges associated with the use of OLGs. The opportunities are important to make the business case for the establishment and implementation of OLGs, while the challenges are source of learning to enable developing solutions to improve effectiveness of OLGs.

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<sup>46</sup> Sarah and Jenkin (n 26) 802-803.

<sup>47</sup> Sarah and Jenkin (n 26) 802-803.

<sup>48</sup> Sarah and Jenkin (n 26) 810.

<sup>49</sup> Kaufman Jonathan and Katherine McDonnell, 'Community-driven operational grievance mechanisms' (2016) *Business and Human Rights Journal* 127, 127-128.

<sup>50</sup> The RAID Report, 'Human Rights Violations Under Private Control: Acacia Mining's Grievance Mechanism and the Denial of Rights' (2019) 7-11, <[http://www.raid-uk.org/sites/default/files/raid\\_report\\_on\\_private\\_grievance\\_mechanisms\\_final\\_12\\_june\\_2019.pdf](http://www.raid-uk.org/sites/default/files/raid_report_on_private_grievance_mechanisms_final_12_june_2019.pdf)> accessed 20 July 2019



## V. Effectiveness Criteria for OLGMs

*John Ruggie (2008)*, advanced six (6) essential criteria for effective non-judicial grievance mechanisms (including OLGMs), which are: legitimacy, accessibility, equitability, predictability, transparency, rights-compatibility.<sup>51</sup> In addition to the six overarching principles, Principle 31 of the UNGP added that OLGMs should also be a source of continuous learning, and based on engagement and dialogue. In total, making up eight criteria. However, it is viewed that the eight criteria are not conclusive. Emerging best practices may be used to supplement them. *D. Kemp and N. Gotzmann (2009)* supports that there are a set of supplementary best practices principles such as culturally appropriate, proportionality, empowering, and continual improvement, that are prominent in guidelines relating to OLGMs.<sup>52</sup>

*Newton Alex (2019)*, confirmed that the effective criteria provide a standard for inter alia designing a non-judicial grievance mechanism to help ensure that it is effective in practice.<sup>53</sup> That the criteria are intended to be interdependent and should be implemented as a whole.<sup>54</sup> However, the author's work never provided the steps companies should take to meet the different standards in the context of OLGMs. But, *Caroline Rees (2008)*, argued that the criteria could be fulfilled by integrating them in the steps and processes involved in the establishment and implementation of the OLGMs.<sup>55</sup>

In sum, the eight criteria are not conclusive but minimum standards to guide the establishment and implementation of OLGMs. Best practices may supplement them. Compliances with the standards require incorporating the standards in the processes involved in the creation and administration of OLGMs.<sup>56</sup> Incorporating the standards require articulation of action-guidance that companies should perform to meet the standards.<sup>57</sup>

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<sup>51</sup> Ruggie John, 'Protect, respect and remedy: A framework for business and human rights' (2008) *Innovations: Technology, Governance, Globalization* 189, 206.

<sup>52</sup> Kemp D., and N. Gotzmann, 'Community complaints and grievance mechanisms and the Australian minerals industry' (2009) vii.

<sup>53</sup> Newton (n 25) 118.

<sup>54</sup> Newton (n 25) 118.

<sup>55</sup> Caroline (n 44) 1.

<sup>56</sup> Caroline (n 44) 1.

<sup>57</sup> CSR Europe, 'Assessing the effectiveness of company grievance mechanisms; CSR Europe's Management of Complaints Assessment (MOC-A) Results' (2013) 10,

## VI. Justifications for implementing OLGMs

*Caroline Rees (2011)*,<sup>58</sup> supported that OLGMs plays a critical role in meeting the corporate responsibility to respect human rights in two main ways. Firstly, the mechanisms support the identification of adverse human rights impacts as a part of a company's ongoing human rights due diligence by providing a channel for raising concerns to victims when they believe they are being or will be harmed. Secondly, the mechanisms make it possible for grievances, once identified, to be addressed early and directly by the company, thereby preventing harms and grievances from compounding and escalating, respectively.

*Newton Alex (2019)*,<sup>59</sup> also explained that implementing the mechanisms is not only beneficial to the victims in terms of easy access at reduced costs compared to litigation, it is also significant to the company in that through the mechanisms, companies are not only enabled to resolve grievances early and directly, but also facilitated to obtain essential information on trends and patterns in complaints which can enable them to respond and adapt their business practices accordingly.

However, the works of *Newton Alex* and *Caroline Rees* did not evaluate the arguments against OLGMs that may push a company to resist the establishment and implementation of OLGMs. Nonetheless, *Emma Wilson and Blackmore Emma (2013)* provided that the mechanism is associated with a number of perceived disadvantages:<sup>60</sup> It is resource-intensive, and it might encourage the filing of vexatious claims and putting pressure on the company to make unreasonable concessions or payments.

Overall, the assessment of the literature demonstrates that establishing and implementing OLGMs could be beneficial to the company and intended users, hence the justification for their development.

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<[https://www.csreurope.org/sites/default/files/uploads/Assessing%20the%20effectiveness%20of%20Company%20Grievance%20Mechanisms%20-%20CSR%20Europe%20%282013%29\\_0.pdf](https://www.csreurope.org/sites/default/files/uploads/Assessing%20the%20effectiveness%20of%20Company%20Grievance%20Mechanisms%20-%20CSR%20Europe%20%282013%29_0.pdf)> accessed on 29 August 2019.

<sup>58</sup> Rees Caroline, 'Piloting principles for effective company-stakeholder grievance mechanisms: A report of lessons learned. *Corporate Social Responsibility Initiative*' (Harvard Kennedy School 2011) 8-9.

<sup>59</sup> Newton (n 25) 116.

<sup>60</sup> Wilson Emma and Emma Blackmore, 'Dispute or Dialogue: Community perspectives on company-led grievance mechanisms' (*International Institute for Environment and Development (IIED)*: London 2013) 13.

However, the company may be held back by the perceived disadvantages, unless a persuasive business case that offsets the perceived disadvantages, is presented.

## **2.2. Conclusion**

This study reviewed the literature relevant to establishing and implementing OLGMs, around five main areas: understanding of OLGMs; grievance resolution models of the mechanisms; designing and implementing the mechanisms; experiences with regards to the mechanisms; the effectiveness criteria for the mechanisms; and the justification for the mechanisms. What arose from the review is that companies can play a significant role in enabling and strengthening access to remedies through OLGMs. Whereas the literature concur on the need for companies to develop and administer OLGMs, they presented the information on establishing and implementing OLGMs in a general perspective, albeit acknowledging that the process is a tailored one that must be done in the context of a specific country, business, culture and intended stakeholders.<sup>61</sup> This manifests a knowledge gap in creating and operating OLGMs in the context of specific countries and local environment. In light of the gap, this study focuses on establishing and implementing OLGMs to remediate human rights abuses involving oil and gas companies in the context of South Sudan in view of the UNGP, Petroleum Act, and other best practice principles. Further research could also be done in the context of specific businesses in other countries in view of the UNGP and relevant domestic legislation. The study would vitally contribute to guaranteeing access to remedies via OLGMs.

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<sup>61</sup> Caroline (n 44) 2.

## CHAPTER THREE: THE RIGHT TO EFFECTIVE REMEDIES AND OLGMS

### 3.0. Introduction

This Chapter examines the indirect obligation of corporations to provide effective remedies under international law, the corporate responsibility to respect and provide a remedy under the UNGP, the standards under the UNGP and Petroleum Act, for effective OLGMS. The chapter further explains the procedural and substantive aspects of the right to remedies, and the relationship between remedies and underlying rights.

### 3.1. The indirect obligation of corporations under international law

International Law recognises the right to an effective remedy for victims of violations of international human rights law, under numerous international instruments.<sup>62</sup> In particular, article 8 of the UDHR, article 2(3) of the ICCPR, article 6 of the ICERD, article 14 of the CAT, and article 39 of the CRC. The right is also affirmed under soft-law instruments such as the Basic Principles and Guidelines on the Right to a Remedy (2005),<sup>63</sup> and the UNGP.<sup>64</sup> Consequently, there is no contention over the fact that victims of human rights violations and abuses have a right to an effective remedy and reparation.<sup>65</sup>

Generally, the obligation under international law to provide effective remedies applies directly to the State parties. It is part of the State's obligation to protect human rights.<sup>66</sup> The protect obligation stems from the interpretation of human rights obligations under human rights treaties.<sup>67</sup> The UN Human Rights treaty bodies adopted specific tripartite typology of how human rights obligations should be secured. According to the typology, States have obligations to 'respect', 'protect' and 'fulfil' human rights.<sup>68</sup> In the context of business activities, the obligation to protect is the most relevant.<sup>69</sup> The protect obligation means that States parties must prevent infringements of human rights by third party,

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<sup>62</sup> Sonja B. Starr, 'The right to an effective remedy: Balancing Realism and Aspiration,' in Ssenyonjo Manisuli, *International human rights law: six decades after the UDHR and beyond* (Routledge 2016) 478.

<sup>63</sup> Principles 11, 12, 13, 14, 15, 18 – 23.

<sup>64</sup> Principles 11, 13, 15, 22 and 25.

<sup>65</sup> Livio Zilli, 'The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners Guide No.2' (International Commission of Jurists Geneva 2018) 15.

<sup>66</sup> John (n 51) 191.

<sup>67</sup> Frederic Megret, 'Nature of Obligations', in Moeckli Daniel, et al., (eds), *International human rights law* (Oxford University Press 2018) 97.

<sup>68</sup> Ibid.

<sup>69</sup> CESCR GC 24, para.10.

including companies within their territory and/or jurisdiction.<sup>70</sup> However, the obligation is a standard of conduct. States are not per se responsible for human rights abuse by private actors, but they may breach their obligations where such abuse can be attributed to them, or where they fail to act with due diligence to prevent, investigate, punish and redress private actors' abuse.<sup>71</sup>

Because the State has the power to decide the appropriate steps to take to protect human rights, it can consider a wide range of acceptable preventative and remedial measures, including legislation.<sup>72</sup> The Human Rights Committee (HRC), the Committee on the ESCR, and the Committee on the Rights of the Child, for instance, explained that States should, on the one hand, provide adequate remedies to redress adverse business-related human rights impacts, and on the other hand, adopt a legal framework requiring business entities to inter alia, account for their negative business-related impacts.<sup>73</sup> This recommendation is construed to mean that under international law, effective remedies can be directly provided by the State, or/and the State can, through national law, require corporations to provide effective remedies as a mean to ensure corporate accountability.

The direct provision of remedies by the State involves establishing effective State-based processes of claiming reparations by victims of rights violations against corporate perpetrators.<sup>74</sup> The State-based mechanisms may be judicial or non-judicial administered.<sup>75</sup> Judicial processes can include claims in civil or criminal proceedings against the corporation alleged to have committed or contributed to the human rights abuse.<sup>76</sup> Non-judicial State-based grievance mechanisms vary from State to State but may include, labour tribunals, national human rights institutions, ombudsperson offices, and other Government-run complaints offices.<sup>77</sup> The reparations which can be provided by the State-based mechanisms may include apologies, restitution, rehabilitation, financial or non-financial compensation, criminal or administrative sanctions, and prevention orders such as injunctions or guarantees of non-

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<sup>70</sup> Megret (n 67) 97.

<sup>71</sup> Commentary to Principle 1.

<sup>72</sup> Commentary to Principle 1.

<sup>73</sup> HRC GC 31, CESCR GC 24 and CRC GC 16.

<sup>74</sup> Principle 25.

<sup>75</sup> Commentary to Principle 25.

