

Minutes, ICoC Working Group #2 Meeting: 28 June 2011 via teleconference

Attending

- Andy Orsmond, Human Rights First (USA)
- Tara Lee, DLA Piper (USA)
- Tricia Feeney, Rights and Accountability in Development (UK)
- Jonathan Morgenstein, US Department of Defense (USA)
- Ian Ralby, ADS Security in Complex Environments Group (UK)
- Mike Littlejohn, SOC LCC (USA)
- Mike Clarke, G4S (UK)
- Graham Kerr, Hart Security (UK)
- Rachel Davis, Legal Adviser to UN Special Representative for Business and Human Rights (USA)
- Christopher Beese, Olive Group (UK)
- Margaret Belof, UK Foreign & Commonwealth Office (UK)
- John Lea, UK Ministry of Defence (UK)
- Ian McKay, US Department of State (USA)
- André du Plessis, DCAF
- Michelle Hess, DCAF

BEGIN 09:00 DC / 14:00 UK / 15:00 GENEVA

Introduction by Chairs

- In their introduction, the chairs noted that while the cost feasibility of any particular proposal would clearly be a core issue, at least for today's call cost that should not immediately hinder a discussion on such a proposal
- The discussion then focused around five non-exhaustive potential functions of a grievance mechanism: Referral, Fact-finding, Arbitration, Mediation and Special audit. Each participant was invited to comment on the various potential functions. For the purposes of these minutes, comments are grouped under the functions rather than by Working Group members.

Comments Raised by Working Group Members in respect of the Various Functions

Note – these are not consensus statements, but rather comments raised

1. Referral Function

- Clarified that this would be the IGOM receiving a complaints and then referring them on to other pre-existing grievance mechanisms as appropriate
- The referral process is potentially an inexpensive and relatively easy way to address some concerns
- It would be helpful to have a centralized point of contact for complainants to reach out to
- Possibilities for the referral function. The complainant is referred to:

- the company's internal complaints system
- a national legal system
- a non-judicial means of settlement
- If referred to a mediator, consider whether to use a local mediator or an international one.
- The IGOM should retain a list of complaints and their outcomes rather than actually deciding on outcomes
- There perhaps shouldn't be an automatic referral to the company's internal process as there is no guarantee that the internal process is effective
- Consider that the process shouldn't be a "referral" to other processes, but rather "recommend" to complainant that they could take other action
- Companies could record complaints that have come forward and how they've been resolved or dealt with (with various layers of confidentiality)
- The example of FIDH's referral document was raised as an example of such a referral process: <http://www.fidh.org/Corporate-Accountability-for-Human-Rights-Abuses>

2. Fact Finding Function

- Clarified that this would be the IGOM arranging for experts to investigate an incident – at HQ-level and/or in the field. It is principally to find out factual information.
- This is potentially a very expensive and difficult process and so this probably wouldn't be the primary focus of an IGOM
- It could potentially result in, inter alia, proposals from the expert investigators for how a company could remediate its policies or practices
- Fact finding would probably only be applied in less developed places where we have little information, or in cases of a pattern of complaints. Potentially could be used where there are certain significant incidents
- There is some overlap in the functions of a Fact-finding function and the special audit function
- As a process that mirrors police investigation functions, fact finding could dangerously tamper with evidence for other investigations. In that sense, there was concern regarding situations that are potentially criminal as well as in violation of the ICoC
- Fact-finding is illegal in some countries (for example in the UAE) where it is viewed as a violation of sovereignty (a function normally carried out by police)
- Consideration of how large a "standing body" of investigators would be needed
- Consideration as to whether this could be outsourced to private firms with expertise in this area, with some concern to ensure that there would need to be no conflict of interests in such a case

3. Arbitration Function

- Clarified that there was a difference between arbitration and mediation. Arbitration would be a tribunal-simulating process with a binding "judgment"; mediation is a voluntary,

consensus-based approach to find solutions between an aggrieved party and the “defending” company.

- The IGOM probably wouldn’t have as its primary function the actual arbitration or mediation of disputes. The IGOM could have a list of experts for these tasks (this raises the question of costs and who would pay).
- Allowing for there to be obligatory monetary awards in any compliance mechanism of the IGOM could be problematic if opened to employees of PSCs. Examples given of other situations where multiple frivolous claims made.
- Arbitration would suit certain kinds of issues better than others (i.e. employment related disputes)
- There are multiple less “compliance focused” options that should be exhausted before you get to the point of arbitration
- More clarity on the role of arbitration and mediation: is this between third parties, between signatories, including employees of companies, etc.

4. Mediation Function

- Clarified that there was a difference between arbitration and mediation. Arbitration would be a tribunal-simulating process with a binding “judgment”; mediation is a voluntary, consensus-based approach to find solutions between an aggrieved party and the “defending” company.
- The fundamental objective of this mechanism is to improve the experience of 3rd parties when dealing with how companies operate out in the field
- Mediation is a conciliatory process that is voluntary and provide the opportunity for a mechanism to establish a dialogue, while arbitration is more of a judiciary process
- If mediation doesn’t work, then we move to compliance mode
- A lot of support that mediation is the more promising function—this is potentially less expensive and less difficult
- Some discussion that local level experts might not always be the appropriate ones to handle mediation given that this is an international code—we will perhaps need to rely on a combination of local and external actors
- More clarity on the role of arbitration and mediation: is this between third parties, between signatories, including employees of companies, etc.

5. Special Audit Function

- Clarified that this would entail referring a company to the assessment/certification/auditing side of the mechanism for a special audit in response to serious or frequent complaints.
- This could be expensive
- Should be used for serious and frequent complaints—could be very helpful for suspending or expelling companies
- Suggestion that any kind of special audit would be part of a process of remediation: recertification on improvement (if a company had been delisted). Some discussion on

whether expulsion would be distinct from remediation—decisions about membership should be addressed by the Multi-Stakeholder board rather than auditors – keeping the certification and grievance branches of the IGOM separate

- A desire to not replicate information that is already prepared: consider working with the certification wing or other data sources to be efficient

Cross-cutting issues:

- The question of conflicting with criminal & civil proceedings — what happens to a complaint if a criminal or civil complaint is already under way?
- The real sanction of any mechanisms would be the delisting of the companies; this would have financial implications but it wouldn't be a fine in itself
- Even if no remedy is to be given, a “determination” is itself enough in some situations—this should be made public
- Each of the SigCos is required by the code to have their own grievance mechanism. How far should this be used as opposed to this supra-company grievance mechanism?
- The role of civil society—NGOs could provide support for third parties who are incapable of bringing up a complaint on their own, or even act as a “gatekeeper” to frivolous complaints
- The importance of not moving toward a legal tribunal-style system.
- Potential other function: advisory or guidance function that would allow for both 3rd party complainants and companies themselves to seek advice on how to apply provisions of the ICoC
- It was noted that further discussion would be needed on other elements in WG#3's mandate, including questions relating to how to deal with parallel proceedings and to what degree the mechanism established would be filling gaps in remedies available

Conclusion by Chairs

- Suggest coordinating better with WG#1 on its auditing/certification work
- It was agreed to look at the issue of special audits between the calls. Ian McKay would lead this.
- It was agreed to better learn from other grievance mechanisms between the calls. Rachel Davis would lead this.
- Next meeting: Tuesday, July 5th at same time

END 10:30 DC / 15:30 UK / 16:30 GENEVA