<sup>76</sup> *ibid.*

<sup>77</sup> *ibid.*

repetition.<sup>78</sup> Generally, the reparations is to counteract or make good any human rights harms that have occurred.<sup>79</sup>

On the other hand, adopting the legal framework to hold corporations accountable for human rights abuses, would require implementing domestic laws to impose legal obligation on corporations to, among others, provide remedies to those affected by their activities as the mean to facilitate accountability.<sup>80</sup> However, adopting national legislation to obligate corporations to provide remedies may be affected by the unwillingness or inability of the State. Many States may be unwilling or unable to adopt legislation or enforce existing legislation that provides protection to victims of corporate human rights violation, for the reason of ‘attracting investments or because of investment agreements that significantly freeze the State’s regulatory powers.’<sup>81</sup> But, where the State through her national law imposes an obligation on corporations to set up remedial mechanisms to redress corporate human rights abuses, this can be considered as an international law compatible-way through which the State has positively given effect to its protect obligation.<sup>82</sup>

In the context of South Sudan, for instance, through her Transitional Constitution 2011 (as amended), under article 172(2)(n), it is required that petroleum and gas development and management must be guided by the principle that ensures accountability for violations of human rights and degradation to the environment caused by petroleum and gas-related operations. As part of the means to achieve the accountability, section 94 of the Petroleum Act, requires petroleum corporations to establish a dispute resolution mechanism to address grievances against the corporations. Adopting such legislation can be argued to be a fulfilment of the country’s obligation to protect human rights under the International Human Rights treaties, to which it is a State party, such as the CAT, CRC, ICCPR and ICESCR. The corporations’ direct obligation under the national law is considered the indirect obligation under international law.

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<sup>78</sup> *ibid.*

<sup>79</sup> *ibid.*

<sup>80</sup> Principle 28.

<sup>81</sup> John (n 51) 192.

<sup>82</sup> Andrew Clapham, ‘Non-State actors,’ in Moeckli Daniel, et al., (eds), *International human rights law*. (Oxford University Press 2018) 563.

### **3.2. The Corporate responsibility to respect, and provide a remedy under the UNGP**

The corporate responsibility to respect human rights calls on corporations to address adverse human rights impacts caused through their activities or business relationships.<sup>83</sup> While a company's "activities" are understood to include both actions and omissions, its "business relationships" are understood to include relationships with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services.<sup>84</sup> As per principles 15(c) and 22, to fulfil the respect responsibility, companies should have legitimate processes to enable the remediation for the reason that even with the best policies and practices, a company may cause or contribute to an adverse human rights impact that it has not foreseen or been able to prevent. When such adverse impacts are identified, the company should actively engage in the remediation.<sup>85</sup>

One of the legitimate processes to enable remediation, is 'OLGMs' as per the clarification commentary to principle 22 provided. Commentary to principle 29 clarifies three ways of administering the OLGMs: a) the company alone b) the company in collaboration with other stakeholders or c) by mutually acceptable external expert or body. Although the same standards can be used for their development, the OLGMs administered in the three ways 'vary in terms of processes, form, location, and remedy outcomes.<sup>86</sup> The relevant OLGMs for the purpose of this study is the OLGMs administered by a company alone.

Commentary to Principle 29 cautioned against using the OLGM to oust access to other grievance mechanisms. This thoughtfulness implies OLGMs should be established and implemented 'within the prospect of existing mechanisms to ensure the provision of alternative channels for issues that cannot or should not be addressed through the mechanism.'<sup>87</sup> It is debatable whether the limitation can be

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<sup>83</sup> Principles 11, 13(a), 15(c) and 22

<sup>84</sup> Commentary on principle 13.

<sup>85</sup> Commentary on principle 22.

<sup>86</sup> Martijn (n 24) 190-191.

<sup>87</sup> SHIFT, "Remediation, Grievance Mechanisms, and the Corporate Responsibility to Respect Human Rights" (New York 2014) 4.

legally binding on the victim. However, it will demonstrate the company's bad faith in terms of guaranteeing access to remedies.<sup>88</sup>

The corporate responsibility to respect human rights does not depend on the willingness or ability of a State to protect human rights. It is an independent responsibility as per commentary to Principle 11. This clarification implies that it is no longer an excuse for corporations to fail to provide remedies on the basis of State's inability or unwillingness to directly provide State-based grievance mechanisms or adopt domestic legislation requiring corporations to establish OLGs for ensuring accountability for violations.

Though the respect responsibility under the UNGP exists "autonomously, and above compliance with national laws,"<sup>89</sup> it does not remove or lessen a corresponding corporate duty under national law to create a complaint resolution mechanism. Where there is a national law which is consistent with international norms such as the Petroleum Act, it is never inconsistent with any international norms, to create and implement OLGs in compliance with both the national law and the UNGP. It is viewed that such creation could provide a more functional OLGs because of the binding nature of national law and the influential nature of international norms which can mutually reinforce each other.

### **3.3. The Standards under the UNGP and the Petroleum Act, for effective OLGs**

The standards for effective OLGs are expressed under the Petroleum Act and the UNGP. Section 94(1) of the Act requires the mechanism to comply with the highest international standards, and be: (a) proportional to the complexity of the issue; (b) culturally appropriate; (c) understandable, transparent, accountable; (d) address concerns promptly; and (e) at no cost to the successful party and without reprisal. However, the Act never provided explanation of the standards. But, by virtue of requiring compliance with the 'highest international standards', it is argued that the Petroleum Act's standards be construed in accordance with those of the international norm, the UNGP.

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<sup>88</sup> Cathal (n 6) 48.

<sup>89</sup> Commentary to Principle 11.



Principle 31 of the UNGP outlined and explained the standards as follows:

Legitimacy, signifies that the mechanism must ensure trust from the benefiting stakeholders and being accountable for the fair conduct of its processes; Accessibility, requires that the mechanism must be made known to the stakeholders for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access; Equitability, indicates that it must ensure that aggrieved parties have reasonable access to sources of information, advice, and expertise necessary to engage in a grievance process on fair and equitable terms; Predictable, infers that the process need to be simplified, clear and known publicly, including the time duration at each step of the process and the nature of outcome available; Transparency, implies that the parties require to continuously updated about the grievance process and performance to build confidence in the mechanism; Rights-compatibility, indicates that the mechanism must ensures that the process, outcomes and remedies resonate with internationally recognized human rights norms; Source of continuous learning, means that frequent assessment of the mechanism should be used to steer improvement in the mechanism to prevent future grievances and harms; and Engagement and dialogue-based approach signifies that the design, implementation and performance assessment of the mechanism should be based on consultation with affected stakeholders.

The UNGP's standards are more expansive than the Petroleum Act's standards. However, the Petroleum Act's standards are observed as consistent with those of the UNGP. In addition to its standards, the Petroleum statute recognizes compliance with the highest international standards. The UNGP being an international norm arguably form part of the highest standards envisaged under the Petroleum Act.

Additionally, it is argued that the Petroleum Act and UNGP's standards are not conclusive. Emerging best practices may be used to supplement them. D. *Kemp and N. Gotzmann (2009)* explained, there are supplementary best practices principles such as proportionality, empowering and continual improvement that are prominent in guidelines relating to OLGMs.<sup>90</sup>

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<sup>90</sup> Kemp and Gotzmann (n 52) vii.

Hence, the requirements set by the Petroleum statute, the UNGP, and other best practice principles are the standards for establishing and implementing effective OLGMs to remediate human rights abuses involving oil and gas companies in the context to South Sudan.

### **3.4. The procedural and substantive components of effective remedies**

Effective remedies are composed of the procedural and substantive components. The procedural aspect concerns the right to raise human rights concerns before a mechanism.<sup>91</sup> The procedural element consists of the State-based and non-State-based grievance mechanisms. The State-based grievance mechanisms are the ones administered by the State.<sup>92</sup> They may be judicial or non-judicial processes.<sup>93</sup> The Non-State-based grievance mechanisms include OLGMs administered by the business either alone or with other stakeholders, or by mutually acceptable external expert or body.<sup>94</sup>

The substantive component on the other hand, concerns the actual relief to which the victims of human rights abuses are entitled.<sup>95</sup> They are sometimes referred to as 'reparations'.<sup>96</sup> The reparations provided by the judicial mechanisms are also relevant in the context of OLGMs, with the exception of criminal sanctions, which are reserve of the State.<sup>97</sup> However, there is no hierarchy in which the reparations may be provided.<sup>98</sup> For example, the company may start with making an apology, and where possible, undoing the misconduct and restoring the situation to its original position, by remediation in kind or financial.<sup>99</sup>

The procedural component provides the channel through which the substantive relief (reparations) are provided to the victims of human rights abuses, and the provision of both OLGMs and reparations are guided by the principle of proportionality.<sup>100</sup> OLGMs must be proportional to the severity of adverse

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<sup>91</sup> Shelton Dinah, *Remedies in International Human Rights Law* (3<sup>rd</sup>edn, Oxford University Press 2015) 7.

<sup>92</sup> Commentary to Principle 25.

<sup>93</sup> Commentary to Principle 25.

<sup>94</sup> Commentary to Principle 29.

<sup>95</sup> Starr (n 62) 478.

<sup>96</sup> Commentary to principle 29.

<sup>97</sup> SHIFT (n 87) 3.

<sup>98</sup> Lambooy Tineke E., Aa Argyrou, and Mary Varner, *Human rights obligations of business: Beyond the corporate responsibility to respect?* (2013) 333.

<sup>99</sup> Tineke, Argyrou, and Varner (n 98) 331-332.

<sup>100</sup>Newton (n 1) 116.

human rights impacts.<sup>101</sup> Equally, the form of reparations awarded needs to be proportional to the gravity of the abuse.<sup>102</sup> However, how to specifically assess proportional remedies is unclear.<sup>103</sup> Whereas the company may offer remedies based on its planned resources, the victim may expect remedies according to his/her satisfaction.<sup>104</sup> The different perspectives on determining remedies raise challenging question of what specifically amounts to proportionate remedies?

### **3.5. Relationship between remedies and underlying rights**

The right to effective remedies is an essential component of all internationally recognised human rights.<sup>105</sup> It is recognized that business entities can have an impact on virtually the entire spectrum of internationally recognized human rights.<sup>106</sup> Where there is a violation of any human rights, there should be remediation.<sup>107</sup> It follows that abuse of any of the human rights generates the right to a remedy.

Without affording the right to adequate remedies to redress a corporation's violation of any human rights, there shall be no meaningful respect for human rights.<sup>108</sup> For instance, the Committee on the Rights of the Child observed that "for rights to have meaning, effective remedies must be available to redress violations", and that "where rights are found to have been breached, there should be appropriate reparation."<sup>109</sup>

### **3.6. Conclusion**

The Chapter reviewed the right to effective remedies and OLGMs. It revealed that the requirement and standards to create and implement OLGMs exist both under the Petroleum Act and UNGP. With or without the existence of the national law, the normative basis could still exist under the UNGP. However, in the presence of the Petroleum Act, it is not inconsistent with any international standards, to establish and implement OLGMs in compliance with the Act, UNGP, and other best practice

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<sup>101</sup> Principle 14.

<sup>102</sup> Commentary to principle 25.

<sup>103</sup> Sarah and Jenkin (n 26) 809.

<sup>104</sup> *ibid.*

<sup>105</sup> Dinah (n 91) 52.

<sup>106</sup> Principle 12.

<sup>107</sup> Principle 11.

<sup>108</sup> Principle 12.

<sup>109</sup> The UN Committee on the Rights of the Child, GC no. 5 (2003), para.24.

principles. The OLG is a procedural aspect of effective remedies through reparations are obtained. Every human rights violation should attract reparation(s) proportional to the gravity of the abuse and harm, to ensure meaningful respect for human rights.

## **Chapter IV: Establishing and implementing an effective OLG**

### **4.0. Introduction**

This chapter examines how the oil and gas corporations can establish and implement an effective OLG in compliance with the standards under principle 31 of the UNGP, section 94 of the Petroleum Act, and other best practice principles.

A variety of studies present different ways of establishing and implementing OLGs. From the work of *Stefan Zagelmeyer, Bianchi Lara, and Shemberg A. R. (2018)*,<sup>110</sup> and the leading guidelines of the CAO (2008),<sup>111</sup> and the IPIECA (2012) and (2015),<sup>112</sup> this study establishes that the companies can achieve the creation and implementation through five (5) essential phases. The phases are: the initial step of considering key issues; designing the mechanism; developing the procedural steps of managing grievances; testing, review and disseminating the mechanism; and finally, the phase of implementing, monitoring and learning. Each of the phases, in turn, involves different steps or processes.

It is reasoned that the five phases are realisable to the companies of all sizes and are capable to adequately produce effective OLGs compatible to the business, local context and legal requirements.

#### **4.1. Phase I: The initial step of considering key issues**

The UNGP and the Petroleum Act provide the normative basis and standards for OLGs, but the frameworks are incapable of setting themselves into operation. As such, it is explained that the idea to establish and implement the OLG starts from 'somewhere and with someone in the company'.<sup>113</sup> For the idea to gain greater support and result into creating appropriate mechanism, two key issues should be considered: (I) the business human rights risks and local context; and (II) the business case for the mechanism.<sup>114</sup> Considering these issues is significant to ensure having a customized

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<sup>110</sup> Ibid (n 39).

<sup>111</sup> GAO (n 41).

<sup>112</sup> IPIECA (n 42) and IPIECA (n 43).

<sup>113</sup> CAO (n 41) 21.

<sup>114</sup> Ibid.

mechanism fit for the business and local circumstances, and to facilitate greater acceptance and support of the mechanism within the company.<sup>115</sup>

### **I. The business human rights risk and the local context.**

Understanding the business human rights risk and local circumstances are significant to influence the creation and implementation of an OLGGM which is proportionate to the human rights harms linked to the business operation in the national context.<sup>116</sup> To gain insight of the potential human rights issues and the local context, the corporations need to conduct 'human rights due diligence' in accordance with the UNGP.<sup>117</sup> Human rights due diligence is one of the means to fulfil the corporate responsibility to respect human rights.<sup>118</sup> It helps to identify who may be affected and the nature of adverse human rights impacts.<sup>119</sup> It also enables the companies to gain an understanding of the existing State-based grievance mechanisms as well as the traditional justice system.<sup>120</sup> Human Rights due diligence is achieved through conducting Human Rights Impact Assessment (HRIA).<sup>121</sup>

Essentially, the people who may be affected by petroleum activities could be within and outside the area of operations. The potential specific human rights issues the HRIA may reveal include, abuses perpetrated through environmental destruction, security guards, employment conditions, undermining the livelihoods of surrounding communities through impacts on their health, land, water and other natural resources, or failing to adequately consult indigenous groups to secure their consent prior to operations.<sup>122</sup> The abuses through these means, translate into the violation of the internationally recognised human rights that companies should respect as clarified under principle 12 of the UNGP.

Regarding traditional justice system, the HRIA will potentially reveal that the local community's common way of resolving grievances in the oil producing regions of South Sudan, is through their

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<sup>115</sup> IPIECA (n 43) 14.

<sup>116</sup> CAO(n 41) 27.

<sup>117</sup> Cathal (n 6) 91.

<sup>118</sup> Principle 17.

<sup>119</sup> Principle 17.

<sup>120</sup> Cathal (n 6) 41.

<sup>121</sup> Nora Gotzmann, 'Human Rights and Impact Assessment: Conceptual and Practical Considerations in the Private Sector Context,' *Matters of Concern Human Rights Research Paper* (2014) 10.

<sup>122</sup> Corporate Human Rights Benchmark pilot methodology (2016) 14.

'traditional authorities'.<sup>123</sup> They apply customary laws to reach culturally appropriate remedies.<sup>124</sup> A violation of the right to life, for instance, is remedied by 'customary blood compensation' in form of cows.<sup>125</sup> The traditional dispute resolution mechanism and the customary blood compensation are recognised by unwritten customs and statutory law. The Local Government Act 2009 (Laws of Southern Sudan), bestows customary powers on the local chiefs to adjudicate on customary disputes such as land disputes, women rights and child rights.<sup>126</sup> The Penal Code Act 2008 (Laws of Southern Sudan), on the other hand, recognises customary blood compensation as a substitute for a death sentence for causing death of a person.<sup>127</sup> The traditional systems of justice and remediation are considered legitimate, respected, and valued by the communities and law enforcement agencies. The understanding of these will lead to designing and implementing a culturally appropriate OLG in line with Section 94(1) of the Petroleum Act, and best practice principle.

OLGM is meant to 'complement and supplement State-based grievance mechanisms,'<sup>128</sup> therefore the understanding of the existing State-based grievance mechanisms at the initial step is vital to inform the establishment and implementation of the mechanism within the prospect of the State-based mechanisms. In the context of South Sudan, the existing State-based mechanisms include judicial and non-judicial mechanisms. The judiciary is established under part seven of the Transitional Constitution 2011 (as amended). On the other hand, the non-judicial mechanisms include the South Sudan Human Rights Commission established under article 6 of the Southern Sudan Human Rights Commission Act 2009 to investigate human rights abuses, and the Commission for Conciliation, Mediation and Arbitration established under section 22 of the Labour Act 2017 (Laws of South Sudan), to resolve labour-related disputes. Hence, these State-based mechanisms may provide alternative channels for issues that cannot or should not be addressed through the OLG.

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<sup>123</sup> Local Government Act 2009, sections 98, 99 and 100.

<sup>124</sup> Ibid.

<sup>125</sup> Penal Code Act 2008, section 206(b)

<sup>126</sup> Local Government Act 2009, sections 98, 99 and 100.

<sup>127</sup> Ibid n 125

<sup>128</sup> Commentary to Principle 29.

In sum, taking into consideration the business and local contexts will lead to developing a mechanism which is business-compatible, culturally appropriate, and complementary to the State-based grievance channels.

## **II. The business case for the mechanism**

Primarily, from the perspective of corporations, developing and administering OLGMs could be perceived as burdensome.<sup>129</sup> It may require investing huge resources in terms of time, money and operating personnel.<sup>130</sup> A formalized mechanism is also feared to put pressure on the company to handle vexatious claim or make unreasonable payments.<sup>131</sup> With such perceived disadvantages, the top management of the corporation may be sceptical to investing in the mechanism or supporting it, unless justification for its creation is clearly advanced to outweigh the perceived disadvantages.<sup>132</sup>

Consequently, to gain 'internal buy-in and influence broader support, ownership and collaboration for the mechanism from the high level of the corporation,' business case for the mechanism need to be made to convince the top leadership to erase the scepticism about the use of OLGMs.<sup>133</sup> the IPIECA (2015), opines that persuasive business case should point out the benefits of the mechanism, explain how the mechanism can prevent or reduce conflict and should propose appropriate mechanism's name.<sup>134</sup>

Principle 29 of the UNGP advances the opportunities of using OLGMs and the way it can prevent or reduce conflict. It describes the mechanism as a channel that enables both actual and perceived grievances to be addressed early and remediated directly by the company, thereby preventing them from escalating.<sup>135</sup> To the company, this would translate into minimizing risk to shareholder value, building good corporate reputation, reducing the threat of judicial actions, and strategic for complying with national law and international standards.<sup>136</sup> To the stakeholders, it would mean that

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<sup>129</sup> Emma and Emma (n 60) 31.

<sup>130</sup> Ibid.

<sup>131</sup> Ibid.

<sup>132</sup> CAO, 'Grievance Mechanisms Toolkit: The purpose, Design and Implementation of grievance (Washington 2016) <<https://www.cao-grm.org/purpose-design-and-implementation>> accessed 19 August 2019.

<sup>133</sup> IPIECA (n 115) 14.

<sup>134</sup> IPIECA (n 115) p.14 – 15.

<sup>135</sup> Commentary to Principle 29.

<sup>136</sup> Cathal (n 6) 33.



through the OLGMs, their grievances will potentially be handled directly by the company, expeditiously, and inexpensively compared to judicial mechanisms.<sup>137</sup> These benefits would arguably incentivise support for the development of the OLGm.

The other component of the business case is naming the OLGm. It is explained that there is no right or wrong way to name a grievance mechanism, but it is risky to call a grievance mechanism by a name that diminishes or glosses over its real purpose.<sup>138</sup> An inappropriate name may leave those with grievances feel belittled and disrespected.<sup>139</sup> Mechanism's appropriate name is judged by its link with the issues it is to remediate, ability to create a conviction to the stakeholders that the mechanism is developed to address their concerns, and the ability to position the mechanism, for instance, as a key element of overall corporate human rights commitment and compliance.<sup>140</sup> It is stated that the common appropriate names used are 'community grievance mechanism', 'complaint mechanism' or 'complaint procedure'.<sup>141</sup> Such a name could be significant in gaining internal buy-in and pleasant to the intended users.<sup>142</sup> Choice of appropriate name is not a legal requirement but best practice.

In sum, persuasive business case that contains the benefits of the mechanism, explanation of how the mechanism can prevent or reduce conflict and proposes appropriate name for the mechanism, will potentially inspire the key decision makers of the company to overlook the perceived demerits allied with the mechanism, but rather supports its development and implementation.

#### **4.2. Phase II: Designing the Mechanism**

The phase of designing the mechanism consists of (I) forming the design team and engaging stakeholders, and (II) defining the scope of the mechanism.

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<sup>137</sup> Newton (n 1) 117.

<sup>138</sup> IPIECA (n 43) 15.

<sup>139</sup> OHRHC (n 45) 69

<sup>140</sup> IPIECA (43) 15.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

## I. Form design team and engage stakeholders

Upon getting persuaded to support the development and implementation of the OLGMS, it is a good practice that the key decision makers of the company form a design team, which will serve as 'the strategy team, designer, and promoter of the mechanism'.<sup>143</sup> The composition of the team depends on what is appropriate to the company, but the team has to be diverse and cross-functional to ensure that different perspectives are considered in the design process.<sup>144</sup> The team may consist of individuals from the company departments such as operations, community relations, human resources, environmental affairs, legal and human rights affairs.<sup>145</sup> Although the design team should be of mixed levels and company departments, the team should, however, be manageable in size to ensure timely decision making and progress in designing the mechanism.<sup>146</sup> The CAO (2008), advises the size of the team to be from eight (8) to twelve (12) with clear terms of reference and a work plan that explains the team goals, roles, level of decision-making authority, reporting lines, tasks, and time frame.<sup>147</sup> However, a smaller company may have a lower number, what is vital is having clear goals to achieve within agreed time frame.

In compliance with Principle 31(h), the design team should engage and involve stakeholders in the establishment process of the mechanism. The team engages with both internal and external stakeholders. Internal stakeholders may include personnel from different company departments, leaders of any existing complaint handling mechanisms, business managers, business partners and contractors.<sup>148</sup> External stakeholders may include community groups, civil society, trade unions, cultural leaders, representatives of indigenous groups, vulnerable groups or minority groups.<sup>149</sup> Whereas engagement with internal stakeholders may be simpler, through meetings or circulating information electronically and getting feedback at the comfort of offices, the engagement with external stakeholders may require extra-attention, because as *Cathal Doyle (2015)* stated, where it is done

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<sup>143</sup> CAO (n 41) 21.

<sup>144</sup> IPIECA(n 43) 19.

<sup>145</sup> CAO(n 41) 22.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> IPIECA (n 43) 19.

<sup>149</sup> Ibid.

inappropriately, it will limit the likelihood of the intended users' participation in the development or use of the mechanism, hence affecting the effectiveness of the mechanism.<sup>150</sup>

The engagement with external stakeholders should be meaningful and inclusive.<sup>151</sup> Meaningful consultation entails considering the concerns and priorities of the stakeholders to enable reaching a mutual perspective about the design and administration of the mechanism.<sup>152</sup> For instance, the stakeholders may want to participate at different levels, ranging from providing advice to co-designing the process and from undertaking some aspects of implementing the mechanism, to needing some remedy outcomes from their perspectives.<sup>153</sup> The design team should be flexible to consider the concerns to create trust in the process.

An inclusive engagement involves consulting the communities widely.<sup>154</sup> A community is made up of a range of stakeholder interests. The stakeholders who may be potential users of the mechanisms should be identified, engaged, and their particular interests given consideration.<sup>155</sup> However, inclusive engagement does not mean that everyone in the community can or should be involved, but that efforts must be made to be as inclusive as possible and to offer everyone a chance to be engaged in a matter that affects his/her interest.<sup>156</sup>

A number of potential barriers may affect carrying out an inclusive engagement. The barriers may include, rural isolation of certain groups, a divided community, the capacity and ability of different groups to participate, hard-to-reach areas, literacy level and levels of community infrastructure.<sup>157</sup> There should be a plan in advance to overcome the barriers. They could be overcome by employing different engagement methods such as organising serial meeting events, collaborating with

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<sup>150</sup> Cathal (n 6) 41.

<sup>151</sup> Ibid.

<sup>152</sup> Community Places, 'Community Planning Toolkit – Community Engagement' (2014) 4, <<https://www.communityplanningtoolkit.org/sites/default/files/Engagement.pdf>> accessed on 02 September 2019.

<sup>153</sup> Ibid p.6.

<sup>154</sup> Ibid p.3.

<sup>155</sup> Dubach Barbara and Maria Teresa Machado, 'The importance of stakeholder engagement in the corporate responsibility to respect human rights,' (2012) 94.887 *International Review of the Red* 1047, 1055.

<sup>156</sup> Aslin Heather and Valerie Brown, 'Towards whole of community engagement: A practical toolkit,' (Murray-Darling Basin Commission 2004) 3.

<sup>157</sup> Community Places (n 152) 5.

independent entities to facilitate the engagement or transportation to local areas which are hard-to-reach, formulating communications into local languages, or using local interpreters.<sup>158</sup>

Furthermore, challenges may also arise during the engagement. For instance, the stakeholders may attempt to change the context of discussion to matters beyond the designing and implementing the mechanism.<sup>159</sup> To mitigate the challenge, the *IPIECA* (2015) advises that the design team need to provide a clear framework for discussion which should revolve around the objectives and scope of the mechanism.<sup>160</sup> In addition, the team should explain to the stakeholders, the limitations they face, such as time constraints, finances and resources available.<sup>161</sup> These will potentially keep the engagement focused on issues which are up for discussion. Expectations of stakeholders should be managed within the issues under discussion, although must be done with a certain level of flexibility capable to retain meaningful engagement to create trust in the process.<sup>162</sup> Results of engagements should be documented. They are vital in defining the scope of the mechanism that will be appropriate for the business and the stakeholders.<sup>163</sup>

Conducting meaning and inclusive engagement with the stakeholder groups to consider their concerns and priorities, reflects the fulfilment of the standard of engagement and dialogue under principle 31 (h). It is also a foundation to build trust and legitimacy around the mechanism.<sup>164</sup>

## **II. Defining the scope of the mechanism**

The process of defining the scope of the mechanism is undertaken based on the results from the engagement process, and the assessment of the business human risk and local context done at the initial phase.<sup>165</sup> Defining the scope of the mechanism requires: a) determining the types of grievances that will be within or outside the jurisdiction of the mechanism; b) the geographical area from within

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<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

<sup>160</sup> IPIECA (n 43) 20.

<sup>161</sup> Community Places (n 152) 6.

<sup>162</sup> Ibid.

<sup>163</sup> IPIECA (n 42) 9.

<sup>164</sup> Cathal (n 6) 41.

<sup>165</sup> IPIECA (n 42) 17.

which grievances can be accepted; c) who is eligible to bring complaint; and d) scaling the mechanism to the business human rights risks.<sup>166</sup>

a) Types of grievances within and outside the scope

*Principle 22* of the UNGP is to the effect that remediation through the OLGGM should be for adverse impacts the business caused or contributed to. This implies that the types of grievances within the scope of the mechanism should be the actual adverse human rights impacts. The *OHRHC interpretive guide* defines “actual human rights impact” to mean an adverse impact that has already occurred or is occurring.<sup>167</sup> This is a restricted interpretation that leave out a range of concerns likely to intensify into severe impacts at a later stage. The CAO (2008) advises that the grievances may also include those arising from perceptions because perceived concerns can be as critical to addressing as actual adverse impacts. They often arise when people are misinformed or do not have adequate information.<sup>168</sup> Additionally, impacts that may not raise human rights issues immediately should be included because they could intensify overtime into severe impacts.<sup>169</sup> For instance, communities that find their grievances about noise or dust continually ignored would feel compelled to engage in a protest to get the company to pay attention.<sup>170</sup> Such situations could lead to incidents of violence and harm to health or life.<sup>171</sup> OLGGM should, therefore, be able to pick up a full range of concerns early enough to prevent their escalation and address underlying issues.<sup>172</sup>

Grievances that may fall outside the scope of the mechanism are those that allege criminal offences because OLGGM does not provide ‘criminal sanctions’, which is a reserve of the State.<sup>173</sup> Generally, they should be referred to be handled through the State’s criminal justice system. However, in other circumstances, criminal offences may constitute human rights abuses. Such could be classified as falling within the scope of the mechanism.<sup>174</sup> For instance, where government security personnel or

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<sup>166</sup> Ibid.

<sup>167</sup> OHRHC (n 45) 6.

<sup>168</sup> CAO (n 41) 29.

<sup>169</sup> SHIFT and IHRB (n 16) 95.

<sup>170</sup> SHIFT and IHRB (n 16) 96.

<sup>171</sup> SHIFT and IHRB (n 16) 96.

<sup>172</sup> Ibid.

<sup>173</sup> SHIFT (n 87) 3.

<sup>174</sup> Sarah and Jenkin (n 26) 803

police, are employed to provide security to the company facilities and in the course of their duties, they commit abuses amounting to human rights abuses, the matters could still be addressed by the company mechanism. The *RAID report* (2019), illustrated such a scenario with the Acacia Mining grievance mechanism in Tanzania, clarifying that it had the scope to handle as human rights abuses, security-related abuses such as murder, assault and violence committed by the security agents or Tanzanian police who worked alongside the company.<sup>175</sup> However, handling the matters as human rights abuses via the mechanisms will not prevent criminal prosecution in the State criminal justice system.

b) Geographical scope

Limitation on admissible complaints in terms of geographies should be minimized. This is because petroleum activities have the ability to 'affect individuals or communities that are physically or/and geographically distant from operating area.'<sup>176</sup> The BP's Deepwater Horizon oil spill of 2010 that commenced from Macondo operating area of Mexico, provides a good example. It was reported that in a day for 87 days, estimated 40,000 to 60,000 barrels leaked into the Gulf of Mexico.<sup>177</sup> The oil spill damaged the environment, marine life and the Gulf, affecting thousands of the Gulf residents whose livelihood depended on tourism or harvesting marine life.<sup>178</sup> This clearly illustrates that petroleum activities can affect areas beyond operating location. Thus, geographical scope for the purpose of accepting complaints should be extensive, so long as complainants can support their claim.

c) Locus standi

*Section 94(1) of the Petroleum Act, Principle 29* and the *Complementary to Principle 22*, envisage that the right to bring complaint before the mechanism is for individuals and communities who may be adversely impacted by the company's activities. The *OHCHR interpretive guide* signals that the primary right is to the 'directly' affected stakeholders.<sup>179</sup> This may be construed to mean that where the directly affected individuals or groups cannot exercise the 'primary right' for one reason or the other,

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<sup>175</sup> The RAID Report (n 50).

<sup>176</sup> Cherry Miriam and Judd Sneirson, 'Beyond profit: Rethinking corporate social responsibility and greenwashing after the BP oil disaster,' (2010) 85 *Tul. l. rev.* 983, 991-994.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> OHRHC (n 45) 69.

their authorized representatives can have the standing (secondary right) to bring the complaint on their behalf. However, other third parties not directly impacted or authorized to represent may not be given the standing to lodge complaint before the mechanism.<sup>180</sup> This limitation can be justified by resources availability that the company plans to invest in operating the mechanism because handling complaints is resource intensive.<sup>181</sup> *Caroline Rees (2008)*, argued that fact-finding investigation takes considerable money and time, yet a company may have other primary functions on which it wishes to focus its resources, and to which the grievance mechanism is an adjunct.<sup>182</sup> Therefore it may not be in line with resources plan of the company to permit locus standi to any busybody.

d) Scaling the mechanism

Section 94(1)(a) of the Petroleum Act and best practice principle require establishing a mechanism which is proportional to other factors and the complexity of the issue or adverse impacts. The factors and complex issue referred here, are the above explained constituents of the scope of the mechanism. Namely: the types of grievances that fall within the jurisdiction of the mechanism, the geographical coverage of the mechanism, and the eligible persons. Collectively, these factors should inform the establishment of a commensurate mechanism.

In sum, clearly defining the scope of the mechanism and imposing fewer restrictions on admissibility issues in terms of geographical location, and the locus standi, shall facilitate development of mechanism which shall be appropriate to remediate issues of intended users and also eliminates barriers to accessing the mechanism. Consequently, the actions will demonstrate compliance with the best practice principle and the Petroleum Act's requirement of developing a proportionate mechanism,<sup>183</sup> and also a fulfilment of the UNGP's standard of facilitating accessibility to affected stakeholders.<sup>184</sup>

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<sup>180</sup> IPIECA (n 43) 25.

<sup>181</sup> Rees Caroline, '*Grievance Mechanisms for Business and Human Rights: Strengths, Weaknesses and Gaps*. Corporate Social Responsibility Initiative, Working paper No. 40 (Cambridge, MA: John F. Kennedy School of Government, Harvard University 2008).12.

<sup>182</sup> Ibid p.12-13.

<sup>183</sup> Principle 12, and Section 94(1)(a).

<sup>184</sup> Section 94(1) and Principle 31(b).

### 4.3. Phase III: Developing the Procedural steps for Grievance Management

Creating the procedural steps for grievance management is the next phase after the design phase. Save for indicating the standards that must be reflected in the steps, the UNGP and the Petroleum Act, are mute on the steps of managing grievance mechanism. *Stefan Zagelmeyer, Bianchi Lara, and Shemberg A. R. (2018)*, pointed out that the steps vary from one company to another, with others mentioning four (4) or eight (8) steps.<sup>185</sup> However, from the review of the leading guidance practices of IPIECA (2012),<sup>186</sup> IPIECA (2015),<sup>187</sup> CAO (2008), ICMM (2009),<sup>188</sup> and IFC (2009),<sup>189</sup> this study supports that, a typical OLGGM is characterized by seven (7) basic steps for grievance management: I) receive and register the grievance; II) acknowledge receipt; III) assess and assign; IV) investigate; V) respond; VI) appeal or recourse to ADR and State-based mechanisms; and finally, VII) follow-up and close-out. It is supported that the 7 basic steps lead to a methodical resolution of grievances of all levels without creating procedural vacuum.

#### I. Receiving and registering the grievance

The receiving process is to facilitate the filing of grievances. To enable the reception of grievances, there need to be functional access points and methods of filing grievances.<sup>190</sup> The access points could be a grievance section or designated company grievance officers, indigenous representatives, independent statutory bodies or/and local NGOs offices.<sup>191</sup> The methods of filing grievances could be through dedicated email, letters, company complaint form, company website or toll-free telephone services.<sup>192</sup> Whatever various access points and methods are provided, a study encourages that at least one of the them should be independent of the company for the reason that an assumption must

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<sup>185</sup> Stefan, Bianchi, and Shemberg (n 110) 23.

<sup>186</sup> IPIECA (n 42).

<sup>187</sup> IPIECA (n 43).

<sup>188</sup> ICMM, 'Human Rights in the Mining and Metals Industry: Handling and Resolving Local Level Concerns and Grievances,' (The International Council on Mining and Metals, London, 2009), <<https://www.icmm.com/website/publications/pdfs/social-and-economic-development/691.pdf>> accessed on 14 August 2019.

<sup>189</sup> IFC, 'Addressing Grievances from Project Affected Communities. IFC 'Good Practice Note'. International Finance Corporation' (Washington, 2009), <<https://www.ifc.org/wps/wcm/connect/f9019c05-0651-4ff5-9496-c46b66dbee8b/IFC%2BGrievance%2BMechanisms.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-f9019c05-0651-4ff5-9496-c46b66dbee8b-jkD0-g>> accessed on 17 August 2019.

<sup>190</sup> IPIECA, (n 43) 43.

<sup>191</sup> Ibid

<sup>192</sup> IPIECA (n 43) 43 – 44.



be drawn that certain persons feel too frightened even at their own volition, to file a complaint directly with the company, so it is best that the company representatives are not made sole point of contact.<sup>193</sup>

The access may be affected by possible barriers such as 'lack of awareness, illiteracy, costs, physical location and fears of reprisals.'<sup>194</sup> Therefore, actions should be taken to minimise the barriers as much as possible. Lack of awareness could be addressed by making the access points and methods known to the intended users through wider publicization via appropriate methods in the local context.<sup>195</sup> Depending on the local circumstances at the material time, some of the ways for wider dissemination of the access points and methods may include the use of posters and leaflets, public meetings, newsletter articles, and local radios.<sup>196</sup> Illiteracy-associated concern may be addressed by simplifying the methods of accessing the mechanisms or availing local interpreters to provide assistance where necessary.<sup>197</sup> The question of cost may be remedied by affording access free of charge. Physical location issue could be addressed by providing the access points in multiple locations where the intended users reside, and the fears of reprisals may be minimized by permitting anonymous filing or/and guaranteeing confidentiality of complaints in the mechanism's governance framework.<sup>198</sup>

Affording a variety of access points and methods of filing claims; making the access points and methods known through wider dissemination; permitting anonymous filing; guaranteeing confidentiality; and minimizing the barriers to accessing the mechanisms, shall be the fulfilment of accessibility standard of the UNGP,<sup>199</sup> and achieving the Petroleum Act's standard requiring that access to the mechanism be provided at no cost to the party and without reprisal.<sup>200</sup>

Though it is applaudable for companies to provide a variety of methods of filing complaints, it is argued that permitting various methods may pose the challenge of receiving an 'unidentical format of

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<sup>193</sup> Caroline(n 44) 21.

<sup>194</sup> Commentary to principle 31.

<sup>195</sup> IPIECA (n 43) 43.

<sup>196</sup> Ibid p.35.

<sup>197</sup> Caroline(n 44).

<sup>198</sup> IPIECA (n 43) 43 – 44.

<sup>199</sup> Principle 31(b).

<sup>200</sup> Section 94(1) (e).

complaint.<sup>201</sup> This will affect the company's effort to maintain a common protocol of grievances for its record. It is encouraged that the company should formulate 'grievance recording form to collect grievances.'<sup>202</sup> The form, however, needs to be simplified preferably in the language understandable to the users, and assistance in completing should be made available for persons who may need assistance in filling.<sup>203</sup> The complaint form could require essential information to facilitate easier follow up of the grievance. For instance, in the Chevron corporation's grievance recording form formulated for use in the Chevron Myanmar Grievance Mechanism Procedure, the form requires basic information such as the date, time and location of filing; name and guarantee of confidentiality; preferred methods of contacting the complainant, physical address, nature of the complaint, reparations sought; and how the complainant proposes the grievance be solved.<sup>204</sup> Such form could provide a good premise for formulating a simple company complaint form.

In whichever channel and contact point the grievance is filed, the complaint needs to be forwarded to the central point of contact at the company. The complaints should be registered in a data system of complaints prepared by the company.<sup>205</sup> The register of complaints should reflect the essential information contained in the grievance form, with additional information such as the name of the registering company officer and details of the accountable company officer the complaint is referred to.<sup>206</sup> The registration is significant to keep track records of all complaints received and to establish clear lines of accountability.<sup>207</sup> This ensures trust from the users of the mechanism, and accountability for the grievance processes, in line with the UNGP's principle of legitimacy,<sup>208</sup> and the Petroleum Act's requirement of accountability.<sup>209</sup>

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<sup>201</sup> IPIECA (n 43) 43–44.

<sup>202</sup> Ibid.

<sup>203</sup> Caroline(n 44) 21.

<sup>204</sup> Chevron Corporation, 'Chevron Myanmar Grievance Mechanism Procedure: Policy, Government and Public Affairs (2015) 14. <<https://www.chevron.com/-/media/chevron/worldwide/documents/myanmar-grievance-mechanism.pdf>> accessed on 09 September 2019.

<sup>205</sup> CAO (n 41) 35.

<sup>207</sup> IPIECA (n 43) 43–44.

<sup>208</sup> Principle 31(a).

<sup>209</sup> Section 94(1)(c).

## II. Acknowledge

The process for acknowledging the receipt of a grievance needs to be in place.<sup>210</sup> Acknowledgement confirms to the complainant that his/her complaint is received and registered.<sup>211</sup> Depending on the manner in which the complaint has been lodged, acknowledgement may be made through signing on the copy of the grievance letter or acknowledgement slip. It could also be through a letter, email, telephone call or other appropriate ways.<sup>212</sup> A study explains that acknowledgement may be made immediately upon receipt of the grievance or typically within the standard of 2 to 7 days from the date of receipt of the complaint.<sup>213</sup> However, circumstances such as anonymous complaint may delay timely acknowledgement, especially where the complainant could not easily be traced.<sup>214</sup>

Acknowledgement needs to include information about the next steps to resolving the grievance, who to contact in the company for follow-up on the status of the complaint, the time frame in which a response can be expected, and a guarantee of confidentiality of the complaint.<sup>215</sup> The detail information is significant to erase any mistaken assumption that the grievance is being ignored, to ensure transparency, and enable the complainant to foresee how the grievance will be handled.<sup>216</sup> This is consistent with the UNGP's effectiveness principles of predictability and transparency,<sup>217</sup> as well as the transparency standard of the Petroleum Act.<sup>218</sup>

## III. Screen and assign

Following acknowledgement of receipt of the complaint, the next step is to screen the complaint against the eligibility criteria of the OLG. <sup>219</sup> An eligible complaint will be one that has nexus to the business operation, falls within the scope of the mechanism, and the complainant has the standing to file the complaint.<sup>220</sup> However, in the screening step, the grievance officer should avoid considering

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<sup>210</sup> IPIECA (n 42) 11.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid.

<sup>213</sup> Caroline (n 44) 24.

<sup>214</sup> IPIECA (n 42) 11.

<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> Principle 31(c) and (e).

<sup>218</sup> Section 94(1)(c).

<sup>219</sup> CAO (n 41) 35.

<sup>220</sup> Ibid.

the substantive merit of the complaint because it may lead to rejecting the complaint hastily without truly understanding the gist of the complaint.<sup>221</sup>

Where the grievance clearly falls outside the mechanism's remit, it may be rejected or referred to alternative grievance mechanisms, and the complainant informed of the reason accordingly.<sup>222</sup> However, before a complaint is rejected or referred to be handled elsewhere, a study clarifies that it is important that the complainant be directly engaged and afforded the benefit of doubt.<sup>223</sup> This is because the complainant may have provided incomplete information due to his/her inability to have access to information or professional resources.<sup>224</sup> The company needs to acknowledge this imbalance and make an effort to truly understand the grievance before rejecting or referring it elsewhere.<sup>225</sup> Failure to recognize such barrier can reduce perceiving the mechanism as a fair grievance avenue and will boost resentment against the mechanism which may lead to protest and stiff opposition against the company by the users.<sup>226</sup>

Upon assessing the grievance against the eligibility criteria, the step to follow, is assigning the grievance to the appropriate company officer who shall handle it. Assigning company personnel to handle a particular grievance depends on the severity of the grievance.<sup>227</sup> A company may use risk criteria created as part of the mechanism to categorize grievance according to level of severity, that is; less, moderate or highly severe, to help determine what action is required and who will be appropriate to address the grievance.<sup>228</sup> Where the grievance is classified as highly severe (grievance with high adverse impacts on individuals, community or/and company), senior management of the company may be advised to handle, but where the grievance is less severe or moderate, it may be handled by a designated company officer.<sup>229</sup>

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<sup>221</sup> Ibid.

<sup>222</sup> Caroline(n 44) 31.

<sup>223</sup> Ibid.

<sup>224</sup> CAO (n 41) 36.

<sup>225</sup> Ibid.

<sup>226</sup> Caroline(n 44) 31.

<sup>227</sup> IPIECA (n 42) 11.

<sup>228</sup> Ibid.

<sup>229</sup> CAO (n 41) 37.

The assigned grievance officer or senior manager of the company (as the case may be), in collaboration with the grievance committee or relevant business unit, will assess the complaint from the company's perspective.<sup>230</sup> Grievances that are observed as less serious, from the perspectives of the company and complainant, and do not require additional information may be resolved promptly without proceeding to the investigation stage.<sup>231</sup> However, grievances that are complex and require additional information and in-depth scrutiny proceeds to the investigation step.<sup>232</sup>

In the step of screening and assigning grievances, the UNGP's principle of 'rights-compatibility',<sup>233</sup> is complied with by assessing the grievance flexibly; engaging complainant directly on a grievance that could otherwise be outrightly rejected or referred elsewhere; and assigning the handling of the grievance according to the level of seriousness. The Petroleum Act's standard requiring 'addressing concerns promptly' is achieved by resolving less or moderate grievances promptly without subjecting them to the investigation step.<sup>234</sup>

#### IV. Investigate

The investigation step is activated for grievances that are complex, require additional information, and in-depth scrutiny. In the absence of independent technical investigators, the business unit associated with the grievance should be required to appoint technical investigator(s) to examine within specified timeframe, the grievance that requires scrutiny.<sup>235</sup> The purpose of the investigation is to understand the circumstances leading to the complaint, verify the facts of the grievance or obtain additional information from the view point of the company.<sup>236</sup>

To ensure trust and fair conduct of investigation process in accordance with UNGP's principles of legitimacy and rights-compatibility,<sup>237</sup> the investigators have to be independent, neutral and free of personal interest in the matter under the investigation. To achieve this, the investigators should be

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<sup>230</sup> IPIECA (n 42) 11.

<sup>231</sup> Ibid.

<sup>232</sup> Ibid.

<sup>233</sup> Principle 31(f).

<sup>234</sup> Section 94(1)(d).

<sup>235</sup> IPIECA (n 43) 48.

<sup>236</sup> IPIECA (n 42) 11.

<sup>237</sup> Principle 31(a) and (f).

independent of those that will be authorizing reparations. It is also a good practice for the company to consider giving an opportunity to the complainant to accept or object to the assigned investigator(s).<sup>238</sup> Neutral investigators will build confidence in the fact-finding process.<sup>239</sup>

The investigation may include engaging directly with the complainant individually or together with his/her representative to understand the complainant's insight into the issue and what can be done.<sup>240</sup> It may also involve engaging with relevant stakeholders within and outside the company or other parties involved.<sup>241</sup> However, in the process of engaging with outside stakeholders or other parties, the investigation team should endeavour to maintain confidentiality of the complainant as much as possible.<sup>242</sup> An exception to confidentiality would be when the prior consent of the complainant is obtained for the benefit of resolving the complaint.

To meet the requirements of enabling access to information and keeping the complainant informed of the progress of the complaint, in line with the principles of equitability and transparency, the outcome of the investigation should be documented appropriately, submitted to the company, shared and discussed with the complainant.<sup>243</sup> Sharing and discussing the outcome of the investigation will assist in reaching an agreement on the facts and solution with the complainant.<sup>244</sup>

## V. Respond and offer of remedies

The process of responding and offering remedies follows the outcome of the investigation. The outcome of the investigation is internally discussed by the relevant company team.<sup>245</sup> Based on the internal discussion, the authorized company officer formulates a respond that contains interim resolution options.<sup>246</sup> The resolution proposals could be a rejection, offer of substantive remedies or referral of the grievance to be handled elsewhere.<sup>247</sup> In line with the criteria of transparency,<sup>248</sup> the

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<sup>238</sup> IPIECA (n 42)12.

<sup>239</sup> IPIECA (n 42) 11.

<sup>240</sup> Ibid.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Principles 31(d) and (e), and Section 94(1)(c).

<sup>244</sup> IPIECA (n 42) 13.

<sup>245</sup> Ibid.

<sup>246</sup> CAO (n 41) 37.

<sup>247</sup> IPIECA (n 42) 13.

complaint should be informed of the resolution options, preferably in writing.<sup>249</sup> The respond should be able to seek a dialogue directly with the complainant, to discuss the provisional proposal before the company makes a final pronouncement.<sup>250</sup> Seeking dialogue reflects the criteria of prioritising dialogue as a mean to mutually resolve the grievance and creating trust and fairness, in accordance with the UNGP's benchmarks of legitimacy and transparency.<sup>251</sup>

The dialogue needs to be opened and transparent, affording the complainant the liberty to accept, appeal for the offer to be improved, reject or opt for another mechanism to resolve the grievance.<sup>252</sup> Keeping the dialogue opened and transparent is significant as illustrated by the commentary to *principle 31*, that the company cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome. However transparent the dialogue may seem to be, a study explained that the perception of power imbalance by the weaker complainant (as it is often) might inevitably create distrust in the process.<sup>253</sup> To ensure equality before the mechanism, the complainant should be allowed to be assisted in the dialogue by a representative of choice, who would protect his/her interest, or the dialogue meeting should be facilitated by a neutral third party acceptable to the parties to serve as the facilitator of the process.<sup>254</sup>

Where the respond is an offer of substantive remedies, the remedies should be right compatible and commensurate to the nature of the grievance, in line with *principle 31(f)*. It is rights compatible and commensurate when it is capable of correcting, alleviating or reversing the adverse human rights impact suffered by the victim(s).<sup>255</sup> The remedies can be in the form of apologies, restitution, rehabilitation, financial or non-financial compensation, prevention of harm through, for example, injunctions or guarantees of non-repetition.<sup>256</sup> However, as explained by *Tineke Lambooy et al.*, (2013), there is no hierarchy of offering the reparations and could be offered separately or

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<sup>248</sup> Principle 31(e).

<sup>249</sup> CSR Europe (n 57) 10.

<sup>250</sup> IPIECA (n 42) 13.

<sup>251</sup> Principle 31(a) and (e).

<sup>252</sup> IPIECA (n 42) 13.

<sup>253</sup> Caroline(n 44) 16.

<sup>254</sup> CAO ( n 41) 37.

<sup>255</sup> Commentary to Principle 25.

<sup>256</sup> Commentary to Principle 25.

combined.<sup>257</sup> For example, the company may start with making an apology, and where possible, undoing the misconduct and restoring the situation to its original position, by remediation in kind or financial or both.<sup>258</sup>

In addition, the reparations should be culturally appropriate to the complainant in that it should conform to the local customs of the victim(s).<sup>259</sup> From the perspective of South Sudan, the rampant culturally appropriate remedy to remediate, for instance, violation of the right to life, is customary blood compensation in form of cows. The customary blood compensation is recognized under unwritten customary law and statutory law.<sup>260</sup> Accommodating the customary perspective of reparations could present a fundamental concern to the company especially on the numbers of cows to be paid, but it is what could be appealing to the local communities to create satisfaction in the outcome. Therefore, consideration should be given to it, in providing reparations.

Where the company confirms that the reparation is right-compatible, culturally appropriate, and acceptable to the complainant, in accordance with the requirements of the UNGP and the Petroleum statute, the company can 'formulate the final agreement on the complaint,'<sup>261</sup> and accordingly move the agreed reparation(s) to the company's close-out process, unless the final resolution is 'self-executing', such as a guarantee of non-repetition.<sup>262</sup>

## **VI. Appeal or recourse to ADR and State-based mechanisms**

Where the final offer of reparations is rejected by the complainant or the company rejects the complaint, the company owes the duty to explain to the complainant, the available alternative or complementary channels for resolving grievances, such as making an appeal within the company or recourse to other dispute resolution mechanisms such as ADR mechanisms or State-based grievance

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<sup>257</sup> Tineke, Argyrou, and Varner (n 98) 331-332.

<sup>258</sup> Ibid.

<sup>259</sup> Section 94(1)(b).

<sup>260</sup> Section 206(b) of the Penal Code Act, 2008.

<sup>261</sup> IPIECA (n 42) 13.

<sup>262</sup> IPIECA (n 43) 54.



mechanisms.<sup>263</sup> Creating an appellate system within the company to provide in-house review process is not mandatory but demonstrates good intent to resolve grievances amicably.<sup>264</sup>

Where the in-house appeal process fails or it is non-existence, it is the standard of the UNGP that the right to recourse to other grievance mechanisms is afforded.<sup>265</sup> The company is discouraged from using the OLG to bar access to judicial or other non-judicial grievance mechanisms.<sup>266</sup> The SHIFT study (2014) explained that the OLG does not sit in a vacuum but instead within the landscape of State-based and other grievance mechanisms that may provide alternative or complementary channels, or be a potential point of recourse for issues that cannot or should not be addressed through the grievance mechanism.<sup>267</sup>

Despite the requirement on companies to desist from using OLG to preclude access to judicial or other non-judicial grievance mechanisms, studies reveal that some companies use the OLG as the primary, sole and the final mean to obtain remedy. *Cathal Doyle* (2015) showed that Barrick Gold Corporation's grievance mechanism at Porgera mine in Papua New Guinea is a concrete example. Victims who reached a settlement were required to sign an agreement stating that they would not pursue any civil legal actions or claims for compensation related to the acts for which the reparations were provided.<sup>268</sup> Such a limitation negates the guaranteeing of access to remedies.<sup>269</sup> In turn, it creates lack of trust towards the mechanism and undermines the UNGP's principle of legitimacy.<sup>270</sup>

Besides permitting access to State-based mechanisms, the other way companies can fulfil the UNGP's rights-compatible criteria, is by incorporating ADR mechanisms as one of the approaches to handle grievances under the grievance mechanism.<sup>271</sup> The ADR consists of mediation, negotiation and arbitration. Overall, it is a form of dispute resolution that involves active engagement of the

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<sup>263</sup> Cathal (n 6) 42.

<sup>264</sup> IPIECA (n 43) 55.

<sup>265</sup> Commentary to principle 29.

<sup>266</sup> Ibid.

<sup>267</sup> SHIFT (n 87) 4.

<sup>268</sup> Cathal (n 6) 58-59.

<sup>269</sup> Cathal (n 6) 48.

<sup>270</sup> Principle 31(a).

<sup>271</sup> Sarah and Jenkin (n 26) 804.

parties involved, outside the judicial mechanism.<sup>272</sup> Incorporating ADR does not only ensure compliance with the UNGP's rights-compatibility,<sup>273</sup> and the Petroleum Act's standard requiring referral to arbitration where necessary,<sup>274</sup> it also provides benefits to the company and complainant. ADR gives the opportunity to resolve grievance outside litigation arena where the initial dialogue-based approach could not settle the said complaint.<sup>275</sup> Compared to litigations, ADR is arguably cheaper, quicker, non-adversarial, may provide appropriate remedy, and is subject to the choice of the parties.<sup>276</sup> However, using ADR mechanism such as Arbitration may serve to exclude recourse to other grievance mechanisms because of the binding nature of arbitration decisions, unless the parties agree otherwise.<sup>277</sup>

#### **VII. Follow up and close-out.**

The follow-up and close-out form the final procedural step in the grievance management. The resolution agreed upon with the complainant need to be implemented within the specified time agreed in the final agreement of settlement.<sup>278</sup> The complaint should then be close-out unless the complainant has further concern regarding the same grievance.<sup>279</sup> Further concern from the complainant will signify that the grievance is not resolved satisfactorily. Therefore, adjustments may be necessary to ensure that the root causes of the complaints are addressed, and outcomes are consistent with mutual agreement with the complainant.<sup>280</sup> Implementing the agreed outcomes promptly and availing opportunity to make adjustments where necessary, show being accountable, in line with the UNGP's criteria of legitimacy,<sup>281</sup> and the Petroleum Act's standard of accountability.<sup>282</sup>

Where the complaint is a subject of appeal within the company or being considered before other mechanisms, the company should create a system of tracking the grievances to facilitate follow-up of

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<sup>272</sup> Lukas Karin, et al (n 33) 8-9.

<sup>273</sup> Principle 31(f).

<sup>274</sup> Section 94(3).

<sup>275</sup> Sarah and Jenkin (n 26) 804.

<sup>276</sup> Lukas Karin, et al (n 33) 8-9.

<sup>277</sup> Todd and Vondra (n 36) 120.

<sup>278</sup> IPIECA (n 43) 58.

<sup>279</sup> Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> Section 31(a).

<sup>282</sup> Section 94(1)(c).

the complaints to their logical conclusion.<sup>283</sup> Experiences from the resolution implementation and follow-up should be diligently documented via a system of documentation created by the company. The record may be used to further refine the grievance handling process in accordance with the best practice principle of continuous improvement or to inform future responses to similar grievances.<sup>284</sup> Documenting the experiences to identify lessons for improving the mechanism and preventing future grievances and harms will also reflect compliance with the UNGP's criteria of having a source to facilitate continuous learning of the mechanism.<sup>285</sup>

#### **4.4. Phase IV: Test, review and disseminate the mechanism**

The phase of testing, reviewing and publishing the mechanism follows, once approval of the design and governance frameworks of the mechanism is done by the company's top management and there is support from the external stakeholders.<sup>286</sup> The governance framework is an independent but complementary document that guides the management of the entire grievance mechanism processes.<sup>287</sup> The framework basically contains three elements: (I) reference to the statement of policy upon which the grievance mechanism is premised; (II) the standard operating procedure, which specifies the constitution and roles of the operating personnel, adequate resources plan, interface with other grievance mechanisms, and oversight process;<sup>288</sup> and (III) where to operate the mechanism from (either at the company-level or at the site/project level).<sup>289</sup> Studies support that the preference is at the project site because complaints are most effectively addressed when the grievance process is located at the area of business operation.<sup>290</sup> However, the duty to make the mechanism work needs to be mainstreamed throughout the business operations and the corporate office to ensure collaborative resolution of grievance.<sup>291</sup>

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<sup>283</sup> IPIECA (n 43) 58.

<sup>284</sup> Ibid.

<sup>285</sup> Principle 31(g).

<sup>286</sup> CAO (n 41) 48.

<sup>287</sup> Ibid 46.

<sup>288</sup> Ibid.

<sup>289</sup> Ibid.

<sup>290</sup> Ibid.

<sup>291</sup> Ibid.

Testing the mechanism is done in accordance with the procedural steps of grievance management and the governance framework.<sup>292</sup> It would require running fictitious complaints through the grievance mechanism and trying the functionality of the channels of submitting and receiving grievances, such as the designated email address, the company website, and toll-free telephone.<sup>293</sup> Where the channels are not working, they are reviewed and fixed to ensure that they are credible and functional.<sup>294</sup>

Where every step is fully functional, the mechanism is publicized.<sup>295</sup> It is officially introduced to the company and potential users on a wide scale.<sup>296</sup> *Laura Curtze and Steve Gibbons (2017)* explained that grievance mechanism could fail to be effective from the start where the intended users lack information about its existence. The company must provide sufficient resources and priority to communication and awareness-raising to ensure the grievance mechanism is known and understood by the stakeholders.<sup>297</sup> In order for communication and outreach activities to be successful, the information about a grievance mechanism in a language understandable to the users, needs to reach them.<sup>298</sup>

Depending on the local circumstances at the material time, some of the ways for wider dissemination of the mechanism include: the use of posters and leaflets; public meetings; newsletter articles; local radios; and other appropriate means.<sup>299</sup> The dissemination should be in a language understandable to the users, let the potential users know how and where to access the mechanism, and may need to be continuous, to achieve wider coverage.<sup>300</sup>

Testing, reviewing and dissemination of the mechanism ensures the proper functioning of the mechanism and wider knowledge about the mechanism, to enable accessibility in line with the UNGP

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<sup>292</sup> Ibid.

<sup>293</sup> IPIECA (n 43) 34.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> Laura Curtze and Steve Gibbons, 'Access to remedy and operational grievance mechanisms in global supply chains,' (2017) 10.

<sup>298</sup> Ibid.

<sup>299</sup> IPIECA (n 43) 35.

<sup>300</sup> Ibid.

criteria of accessibility,<sup>301</sup> as well as the petroleum Act's standard that requires corporations to inform the affected communities about the mechanism.<sup>302</sup>

#### **4.5. Phase V: Implement, Monitor, Report, and Learn**

The full implementation of the mechanism is the next stage after the mechanism is launched and disseminated.<sup>303</sup> The mechanism is implemented in accordance with the design components and governance framework of the mechanism.<sup>304</sup> Implementing the mechanisms essentially require skilled personnel and adequate resources. The success of grievance mechanisms substantially depends on having skilled personnel trained in conflict resolution. The personnel may be sourced from the company, community or outside.<sup>305</sup> Effective resolution of grievances depends on how they are handled, as a study explained, grievances brought before the mechanism do not need to be inherently bad or good, but the manner in which they are managed can spring a success story or will have serious knock-on implications both for those impacted and the company's operations and reputation. Having adequate resources on the other hand is crucial, as *Cathal Doyle (2015)* explained, "if the decision to establish OLGm is not accompanied by the allocation of sufficient resources to ensure effective functioning, staff levels tend to be inadequate, training insufficient, and there is generally inadequate appreciation of the relationship between grievance mechanisms and risk management."<sup>306</sup>

To monitor the performance of the mechanism, the company needs to have in place a monitoring mechanism managed by a designated company officer to routinely update the data base about the mechanism performance.<sup>307</sup> The monitoring identifies the patterns of complaints, the volume of complaints, the common and recurrent complaints, response times, actual outcomes, and feedback from stakeholders about their satisfaction with the process.<sup>308</sup> The monitoring data forms the records for continuous learning, assessing the effectiveness of the mechanism, improving the effectiveness of

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<sup>301</sup> Principle 31(b).

<sup>302</sup> Section 94(1).

<sup>303</sup> CAO (n 41) 51.

<sup>304</sup> Ibid p.46.

<sup>305</sup> Ibid p.54.

<sup>306</sup> Cathal (n 6) 39.

<sup>307</sup> CAO (n 41) 45.

<sup>308</sup> IPIECA ( n 42) 19.

the mechanism, and a resource that informs the formulation of adverse impacts mitigation mechanisms to prevent future occurrences.<sup>309</sup>

In the spirit of transparency and accountability, in line with the UNGP's principles of transparency and legitimacy,<sup>310</sup> and the Petroleum Act's principles of transparency and accountability,<sup>311</sup> it is encouraged that the results of the monitoring are reported and shared with the wider stakeholders.<sup>312</sup> Reporting to the stakeholders is significant to get their feedback to devise ways to make the grievance mechanism more effective, and bolster local trust in the mechanism .<sup>313</sup>

*Principle 31(g)* requires that the measure for identifying lessons (monitoring mechanism) should be a continuous source of learning. Fulfilling this criterion requires the company to positively take the monitoring data and feedback from the wider stakeholder, as a learning resource to assist in making sound decision for the periodic review of the mechanism and informing management decisions towards formulating adverse impacts mitigation mechanisms.<sup>314</sup> It would also mean that the monitoring data be kept for a considerable period of time since it is for continuous use. The UNGP is silent on the period of time for keeping the data, but the Petroleum Act requires the documented records be kept for 'at least 20 years' from the date of making them.<sup>315</sup>

#### **4.6. Conclusion**

The chapter reveals that the OLGMS's establishment and implementation can be done through five basic phases. Compliance the required standards, is achieved by reflecting the standards across the phases. The standards are reflected through articulated action-guidance. Although the standards are 'inter-related and should be taken as a whole,' all of them are not fulfillable at once in a phase.<sup>316</sup>

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<sup>309</sup> CAO (n 41) 57-59.

<sup>310</sup> Principles 31(a) and (e).

<sup>311</sup> Section 94(1)(c).

<sup>312</sup> IPIECA (n 278) 37.

<sup>313</sup> ICMM (n 188) 21.

<sup>314</sup> CAO (n 41) 60.

<sup>315</sup> Section 94(2).

<sup>316</sup> OHRHC (n 45) 76.

## CHAPTER V: BENEFITS AND CHALLENGES

### 5.0. Introduction

This chapter explains the potential benefits of OLGMs, the challenges companies may face in the process of establishing and implementing OLGMs, and the challenges users may experience while accessing remedies via the mechanism.

### 5.1. Potential benefits of OLGMs

#### *Enhance relationship and trust*

OLGM designed with the involvement of the affected groups enhances company's relations and trust with the stakeholders.<sup>317</sup> The relationship, in turn, contributes to the prevention of future disputes, thereby reduces grievances.<sup>318</sup>

#### *Prevent grievances from compounding and escalating*

The mechanisms enable grievances to be addressed early and directly by the company, thereby preventing them from compounding and escalating.<sup>319</sup> This reduces the company's operational and reputational risks.<sup>320</sup> Neglecting to resolve community issues earlier may lead to protest and suspension of operations, which harm the business.<sup>321</sup> Thus, where there is OLGGM in existence, community issues can be remediated earlier to avoid the risks.<sup>322</sup>

#### *Resolve disputes speedily, inexpensively, and fairly*

OLGM increases the likelihood of resolving disputes speedily, inexpensively, and fairly, with possible solutions that may satisfy both sides.<sup>323</sup> This is because the mechanism focuses on dialogue as the approach to address and resolve grievances, and accessing, is meant to be at no cost to the users.<sup>324</sup>

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<sup>317</sup> Caroline (n 58) 8-9.

<sup>318</sup> Caroline (n 44) 2.

<sup>319</sup> Commentary to Principle 29.

<sup>320</sup> Cathal (n 6) 33.

<sup>321</sup> IFC (n 189) 6.

<sup>322</sup> Ibid.

<sup>323</sup> Newton (n 1) 117.

<sup>324</sup> Principles 31(h) and (b).

### *Helps companies obtain essential information for improvement*

The monitoring data on the mechanism's performance gives the company essential information on trends and patterns in complaints which can feed into their ongoing human rights due diligence process.<sup>325</sup> This enables the companies to respond and adapt their business practices to prevent future human rights abuses from re-occurring.<sup>326</sup>

### *Guarantee access to remedy*

OLGMs guarantee access to remedy to victims in circumstances where State-based mechanisms are ineffective, non-existence, slow, or/and costly.<sup>327</sup> This helps in filling the gap for remediation or complementing the State-based mechanisms.<sup>328</sup>

## **5.2. Possible challenges companies may experience**

### *Managing expectations*

Establishing and implementing OLGM involves a variety of stakeholders. They may view the purpose and expected outcomes of the mechanism differently.<sup>329</sup> Managing the different needs, interests, perspectives and priorities of stakeholders in the processes and outcomes, may be challenging.<sup>330</sup>

### *Building trust in the mechanism*

Companies could face the challenge of building trust in the mechanism. The stakeholders may question the legitimacy and independence of OLGMs.<sup>331</sup> This is because the companies are the designers and administrators of the mechanisms, which make OLGMs vulnerable to being suspected

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<sup>325</sup> Commentary to Principle 29.

<sup>326</sup> Newton (n 1) 117.

<sup>327</sup> Sarah and Jenkin (n 26) 802-803.

<sup>328</sup> IFC (n 321) 6.

<sup>329</sup> Community Places (n 152) 5.

<sup>330</sup> Ibid.

<sup>331</sup> SOMO, 'The patchwork of non-judicial grievance mechanisms: addressing the limitations of the current landscape,' (2015) 4.



of being biased or illegitimate sources of remedy for harms.<sup>332</sup> The suspicion leads to mistrust and reduces the use of the mechanism.<sup>333</sup>

#### *Resources concern*

The administration of OLGs is resource intensive.<sup>334</sup> yet, a company may have other functions on which it wishes to focus its resources, and to which its OLG is an adjunct.<sup>335</sup> Therefore, limited resources may be a barrier to implementing the mechanism effectively.

#### *Determining reparations*

The UNGP require remedies to accord with internationally recognized human rights' standards.<sup>336</sup> International human rights law, on the other hand, guarantees reparations should be proportional to the gravity of the harm suffered.<sup>337</sup> However, they say little about how to specifically assess remedies.<sup>338</sup> This presents the challenge of determining what specifically amounts to proportionate or satisfactory reparations.<sup>339</sup>

#### *Integrating the OLGs with the local cultural practices*

In developing OLGs, there is a potential challenge of how to align the OLG process with the customary justice system, as local communities have traditional approaches to resolving disputes that may not be based on universal principles.<sup>340</sup> For example, in South Sudan, local communities have existing dispute resolution systems through their traditional authorities, recognized under customary law and the Local Government Act 2009.<sup>341</sup> The Petroleum Act explicitly requires a company-based grievance mechanism to be culturally appropriate.<sup>342</sup> This implies that existing cultural practices need

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<sup>332</sup> Ibid.

<sup>333</sup> Cathal (n 6) 41.

<sup>334</sup> IFC (n 189) 2.

<sup>335</sup> Caroline (n 181)12-13.

<sup>336</sup> Principle 31(f).

<sup>337</sup> Principle 15 of the Basic principles and Guidelines on the Right to a Remedy and Reparation,2005.

<sup>338</sup> Sarah and Jenkin (n 26) 809.

<sup>339</sup> Sarah and Jenkin (n 26) 809.

<sup>340</sup> Emma and Emma (n 60) 31.

<sup>341</sup> Sections 98, 99 and 100.

<sup>342</sup> Section 94(1)(b).

to be incorporated into the OLGMs process. There is, however, no clarification on how the practices should be incorporated in the OLGMs.

### **5.3. Possible challenges users of the OLGMs may experience**

#### *Limited information about the mechanism*

Awareness about the mechanism may not reach every potential user, especially those in remote areas.<sup>343</sup> Such persons may not find it obvious where to go to seek redress and what procedure to follow.<sup>344</sup> Complainants may also face the challenge of filing a complaint, as they may be required to meet burdensome filing requirements, arbitrary deadlines, and language barriers.<sup>345</sup> The RAID study described such challenges as erecting barrier to remedy for violations.<sup>346</sup>

#### *A barrier to accessing other mechanisms*

Some companies may use the OLG as the primary, sole and the final mean to obtain remedy.<sup>347</sup> Therefore, complainants may find themselves being prohibited from accessing other mechanisms. *Doyle Cathal (2015)*,<sup>348</sup> gave an example of Barrick Gold Corporation's grievance mechanism at Porgera mine in Papua New Guinea that used OLG as to limit access to judicial remedies to victims of corporate human rights violations. This limitation leads to a negative implication in terms of guaranteeing access to remedies.<sup>349</sup>

#### *Power Imbalance*

While using the OLG, complainants may be at a distinct power imbalance with the company.<sup>350</sup> This is due to the fact that the company has total control of the mechanism's implementation and the outcome of all grievances.<sup>351</sup> The RAID study explained, the absolute control over the grievance

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<sup>343</sup> Caroline (n 181) 14.

<sup>344</sup> SOMO (n 331) 4.

<sup>345</sup> Ibid.

<sup>346</sup> The RAID Report (n 50) 9.

<sup>347</sup> Cathal (n 6) 58-59.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid.

<sup>350</sup> SOMO (n 331) 4.

<sup>351</sup> The RAID Report (n 50) 5.

process means the company can control access to information, access to expert assistance, and can disregard its own procedure to the prejudice of complainants.<sup>352</sup>

#### *Unsatisfactory outcomes*

Meeting the legal standards does not guarantee an outcome or provision of a satisfactory remedy.<sup>353</sup> Companies are therefore more inclined to determine the outcomes of grievance according to their interest.<sup>354</sup> The most likely outcome is rejection or offer of much less remedy.<sup>355</sup> This frustrates the users who may subsequently perceive the OLGGM as a worthless mechanism.

#### **5.4. Conclusion**

The Chapter finds that OLGGM benefits both the company and complainant. However, the company and users may face some challenges in relation to the OLGGM. The possible solutions are provided in Chapter Six.

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<sup>352</sup> Ibid.

<sup>353</sup> SOMO (n 331) 3.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid p.4.

## CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

### 6.0. Introduction

The research question this study pursued to answer is ‘how can oil and gas companies establish and implement effective OLGMs in compliance with the standards of the Petroleum Act 2012, the UNGP, and other best practice principles in the context of South Sudan?’ While using an analysis of primary and secondary sources, and best practices guidelines, the question is answered by specifying and examining the essential phases through which the OLGMs establishment and implementation can be achieved. It is further answered by reflecting the standards within the phases. The reflection is done by the articulation of action-guidance that the companies should perform to achieve the standards.

This final Chapter draws the main findings of each chapter while considering the study’s objectives, followed by a conclusion drawn from the study. The Chapter then makes recommendations in line with Chapter Five’s findings, and for potential future research.

### 6.1. Main findings and arguments of the study.

In **Chapter One**, the study explored the efforts for ensuring corporate accountability in the context of business activities and the motivation for the research. The chapter reveals that internationally, the UNGP confirmed corporations’ responsibility to establish and implement OLGMs. The responsibility applies to all companies world-wide. Nationally, the South Sudan’s Petroleum Act also obligates the oil and corporations to establish ‘dispute resolution mechanisms’, construed to include OLGMs analogous to the UNGP’s. The chapter further revealed that despite the legal call, evidence of corporate human rights abuses, and usefulness of OLGMs, less or no progress is being made by the companies to create the mechanism which has in effect increasingly hindered the right to effective remedies. Potentially, there is limited understanding of how to create and implement the OLGMs. Hence the motivation for the study.

**Chapter Two** on literature review, establishes the theoretical basis upon which all the Chapters benefited from. Particularly, the Chapter establishes the understanding of OLGMs; grievance resolution approaches of the mechanisms; designing and implementing the mechanisms; experiences

with regards to the mechanisms; the standards for the mechanisms; and the justification for the mechanisms. The chapter also discovers a knowledge gap in creating and operating OLGMs in the context of specific countries and local environment, upon which this study focused to fill. Chapter Two fulfils the study's objective on literature review.

**Chapter Three** provided the overview of the right to effective remedies and OLGMs. The Chapter found the obligation of corporations under international law to provide effective remedies is realised through the adoption of domestic legislation. In the South Sudan's context, it is found the Petroleum Act obligates oil and gas corporations to create dispute mechanisms to address grievances against the corporations. The Chapter also found that with or without the national law, the normative basis to create OLGMs still exist under the UNGP's corporate responsibility to respect human rights. The responsibility exists autonomously. However, it is argued that its independency does not remove or lessen a corresponding corporate duty under national law. Therefore, developing and operating OLGMs in accordance with both the Petroleum Act and the UNGP is consistent with international standards.

The Chapter also reveals the standards for effective OLGMs are expressed under Section 94 of the Petroleum Act and Principle 31 of UNGP. Though the UNGP's standards are more expansive than the Petroleum Act's, they are observed to be consistent with the UNGP's because in addition to its requirements, the Petroleum statute recognizes compliance with the highest international standards (the UNGP). Additionally, it is argued that the standards under the Petroleum Act and the UNGP are not conclusive. Emerging best practices such as 'proportionality, empowering and continual improvement' may be used to supplement them.<sup>356</sup> Hence, the standards of the Petroleum statute, the UNGP, and other best practice principles are discovered as the standards for creating and administering effective OLGMs in the context to South Sudan.

The Chapter further disclosed the right to effective remedies is comprised of procedural and substantive aspects. OLGMs forms part of the procedural aspect. The substantive component, on the other hand, concerns the actual relief, sometimes referred to as reparations. The OLG is a channel

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<sup>356</sup> Kemp and Gotzmann (n 52) vii.

to obtaining reparations, and the provision of both the OLG and reparations are guided by the principle of proportionality. Every human rights violation deserve remediation and reparation(s) proportionate to the harm to ensure meaningful respect for human rights. Chapter Three fulfils the study's objective to review the right to remedies and OLGs.

**Chapter Four** sets to examine how to establish and implement OLGs in compliance with the required standards. While drawing on the work of others, the chapter discovers that the establishment and implementation can be done through five essential phases: (I) the initial step of considering key issues; (II) designing the mechanism; (III) creating the procedural steps of managing grievances; (iv) testing, review and disseminating; and (v) implementing, monitoring and learning. Each of the phases, in turn, consists of steps or processes. It is reasoned that the five phases are practicable and realisable to the oil and gas companies of all sizes, and are capable to adequately produce effective OLGs compatible to the business, local context and legal requirements. However, overlooking a phase may lead to a poorly established OLGs because the phases are mutually interdependent in that subsequent phases rely on preceding phases for implementation.

Compliance with the required standards is achieved by reflecting the standards across the various phases. The standards are reflected through articulated action-guidance companies should perform to fulfil the standards. Although the standards are 'inter-related and should be taken as a whole',<sup>357</sup> all of them are not fulfillable at once in a phase. One or more standards are met in a phase, and the others in other phases. Chapter Four fulfils the study's objective to examine the OLG's establishment and implementation in line with the required standards.

**Chapter Five** elaborated on the benefits of OLG, and the challenges in relation to the OLGs. The study found OLGs present potential benefits ranging from relationship enhancement to guaranteeing access to remedies. However, the companies may experience some challenges such as managing expectations of the users and resources constraints. On the other hand, the users may experience certain challenges such as limited information about the mechanism and barrier to

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<sup>357</sup> OHRHC (n 45) 76.

accessing other mechanisms. These challenges may affect the effectiveness of the mechanism, but possible solutions are provided in the recommendations section.

The final objective of the study was to conclude the study and develop recommendations. **Chapter Six** achieves this.

## **6.2. Conclusion**

It is drawn that this research builds on and strengthens existing knowledge on establishing and implementing OLGMs, with additional information. The study examines the creation and operation of OLGMs from the perspective of the standards of the Petroleum Act, the UNGP, and other best practice principles. Arguably, this could provide a more functional OLGMs because of the binding nature of national law and influential nature of the international norms. Creating and implementing OLGMs contrary to the national law would mean violating the law which could attract sanctions. Because of its influence, the international norm can supplement the provisions of national law in the efforts to create OLGMs consistent with international standards.

The companies can achieve the OLGMs's creation and administration in compliance with the required standards through the five (5) essential phases. It is reasoned that the processes are practicable and realisable to the oil and gas companies of all sizes, and are capable to adequately produce effective OLGMs compatible to the business, local context and legal requirements. However, overlooking a phase may lead to a poorly established OLGMs because they are mutually interdependent for the reason that subsequent phases rely on preceding ones for implementation.

In realising the processes, the companies and users may experience some challenges that may affect the mechanism's effectiveness in practice. The companies and users may mainly experience resources constraint and the barrier of accessing other mechanisms, respectively. It is recommended the mechanism be set within an existing business unit than setting it as an independent structure to minimise resources burden, and access to alternative grievance mechanisms be guaranteed in the mechanism's governance framework to mitigate against using the mechanism as a primary and final channel to resolve grievances.

This study contributes to the global effort to ensuring and improving access to effective remedies through establishing and implementing effective non-State-based grievance mechanisms. The study is examined as a practical instrument and using it to guide and effect the creation and implementation of OLGMs would be a suitable step for oil and gas companies in South Sudan to fulfil their corporate responsibility to ensuring the individuals and communities negatively impacted by their activities have access to effective remedies.

### **6.3. Recommendations**

*Possible solutions to the challenges that companies might experience in relation to the design and implementation of OLGMs:*

The challenge of managing stakeholders' expectations during the process could be addressed by clearly defining the scope of the mechanism. Well defined scope will eliminate the expectations not falling within the mechanism's mandate.<sup>358</sup> In addition, providing explanation to the stakeholders about the limitations faced, such as resources concern for the operation of the mechanism may help keep their expectation within what is manageable.<sup>359</sup>

The mistrust of stakeholders could be addressed by building trust with them. Trust could be built by inclusively engaging the intended users to get involved in the design and implementation as required under Principle 31(h) of the UNGP. The engagement will promote a 'sense of ownership, trust and respect for the mechanism.'<sup>360</sup>

The concern of resources could be solved by considering the administration of the OLGMs as a company's priority. The priority commitment should be guaranteed in the 'governance framework.'<sup>361</sup> The resources pressure may also be reduced by institutionalizing the mechanism within an existing business unit rather than creating it as an independent structure. 'So long as it is clear

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<sup>358</sup> IPIECA (n 42) 17.

<sup>359</sup> Community Places (n 152) 6.

<sup>360</sup> IPIECA (n 42) 17.

<sup>361</sup> CAO (n 41) 46.



who is responsible for each procedure and how company staff should interact with each other,' the mechanisms could be run efficiently with minimum resources.<sup>362</sup>

The issue of determining remedies obtained through OLGs require further international guidance to reconcile the disagreement on what amounts to appropriate or satisfactory remedies.<sup>363</sup> Additionally, the challenge may be solved by equating the remedy obtained via the mechanism to what the victim would have gotten under their traditional justice and civil courts.<sup>364</sup>

The challenge of integrating the mechanisms with the local cultural practices could be solved by aligning existing traditional dispute mechanisms to the OLG's ADR mechanisms such as mediation and negotiation. The ADR mechanisms 'involve engagement of neutral third parties,'<sup>365</sup> therefore, it is recommended the traditional authorities be used as mediators and negotiators.

*Possible solutions to the challenges that the users might experience when seeking remedies via the OLG:*

The challenge of limited information about the mechanism may be solved by 'wider awareness raising to ensure the mechanism is known and understood by the stakeholders.'<sup>366</sup> The outreach activities should be in a language, understandable to the users. Some of the ways for wider dissemination include; the use of simplified handbooks, posters and leaflets, public meetings, newsletter articles, local radios and other appropriate means in the local context.<sup>367</sup> The dissemination may need to be continuous and should let the potential users know how and where to access the mechanism.<sup>368</sup>

Companies should ensure OLGs never encumber users from seeking recourse from the company's internal appeal process or other available mechanisms such as the State-based grievance mechanisms. The company should clearly indicate in the governance framework the alternative

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<sup>362</sup> IFC (n 189) 2.

<sup>363</sup> Sarah and Jenkin (n 26) 809.

<sup>364</sup> Cathal (n 6) 41.

<sup>365</sup> Karin, et al., (n 33) 8.

<sup>366</sup> Curtze and Gibbons (n 297) 10.

<sup>367</sup> IPIECA (n 43) 35.

<sup>368</sup> Ibid.

channels for recourse for issues that cannot or should not be addressed through the OLG. The alternative channels should also be made known to the users.

The challenge of power imbalance could be remediated by facilitating the complainant with information relevant to his/her case. It may also be addressed by allowing the complainant to be assisted in the processes by a representative of choice, who would protect his/her interest.<sup>369</sup> Utilizing neutral third parties to facilitate dialogue on resolving grievance may also contribute to addressing the issue of power imbalance.

To guaranty satisfactory outcomes, there should be transparency and fairness in handling the grievances via the mechanism. This would require having independent, trusted and neutral personnel to administer the mechanisms.

#### **6.4. Limitations**

This research has been limited by inadequate time and scarce international standards especially on the processes of establishing and implementing OLGs. As result, leading guidelines that reflect international best practices of reputable Institutions such as those of the IPIECA, CAO, ICMM and IFC, have been used. The limited time and scarce information limited the conduct of more in-depth research.

#### **6.5. Potential future research**

This study examines establishing and implementing OLGs 'administered by companies alone'. Further studies are needed to examine OLGs administered in collaboration with other stakeholders. New research could also be done on developing and administering OLGs in the context of specific businesses in other countries in view of the UNGP and relevant domestic legislation. The studies would be significant to contribute to guaranteeing access to remedies via OLGs.

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<sup>369</sup> CAO (n 41) 37.

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